

**The Conceptualisation of Family Mediation: Access
to Justice after LASPO**

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Summary

Several decades of policy have reinforced mediation as a critical stakeholder in the English and Welsh family justice system, most notably demonstrated through the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). This has led to rising demand for mediation to adapt to the needs of a diverse and complex client base with little access to legal support. Despite these calls, mediation reform continues to be governed by the orthodox conceptualisation, based on the *limited* mediator. The traditional approach binds mediators to a strictly facilitative framework and an absolute vision of neutrality that cannot ensure access to justice post-LASPO. This thesis proposes that the dominant conceptualisation of family mediation in contemporary justice advances a more adaptable, *modern* mediator, but this role has not been openly recognised.

This argument is based on original research in two parts. First, a qualitative text analysis of family mediation Codes of Practice demonstrates the fluidity of modern mediator practice. Its analysis adopts a new theoretical framework of four mediator functions, showing that mediators are allowed to evaluate though their actions are frequently concealed by a facilitative proxy. Second, interview data with 17 family mediators show that the profession largely associates with facilitation but frequently evaluates. It is revealed that mediators seek a settlement that is assessed against a standard of quality, alluding to a more quasi-legal role for the profession in the post-LASPO era. Nevertheless, this modern mediator type is not acknowledged in discussions due to the strong adherence to mediator neutrality. A further barrier to recognising the modern mediator is the prominence of structural issues surrounding the mediation process. Combined, these obstacles lead the thesis to a final call for further regulation of mediators, as well as attitudinal change that recognises the potential of family mediation in achieving access to justice post-LASPO.

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Divorce, Dissolution and Separation Act 2020

Divorce Reform Act 1969

Family Law Act 1996

Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) (AU)

Human Rights Act 1998

Legal Advice and Assistance Act 1972

Legal Aid and Advice Act 1949

Legal Aid, Sentencing and Punishment of Offenders Act 2012

Legal Services Act 2007

Matrimonial Causes Act 1857

Matrimonial Causes Act 1923

Matrimonial Causes Act 1973

Mediation Act 2017, No. 27/2017 (Ireland)

Table of Regulations and Rules

Civil Legal Aid (Procedure) (Amendment) (No. 2) Regulations 2017, SI 2017/1237

Civil Legal Aid (Procedure) (Amendment) Regulations 2016, SI 2016/516

Civil Legal Aid (Procedure) Regulations 2012, SI 2012/3098

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List of Abbreviations

BCFCS	Bristol Courts Family Conciliation Service
CPU	Conciliation Project Unit
FMA	Family Mediators Association
FMC	Family Mediation Council
FMCA	FMC Accredited Family Mediator
HwFM	Help with Family Mediation
L	Legal
L+T	Legal with Therapeutic Training
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act 2012
LiP	Litigant in Person
MIAM	Mediation Information and Assessment Meeting
NFCC	National Family Conciliation Council
NFM	National Family Mediation
PPC	Professional Practice Consultation
SRA	Solicitors Regulation Authority
T	Therapeutic
UKCFM	UK College of Family Mediators

Introduction

This thesis begins with a simple question: what is family mediation? While such a query might seem at first elementary, it has seldom been revisited throughout traditional and contemporary family justice. The Oxford English Dictionary defines 'mediation' as 'the process of attempting to settle a dispute without recourse to litigation, through negotiation conducted by a neutral intermediary'.¹ The Cambridge Dictionary similarly sets out 'the process of talking to two separate people or groups involved in a disagreement to try to help them to agree or find a solution to their problems'.² Cambridge then provides the example that 'in divorce cases where there are children, mediation is preferable to going to court.' At first glance, it appears that the meaning of mediation heavily rests on its comparison to litigation or court. Mediation is also characterised by the notion of 'negotiation' or 'talking' to find a solution, with Oxford adding that the process involves a neutral third party.

Family mediation, previously known as conciliation, was introduced in England and Wales during the late 1970s and 1980s. Parkinson, a pioneer of family mediation, wrote the following definition in 1986:

'Conciliation may be defined as a structured process in which both parties to a dispute meet voluntarily with one or more impartial third parties (conciliators) who help them to explore possibilities of reaching agreement, without having the power to impose a settlement on them or the responsibility to advise either party individually.'³

She also quoted the first policy definition of conciliation, crafted by the 1974 Committee on One-Parent Families:

'...assisting the parties to deal with the consequences of the established breakdown of their marriage, whether resulting in a divorce or a separation, by reaching agreements or giving consents or reducing the area of conflict... arising from the breakdown which calls for a decision on future arrangements.'⁴

When considering the similarities across these quotes, it is evident that family mediation is a process where a mediator with limited powers *helps* couples to improve the dynamic between them and reach a settlement on family matters, particularly divorce or separation.

¹ Oxford English Dictionary, 'mediation, n' (*OED Online*, 3rd edn, Oxford University Press 2001) <www.oed.com/view/Entry/115665> accessed 22 September 2020.

² Cambridge Dictionary, 'mediation, n' (*Cambridge Dictionary*, 4th edn, Cambridge University Press 2013) <www.dictionary.cambridge.org/dictionary/english/mediation> accessed 22 September 2020.

³ Lisa Parkinson, *Conciliation in Separation and Divorce* (Routledge 1986) 5.

⁴ Committee on One-Parent Families, *Report of the Committee on One-Parent Families: Volume 1* (Cmd 5619, 1974) para 4.288. This quote is revisited in *chapter one*.

Interestingly, family mediation is largely understood in the same manner today. The Family Mediation Council (FMC) is the umbrella regulatory body for family mediators in England and Wales. It defines family mediation on its website:

‘Family mediation is where an independent, professionally trained mediator helps you and your ex to work out an agreement about issues... Mediation can help you stay in control. No-one will make you do anything against your wishes. The mediator will help you find a solution which works for you both and explain how you can make an agreement legally binding.’⁵

According to the FMC, a key facet of family mediation is that the mediator supports disputants to make decisions on, and thus maintain control over, their family problems. While the definitions above do not reflect the intricacies of the mediation process and mediator practice, their many parallels lead to two contrasting propositions.

The first proposition is that the dominant understanding of family mediation has not changed because the process operates in largely the same way since it was introduced in the late 1970s. The family mediator continues to have a limited, albeit facilitative, role in mediation, in contrast to the overriding judge. This suggests that mediation has firmly cemented its position as an alternative process in the English and Welsh family law system, and continues to cater to a particular client base that seeks autonomy over their disputes.

However, the modern family justice landscape is drastically different to the late 20th century. There has been a reduction in the public funding and support available to those navigating the family justice system, subsequently causing a rise in unmet legal need. Family mediation has been increasingly promoted by successive governments and today sits at the heart of private family dispute resolution. Furthermore, family mediation is now a maturing practice. To suggest that the role of the mediator has seen no development in the last forty to fifty years is certainly a bold claim to make. The FMC’s definition above emphasises the professionalism of the mediator, suggesting that the profession has undergone at least some development. In this contemporary climate, does the original definition of family mediation still stand?

Thus, this thesis is premised upon the second proposition: that a new, modern conceptualisation of family mediation has developed in response to the current climate, but is not openly recognised. This notion is investigated through both a theoretical and empirical lens, providing new and innovative data on the purpose of family mediation at a time when the

⁵ Family Mediation Council, ‘What is family mediation?’ (FMC 2020) <www.familymediationcouncil.org.uk/family-mediation/> accessed 22 September 2020.

process has come under increasing scrutiny in the academic sphere. At a broader level, this thesis situates mediation in the debates around access to justice and family law reform.

The purpose of family mediation has been brought into the limelight following the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). LASPO was not an isolated event, but rather symbolised a long-standing effort by successive governments to reform family justice and reduce state responsibility to deal with family problems. Enacted in April 2013, LASPO reduced legal aid funding in a number of areas, including advice and representation for private family disputes in court. But in a move to encourage disputants to resolve their family matters outside the court process, legal aid remained for family mediation. The later Children and Families Act 2014 also required court applicants to attend a meeting about mediation. Whilst the new requirements under both pieces of legislation had some exceptions, the state's message was clear: family mediation was now the primary route for resolving private family matters, and at the very least merited consideration.

These recent reforms have prompted growing concern that mediation is not a one-size-fits-all solution for family law problems. More specifically, the mediator profession is criticised for failing to adapt to the needs of a new client base that is more varied and likely to have little to no legal support. Hitchings and Miles discuss the decline in publicly funded family mediation and legal support after LASPO, and question how far these factors 'prompt an evolution of – or, some might say, compromise – the mediator's orthodox facilitator role'.⁶ In a similar vein, Barlow, Hunter, Smithson and Ewing refer to the 'unintended consequences' of LASPO that 'in fact mak[e] mediation more difficult'.⁷ They argue that reform is urgently needed, particularly if mediation is to have a central position in contemporary family justice. Both academic critiques represent the demand in modern family justice literature for a re-envisioned family process. In particular, they seek reform to update the role of the mediator. This thesis builds upon this foundation of knowledge and considers how such re-envisioning may occur.

Family mediation reform is at a turning point. Since its introduction, family mediation has been surrounded by what Murch and Hooper labelled as 'general ambiguity and uncertainty'.⁸ Girdner similarly highlighted the lack of 'a cohesive set of shared norms and values' for mediators.⁹ She echoed Roberts, who described mediation as 'more an approach, a way of life,

⁶ Emma Hitchings and Joanna Miles, 'Mediation, financial remedies, information provision and legal advice: the post-LASPO conundrum' (2016) 38(2) *Journal of Social Welfare and Family Law* 175, 176.

⁷ Anne Barlow and others, *Mapping Paths to Family Justice: resolving family justice in neoliberal times* (Palgrave Macmillan 2017) 211.

⁸ Mervyn Murch and Douglas Hooper, *The Family Justice System* (Family Law 1992) 82.

⁹ Linda Girdner, 'How People Process Disputes' in Jay Folberg and Ann Milne (eds), *Divorce Mediation: Theory and Practice* (The Guildford Press 1988) 55.

than the embodiment of a specific programme or reform'.¹⁰ In effect, family mediation's full potential – and meaning – has not yet been realised. Yet this is a natural consequence of family mediation's development in the late 20th century. As acknowledged by Maclean and Eekelaar, most efforts during this period were spent setting up mediation services across England and Wales.¹¹ There was, therefore, little time to scrutinise the purpose of family mediation. Family mediation regulation has moved to the forefront of debate in recent years, with the 2012 McEldowney Committee questioning 'the future role of mediators in the light of higher expectations' after LASPO.¹² Their report summarises the major task now faced by the FMC: 'The time is ripe for major reform of the regulatory aspects of mediation.'¹³

Thus, there is growing interest around reforming mediation to, first, adapt to the needs of its users in the post-LASPO landscape and, second, further regulate the mediator profession. However, family mediation reform appears to be at a standstill, halted by a lack of consideration as to what mediation could achieve if reform was permitted. This state of stagnancy warrants a much-needed investigation into the purpose and role of *modern* family mediation in furthering family justice.

Aim of the thesis

This thesis explores the value of family mediation in supporting access to justice in the contemporary climate. The reinstatement of orthodox family justice is, first and foremost, unlikely to be supported by the state. And as this thesis will go on to show, the traditional system was not a panacea for resolving family matters. This project, therefore, is part of a growing body of pragmatic literature that considers the potential ways forward in the post-LASPO landscape. While LASPO has caused significant damage to the operation of justice, it provides an opportunity to rethink how access to justice is not only protected, but how it is provided. In particular, this thesis identifies a place for family mediation beyond its alternative positioning to court in the long-term post-LASPO landscape.

The work in the following seven chapters is a response to the diminishing interest within research around family mediation, with academic critique tending to focus on the impact of

¹⁰ Simon Roberts, 'Mediation in Family Disputes' (1983) 46(5) *Modern Law Review* 537, 539.

¹¹ Mavis Maclean and John Eekelaar, *Lawyers and Mediators: The Brave New World of Services for Separating Families* (Hart Publishing 2016) 70.

¹² John McEldowney, *Family Mediation in a Time of Change: FMC Review Final Report* (FMC 2012) para 6.

¹³ *ibid* para 76.

LASPO on court.¹⁴ It is undeniable that such research is incredibly valuable in understanding the consequences of LASPO for those navigating the family law system. However, this body of work continues an emphasis on traditional access to justice that only scratches the surface of future reform. Empirical research on mediation is, regrettably, now sporadic and intermittent. The fact that the traditional understanding of mediation continues to prevent much-needed reform is overlooked, removing family mediation from the wider debates on access to justice.

This thesis questions how far the original conceptualisation of family mediation – a conceptualisation that still dominates debate – reflects contemporary understanding. It is not the aim of this thesis to specifically determine how the role of mediators should be changed, though it does refer to potential directions for future reform and regulation. Its focus, instead, is to understand how this contemporary understanding differs from the traditional vision and could support the individuals with little to no support after LASPO.

This thesis, therefore, investigates the following research question: ***what is the dominant conceptualisation of family mediation and the role of the family mediator in the contemporary climate?***

It also considers a follow-up question: ***how far does this dominant conceptualisation support access to justice within family mediation?***

These questions must be investigated from a variety of perspectives. The later chapters in this thesis provide new findings on the meaning of family mediation from the perspective of regulatory bodies (using a text analysis of Codes of Practice) and family mediators themselves (following interviews). Altogether, this thesis recognises a disconnect between the orthodox vision of family mediation and its modern purpose, and argues that its contemporary conceptualisation is a fundamental step towards ensuring access to justice in the long-term. Nevertheless, significant barriers prevent this contemporary approach from being realised.

Chapter outlines

The first three chapters set out the policy, empirical evidence and theoretical context around family mediation, contrasting the traditional conceptualisation to what is needed in the modern post-LASPO landscape. *Chapter one* situates family mediation within the access to justice debate and tracks its development in policy from the late 20th century to the LASPO

¹⁴ This is recognised by Moore and Newbury, who write that ‘consideration of the impact of LASPO has tended instead to focus on what’s happening in the courtroom’. See Sarah Moore and Alex Newbury, *Legal aid in crisis: Assessing the impact of reform* (Policy Press 2017) 6.

reforms. The discussion connects these reforms to a long-standing neoliberal agenda, but simultaneously argues that much academic critique has overlooked the value of family mediation in supporting access to justice. *Chapter two* explores how mediation has developed in practice over this period, with particular reference to empirical research. It identifies the traditional limited mediator, an information-giving role that was largely accepted in the early mediation pilots. Yet the withdrawal of traditional legal advice (through a solicitor), coupled with a rising heterogeneity in mediation's clientele, has led to increased interest in the role of the family mediator in recent decades. Academic commentary has consequently called upon mediators to become more flexible in their practice, paving the way for the role of the *modern* mediator. Despite demand for the modern mediator, the limited mediator continues to control discussions about reform, most notably demonstrated through the overwhelming support for absolute neutrality. *Chapter three* consequently considers the theoretical underpinnings of family mediation through two main concepts: the facilitative to evaluative framework, and mediator neutrality. Family mediators were traditionally conceptualised as limited: they were strictly facilitative and neutral third parties, unable to move towards an evaluative framework through which they might shape or steer the direction of the mediation process. The chapter argues that many of the calls for flexibility, identified in *chapter two*, are in fact calls for a modern mediator that can move along the facilitative to evaluative continuum. There is evidence that mediators already evaluate but conceal this strategy to comply with the orthodox facilitative framework. *Chapter three* concludes that in order to enable mediators to freely move along the facilitative to evaluative continuum, mediation theory must be re-envisioned. In particular, if mediator neutrality is no longer understood as absolute, the modern mediator can be recognised and therefore regulated.

The remainder of this thesis produces findings from a two-stage empirical project, the methods of which are detailed in *chapter four*. *Chapter five* is based on a qualitative text analysis of past and present family mediation Codes of Practice in England and Wales. It identifies four mediator functions across the facilitative to evaluative continuum that are visible in Codes of Practice: *helpers*, *referrers*, *assessors* and *intervenors*. Evaluative techniques remain hidden under the guise of information-provision, confirming a facilitative proxy. The study yields strong evidence that mediator evaluation, including screening for suitability, has been increasingly accepted by family mediation's regulatory bodies. This suggests that the modern mediator already operates in practice, but her role is not openly acknowledged due to the lack of development regarding mediator neutrality.

The following two chapters use data from 17 qualitative interviews with family mediators. *Chapter six* argues that the mediators in the study adopt a dominant conceptualisation of

family mediation. They largely align with the image of the limited mediator, bolstered by the facilitative helper function, and understand access to justice as a concept only associated with access to courts. However, they consistently give evidence that they refer, assess and intervene. In particular, mediators not only seek to obtain settlement, but good settlement assessed against a standard of *quality*. They do not recognise that flexibility could complement their neutrality, confirming that the conceptualisation of the modern mediator – which reinstates a continuum of mediator practice – remains overshadowed by the traditional understanding. *Chapter seven* then identifies another significant barrier to recognising the modern mediator: the structural problems surrounding the mediation process. The interview data provide new and important findings on the long-term effects of LASPO, the fragmentation of the mediator profession and a concerning level of pessimism for the future of family mediation. Mediators' recommendations for future reform are also discussed. A natural conclusion to the original work in this thesis is asking whether family mediators will be accepted as a legal profession in the future, with the findings from *chapters six* and *seven* pointing to a quasi-legal space for mediators.

This thesis finishes with a *Conclusion* chapter that summarises the key findings from the research data, as well as its subsequent implications for future work and reform. Altogether, this thesis provides new and innovative data on the dominant conceptualisation of modern family mediation, and considers sustainable ways forward as academic critique turns to the long-term effects of LASPO.

Chapter 1. Access to Justice in contemporary times: the rise of family mediation

This chapter situates family mediation within the context of a changing discourse around access to justice in England and Wales. It traces two policy shifts. First, from a vision of access to justice associated with courts and lawyers to one associated with private settlement and mediation. Second, from the representation of mediation as an alternative dispute resolution process to mediation as the first and preferred family dispute resolution option for family disputes. It is recognised that both developments were only possible after a long-sustained effort by successive governments, most recently demonstrated through the LASPO cuts to legal aid. The chapter then considers the academic criticism surrounding the consequences of these two developments which has gathered pace since LASPO. Notwithstanding the validity of these academic concerns, this thesis offers a pragmatic and evidence-based investigation into the place of family mediation in contemporary family justice.

1.1 The background to modern family law and access to justice in England and Wales

Family disputes are regulated and resolved through the family justice system, which encompasses not only a wide variety of issues, but also a range of individuals with different needs. This thesis specifically considers the operation of private family law disputes that typically involve relationship breakdown or divorce.¹ These legal problems tend to be divided into child arrangements and financial matters, though both elements are present in many separation disputes.

Central to the family justice system is a concept widely known as access to justice. Access to justice stems from the civil aspects of citizenship, essentially 'the rights necessary for individual freedom'.² Writing in 1950, Marshall explained that the 'right to justice' involved 'the right to defend and assert all one's rights on terms of equality with others and by due process of law'.³ His definition was underpinned by *equality*, with parties obtaining a resolution through a just and fair legal process that is equally applied to all users. Other academics, such as Moorhead and Pleasence, have recognised that access to justice is linked with 'the rule of law and equality'.⁴ Sommerlad similarly claims that access to justice is fundamental to 'social

¹ This is different to public family law matters where one party to the dispute is the state, such as adoption, wardship and child protection proceedings.

² Thomas H Marshall, *Citizenship and Social Class* (Cambridge University Press 1950) 10.

³ *ibid* 10-11.

⁴ Richard Moorhead and Pascoe Pleasence, 'Access to Justice after Universalism: Introduction' (2003) 30(1) *Journal of Law and Society* 1, 1.

participation' and 'personhood'.⁵ In effect, access to justice protects and upholds many legal rights and obligations.

In the context of the civil and family justice systems within England and Wales, access to justice is broadly associated with legal aid. Legal aid facilitates access to legal services – typically legal advice and representation – for those otherwise unable to afford such support. To provide a brief history, the legal aid scheme was one part of the welfare state, developed after World War Two when the public felt a sense of 'social solidarity'.⁶ There was particular demand for legal support in family matters following the late-1940s 'divorce crisis', as termed by Goriely.⁷ World War Two had placed further pressures on married life and led to increased interest in divorce throughout the general public. The Rushcliffe Committee was subsequently established in 1944 to advise Parliament on legal welfare. In 1945, the group recommended legislation 'to provide legal advice for those of slender means and resources, so that no one would be financially unable to prosecute a just and reasonable claim or defend a legal right'.⁸ The modern legal aid system was introduced through the Legal Aid and Advice Act 1949, described by Sommerlad as 'the beginning of a new stage in the relationship between law and society'.⁹ Upon enactment, roughly seventy to eighty percent of the population was eligible for legal aid.¹⁰ This was a significant extension of the previous poor persons' scheme. In Elson's words, the legal aid scheme went beyond 'charity' and created 'a right' to legal support that the state was obliged to protect.¹¹

Since the 1950s, legal aid has carried an implicit assumption that access to justice is synonymous with access to the courts. Marshall described legal aid as a 'social service designed to strengthen the civil right of the citizen to settle his disputes in a court of law'.¹² This introduces a procedural element to legal aid that positions the courtroom as the best route to obtaining justice. Under procedural justice, a system of laws is not enough. For family law to have any effect, individuals must be able to enforce their rights and obligations through legal

⁵ Hilary Sommerlad, 'Some reflections on the relationship between access to justice and the reform of legal aid' (2004) 31(3) *Journal of Law & Society* 345, 350.

⁶ Tamara Goriely, 'Rushcliffe Fifty Years On: The Changing Role of Civil Legal Aid Within the Welfare State' (1994) 21(4) *Journal of Law and Society* 545, 546.

⁷ *ibid* 550-551.

⁸ Lord Chancellor, *Summary of the Proposed New Service* (Cmnd 7563, 1948) para 4; Rushcliffe Committee, *Report of the Committee on Legal Aid and Legal Advice in England and Wales* (Cmd 6641, 1945).

⁹ Hilary Sommerlad (n 5) 348.

¹⁰ Note that this statistic includes legal aid recipients who also made contributions to the scheme. See Hilary Sommerlad (n 5) 354; Lisa C Webley, 'Legal Professional De(Re)Regulation, Equality, and Inclusion, and the Contested Space of Professionalism within the Legal Market in England and Wales' (2015) 83(5) *Fordham Law Review* 2349, 2352.

¹¹ Alex Elson, 'The Rushcliffe Report' (1946) 13(2) *University of Chicago Law Review* 131, 134.

¹² Thomas H Marshall (n 2) 48.

structures and procedures.¹³ Under the original legal aid scheme, funding was only available to those involved in litigation (in court) who sought representation through a solicitor. It was thus assumed that access to court as access to justice necessitated access to legal representation. This vision was specifically predicated on the presence of a qualified legal professional who was said to lessen any barriers to participation in the legal system (including structural disadvantages, such as poverty).¹⁴ Legal aid for oral advice was made available from the 1960s, although the parties were still required to be involved in a court case.¹⁵ The legal aid scheme was significantly extended in the 1970s and solicitors could finally receive funding for the provision of advice – written or oral – on any legal matter.¹⁶ This included disputes dealt with outside of court. Regardless, the notion that access to justice demands access to court still holds some power, particularly in the judicial sphere. This is demonstrated by the 2017 case of *Unison v Lord Chancellor* where the Supreme Court unanimously declared that the statutory fees for applicants to employment tribunals were unlawful on the grounds of access to justice.¹⁷ In his judgment, Lord Reed warned that without ‘unimpeded access’ to the courts, the law could become ‘dead letter’ and of little influence in various justice systems.¹⁸ In effect, true access to justice was synonymous with a right to access court.

It is widely accepted that access to justice involves substantively fair outcomes. For instance, Sandefur argues that a ‘just, fair or successful’ resolution is not automatically guaranteed by access to a legally trained professional or a dispute resolution procedure.¹⁹ Substantive justice goes beyond equality before the law and necessitates the adoption of specific standards to determine the integrity and appropriateness of an outcome. Barlow, Hunter, Smithson and Ewing recently studied family mediation through their seminal ‘Mapping Paths’ project.²⁰ They recognised that family justice (as a noun) placed emphasis on the term justice, suggesting that

¹³ As recognised by Lady Hale, ‘the law – and the content of it – needs to be accessible’. See Brenda Hale, ‘Equal Access to Justice in the Big Society’ (Sir Henry Hodge Memorial Lecture, London, 27 June 2011) <www.supremecourt.uk/docs/speech_110627.pdf> accessed 3 April 2020 3.

¹⁴ Gwynn Davis, *Partisans and Mediators: The Resolution of Divorce Disputes* (Clarendon Press 1988) 85; see also Jess Mant, ‘Neoliberalism, family law and the cost of access to justice’ (2017) 39(2) *Journal of Social Welfare and Family Law* 246, 249.

¹⁵ The solicitor could not be reimbursed for any written communications: Sarah Moore and Alex Newbury, *Legal aid in crisis: Assessing the impact of reform* (Policy Press 2017) 18.

¹⁶ The Legal Advice and Assistance Act 1972. This also included written advice; see Mavis Maclean and John Eekelaar, *After the Act: Access to Family Justice after LASPO* (Hart Publishing 2019) 9.

¹⁷ *R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

¹⁸ *ibid* [68].

¹⁹ Rebecca L Sandefur, ‘Access to What?’ (2019) 148(1) *Daedalus: The Journal of the American Academy of Arts and Sciences* 49, 50. Cherry also speaks about the prominence of procedural justice, or in effect ‘process neutrality’, over substantive equality in relation to reproductive rights. See April L Cherry, ‘Choosing Substantive Justice: A Discussion of “Choice”, “Rights” and the New Reproductive Technologies’ (1997) 11 *Wisconsin Women’s Law Journal* 431, 435.

²⁰ ‘Mapping Paths’ is frequently referred to throughout this thesis. Anne Barlow and others, *Mapping Paths to Family Justice: resolving family justice in neoliberal times* (Palgrave Macmillan 2017).

any outcome or process must be fully scrutinised.²¹ The researchers also saw fairness as another key component of substantive family justice, notwithstanding its somewhat ambiguous and malleable nature.²² The demand for an outcome of a certain standard acts as a measure of substantive justice, ensuring justice beyond access to the family law system.²³

The aim of substantive justice – to provide a fair or just outcome – is also said to necessitate access to court. The ‘sole function’ of court, as argued by Roberts, is to apply the law to the context of a particular dispute.²⁴ A judge dispenses the law to promote justness and fairness, subsequently providing the best outcome. This follows a legal centralist approach, as acknowledged by Galanter, whereby justice is ‘produced’ or ‘distributed’ by the state.²⁵ An external forum – court – is required to resolve disputes as a result. Various checks and balances are then put in place to ensure substantive justice occurs in the courtroom, demonstrated through the human right to a fair trial.²⁶ Lady Hale argues that access to the court system is ‘one of the most precious’ constitutional rights in England and Wales.²⁷ She quotes Lord Laws who famously declared: ‘the right to a fair trial, which of necessity imports the right of access to the court, is as near to an absolute right as any which I can envisage.’²⁸ The judiciary thus assumes that court provides a high level of fairness that cannot be ensured through any other process, specifically because court protects parties’ rights through the application of law and other legal norms.

The court system is often deemed the most appropriate procedure for cases involving severe power imbalances between the parties, including instances of domestic abuse. This is because the application of legal rules ‘provide a measure of protection to the powerless’ that are often disadvantaged in family disputes, including women and children.²⁹ The court is an important safety net for these more difficult cases, although it is not the sole function of court to only protect a particular group of disputants. For instance, Main contends that reserving court for a certain type of case overlooks ‘the important role of the courts in the tasks of applying the law

²¹ Barlow and others also recognise the adjectival meaning of family justice, covering ‘family law’ and ‘all the people and institutions associated with its operation’, including mediation. See *ibid* 6.

²² *ibid* 8.

²³ *ibid* 6.

²⁴ Simon Roberts, *Order and Dispute: An Introduction to Legal Anthropology* (2nd edn, Quid Pro Books 2013) 8-9.

²⁵ Marc Galanter, ‘Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law’ (1981) 13(19) *Journal of Legal Pluralism* 1, 1.

²⁶ Human Rights Act 1998, s 6.

²⁷ Brenda Hale (n 13) 7.

²⁸ *R (Witham v Lord Chancellor)* [1998] QB 575 (QB) 585.

²⁹ Michael Freeman, ‘Questioning the Delegalization Movement in Family Law: Do We Really Want a Family Court?’ in John Eekelaar and Sanford Katz (eds), *The Resolution of Family Conflict: Comparative Legal Perspectives* (Butterworth & Co 1984) 16.

and vindicating rights.³⁰ From this perspective, the court is a fundamental component in ensuring substantive justice for *all*, not just *some*, disputes.

How, specifically, is substantive justice upheld in court? Trinder and others describe the 'full representation model' where two parties attend court with their respective lawyers.³¹ The parties are an 'audience', whereas the lawyers become 'actors' who present to the judge. This model is the 'default position' in private family law matters, though it is based on an assumption that the parties can access legal support throughout their dispute.³² Thus, family matters are streamlined because legal professionals, holding the knowledge and ability to apply formal justice, take on an active role in ensuring a fair outcome. This scenario is far from being an accurate depiction of many family matters in court, and the inaccessibility of legal support remains a significant issue in the contemporary family justice landscape.

Another concern around the traditional vision of access to court as access to justice is that the application of formal, official law may not provide the best outcome for some disputes. Substantive norms, such as fairness and justice, differ from what is described by Felstiner, Abel and Sarat as 'ordinary morality'.³³ In some instances, the parties prefer an individualised form of justice, no longer determined by a judge.³⁴ This begins to reveal problems within the dominant thinking about substantive and procedural justice, concepts which are broadly based on generalisations that do not hold true in every circumstance. A difficult balancing act comes to light: how can the law provide a system of checks and balances to ensure procedural and substantive justice have been fulfilled, yet simultaneously support parties to reach an individualised decision that takes their own circumstances into account? A crucial question, therefore, is whether contemporary family justice should continue to emphasise access to court.³⁵

³⁰ Thomas O Main, 'ADR: The New Equity' (2005) 74 *University of Cincinnati Law Review* 329, 401.

³¹ The report was written by Trinder, Hunter, Hitchings, Miles, Moorhead, Smith, Sefton, Hinchly, Bader and Pearce. See Liz Trinder and others, *Litigants in person in private family law cases* (Ministry of Justice 2014) 53.

³² *ibid* 35.

³³ William L F Felstiner, Richard L Abel and Austin Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...' (1980) 15(3/4) *Law & Society Review* 631, 647.

³⁴ This is mentioned by Galanter, who asks: 'Is the utopia of access to justice a condition in which *all* disputes are fully adjudicated?' See Marc Galanter (n 25) 3.

³⁵ 'Access to where? Where is the justice that we want to admit people to? Where does it reside? Whose is it to dispense?' See Marc Galanter, 'Justice in Many Rooms' in Mauro Cappelletti (ed), *Access to Justice and the Welfare State* (European University Institute 1981) 148.

1.2 Three policy concerns in late 20th-century family justice

Over the last fifty years, the approach to family law has drastically changed at a policy level and access to justice is no longer conflated with access to court. The following discussion identifies three broad policy concerns over this period: first, whether the court process (specifically adjudication) was the most effective system for family problems; second, the value of settlement and private resolution; and, third, the extension of legal aid since the scheme was introduced.³⁶

1.2.1 *The efficiency and effectiveness of adjudication*

Theoretically, the introduction of the welfare state and legal aid meant more individuals could access family justice than ever before. In the 19th century, a petitioner could only obtain a divorce decree if their spouse had committed a matrimonial offence on the grounds of adultery.³⁷ Divorce was thus inaccessible to most individuals (particularly women)³⁸ who sought divorce for reasons unattributable to the fault of one party. As highlighted above, public interest in divorce rose after World War Two.³⁹ The legal aid scheme eased the cost of getting a divorce for many couples, but criticism of divorce law was widespread. This led to the Divorce Reform Act 1969.⁴⁰ Effective from January 1971, the element of matrimonial offence was replaced with one of irretrievable breakdown where one of five facts were proven: 'unreasonable behaviour',⁴¹ adultery, desertion, two years separation or five years separation. Fault was no longer a factor in divorce petitions following two years separation if the respondent consented to the divorce, or five years if they refused.⁴² The legislation coincided with a number of 'demographic, socio-economic and attitudinal changes',⁴³ including increased

³⁶ Similar concerns were raised by Piper. See Christine Piper, *The Responsible Parent: A Study in Divorce Mediation* (Harvester Wheatsheaf 1993) 7-11.

³⁷ Matrimonial Causes Act 1857.

³⁸ Until 1923, wives also needed to prove that their husband had committed an aggravating factor, such as cruelty or incest. See the Matrimonial Causes Act 1923.

³⁹ Tamara Goriely (n 6) 550.

⁴⁰ From 1935 to 1947, the divorce rate saw an exponential rise from 0.45 per 1,000 married couples to 5.6. For an overview of events leading up to the Divorce Reform Act 1969, see Stephen Cretney, *Family Law in the Twentieth Century* (Oxford University Press 2003) 319 and Jennifer Levin, 'The Divorce Reform Act 1969' (1970) 33(6) *Modern Law Review* 632.

⁴¹ This ground is listed in the legislation as: 'the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent'. See Matrimonial Causes Act 1973 s 1(2)(b).

⁴² The five facts for irretrievable breakdown have continued under the Matrimonial Causes Act 1973, although are soon to be removed (likely in 2021-2022) following the Divorce, Dissolution and Separation Act 2020.

⁴³ Law Commission, *Facing the Future: A Discussion Paper on the Ground for Divorce* (Law Com No 170, 1988) para 2.14; also see Ian Smith, 'Explaining the Growth of Divorce in Great Britain' (1997) 44(5) *Scottish Journal of Political Economy* 519, 541.

societal acceptance of relationship breakdown.⁴⁴ Enhanced access to divorce, combined with social change, meant the amount of opposite-sex divorces skyrocketed. In the year following the enactment of the Divorce Reform Act 1969, the number of opposite-sex divorces in England and Wales rose by sixty percentage points from 74,437 to 119,025 and reached a peak of 165,018 in 1993.⁴⁵ The divorce rate did not return to its pre-1972 levels, though gradually declined to a low of 90,871 in 2018.

The impact of legal and attitudinal change around the day-to-day functioning of family justice was colossal. To quote Maclean and Eekelaar, family law became 'a victim of its own successes'.⁴⁶ After the 1969 legislation, judges were faced with a high caseload and heavily criticised for subsequent delays.⁴⁷ The government consequently introduced 'special procedures' that no longer required parties to an undefended divorce petition to attend court.⁴⁸ Regardless, the burden on the courts remained.

Meanwhile, there was a policy-level debate over whether the court system was the optimum environment for private family matters. The Law Commission's 'Field of Choice' report in 1966 established two objectives of 'good divorce law': first, to support (rather than weaken) marriage, and, second, to allow divorce to occur 'with the maximum fairness, and the minimum bitterness, distress and humiliation'.⁴⁹ Interestingly, the second objective was underpinned by a new discourse that aimed to reduce alleged hostile and antagonistic litigation. The 1985 Matrimonial Causes Procedure Committee claimed:

'On the evidence presented to us we are satisfied that the bitterness and unhappiness of divorcing couples is frequently exacerbated and prolonged by the fault element in divorce and that this is particularly so where the fact relied upon is behaviour, whether or not the suit is defended.'⁵⁰

The Committee equated attending court with adversarialism and claimed that this had negative repercussions for divorcing parties. Later policy continued the rhetoric that the divorce system heightened feelings of hostility as the petitioner placed the fault for irretrievable breakdown

⁴⁴ Michael Freeman, 'Divorce: Contemporary Problems and Future Prospects' in Michael Freeman (ed), *Divorce: Where Next?* (Dartmouth Publishing Company 1996) 32.

⁴⁵ Office for National Statistics, 'Divorces in England and Wales: 2019' (ONS 2020) <www.ons.gov.uk/people-populationandcommunity/birthsdeathsandmarriages/divorce/bulletins/divorcesinenglandandwales/2019> accessed 21 December 2020.

⁴⁶ Mavis Maclean and John Eekelaar (n 16) 9.

⁴⁷ John Eekelaar and Robert Dingwall, 'The Development of Conciliation in England' in Robert Dingwall and John Eekelaar (eds), *Divorce Mediation and the Legal Process* (Clarendon Press 1988) 10.

⁴⁸ *ibid* 10; Matrimonial Causes Rules 1973, SI 1973/2016 r 48.

⁴⁹ Law Commission, *Reform of the Grounds of Divorce: The Field of Choice* (Cmnd 3123, 1966) para 25.

⁵⁰ Matrimonial Causes Procedure Committee, *Report of the Matrimonial Causes Procedure Committee* (Stationery Office 1985) para 2.10.

on their ex-partner (notwithstanding uncontested applications).⁵¹ For instance, the Lord Chancellor's Department criticised the court process for 'undoubtedly add[ing] to the stress and pain of the divorce' as it supposedly encouraged parties to take opposing sides.⁵² A similar discourse was also adopted by academic commentators, some of whom suggested that court 'polarise[d] the divorcing couple' and placed them in a win-or-lose scenario.⁵³ Underpinning these quotes was an expectation that parties would deal with their family matters in a particular way, specifically in such a way that minimised conflict between them. Parties were encouraged to move away from court and seek different solutions, moving onto a second concern in policy.

1.2.2 *The settlement objective*

The second policy concern relates to settlement. During the late 20th century, the family justice system shifted from being court-centred to encouraging the self-resolution of disputes. The move towards settlement was founded on two primary arguments: first, that court removed all decision-making power from families with lived experiences of the dispute, and, second, that court intensified any feelings of trauma or conflict. In regard to the first argument, court was said to transfer decision-making power to those outside the family unit. As acknowledged by Roberts, lawyers and judges could 'impose their own construction' of a dispute onto the parties, prioritising their preferred outcome.⁵⁴ Thus, policy began to present family matters as best resolved by the parties themselves. The 1979 'Marriage Matters' report is the earliest example of policy adopting this individual responsibility rhetoric.⁵⁵ The Home Office wrote that the family justice system provided services to support married couples and, in circumstances where separation was necessary, 'help[ed] couples resolve their problems'.⁵⁶ The wording chosen by the Home Office signalled an expectation that the parties would resolve *their*

⁵¹ This is mentioned by Hunter, who argues that legal reform has been heavily influenced by 'the notion that lawyers and courts are entrenched in an adversarial mindset, and consequently exacerbate rather than resolve interpersonal and social conflict'. See Rosemary Hunter, 'Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law' (2003) 30(1) *Journal of Law and Society* 156, 156.

⁵² Lord Chancellor's Department, *Looking to the Future: Mediation and the ground for divorce a Consultation Paper* (Cm 2424, 1993) para 7.3.

⁵³ Carol J King, 'Burdening Access to Justice: the cost of divorce mediation on the Cheap' (1999) 73(2) *St John's Law Review* 375, 377.

⁵⁴ Simon Roberts (n 24) 10. Eisenberg makes a similar remark, acknowledging that the judge is a 'stranger... coupled with the binary character of traditional adjudication.' See Melvin Aron Eisenberg, 'Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking' (1976) 89(4) *Harvard Law Review* 637, 658.

⁵⁵ Home Office, *Marriage Matters: A Consultative Document by the Working Party on Marriage Guidance* (Crown 1979).

⁵⁶ *ibid* para 1.10.

dispute, rather than have the outcome decided by a judge. The Matrimonial Causes Procedure Committee adopted similar terminology in 1985:

‘We are firmly of the view that the primary decision-making responsibility should rest with the spouses themselves and that they should be given all necessary help in deciding for themselves what should happen to their children, their property and their marriage.’⁵⁷

From the 1980s, it was clear that public policy prioritised the self-resolution of family disputes.

Moving onto the second argument that underpinned the rise of settlement, government bodies claimed that negotiated settlements reduced ‘the traumatic effect of marital breakdown’ and were more viable in the long-term.⁵⁸ In 1990, the Law Commission built on its original definition of good divorce law, adding two new objectives to its ‘Ground for Divorce’ report:

‘...those basic objectives of a “good” divorce law, as set out by our predecessors in 1966, still command widespread support... however, any summary would include two further objectives: *to encourage so far as possible the amicable resolution of practical issues...* and, for many people the paramount objective, to minimise the harm that the children may suffer...’⁵⁹ [emphasis added]

The first objective is relevant to the current discussion. It advanced a discourse around ‘amicable resolution’, pointing to a preference that parties reach an agreement with reduced hostility or bitterness. Upon close inspection, the phrase ‘amicable resolution’ was simply a softer synonym for settlement and revealed an expectation that parties would resolve disputes with minimal state support. Settlement has slowly taken centre stage in family law, with Mnookin and Kornhauser submitting that the main function of divorce law is not to impose decisions, but to provide a framework for the resolution of disputes.⁶⁰ Most academic commentators acknowledge this view, with Hitchings describing settlement as a ‘practice norm’ laden with rhetoric of ‘agreement, conformity and harmony’,⁶¹ and Barlow and others commenting that a ‘conciliatory, settlement-oriented approach’ dominates contemporary family law.⁶²

⁵⁷ Matrimonial Causes Procedure Committee (n 50) para 3.2.

⁵⁸ Law Commission (n 43) para 3.2.

⁵⁹ Law Commission, *Family Law: The Ground for Divorce* (Law Com No 192, 1990) para 1.6.

⁶⁰ Robert Mnookin and Lewis Kornhauser, ‘Bargaining in the Shadow of the Law: the Case of Divorce’ (1979) 88(5) *The Yale Law Journal* 950.

⁶¹ Emma Hitchings, ‘Official, operative and outsider justice: the ties that (may not) bind in family financial disputes’ (2017) 29(4) *Child and Family Law Quarterly* 359, 359-360.

⁶² Anne Barlow and others (n 20) 22-23.

Thus, governments began to use policy to regulate parties' behaviour during relationship breakdown or other family matters. Reece's research is of particular importance here. In 2003, Reece provided an in-depth overview of the shift in divorce law from preventing divorce to managing the end of relationships, encouraging parties to divorce 'well' rather than 'badly'.⁶³ She noted that this appeared to give parties the autonomy to manage their relationships, though underneath this freedom rhetoric was an opportunity for the state to 'educate' the family on how to behave responsibly.⁶⁴ While Reece primarily focused on the post-liberal Family Law Act 1996 and its attempt to introduce no-fault divorce (considered later in this chapter), her argument applies to all settlement-driven policy seen in the late 20th century. The same argument relating to responsibility was made by Piper several years earlier, who wrote that the idea of responsibility was used 'to delineate socially acceptable behaviour in a situation of rapid change.'⁶⁵ Overall, the rise of the settlement objective reflects a move towards increased individual responsibility and, simultaneously, further regulation of private family disputes.⁶⁶

Empirical research further demonstrates the stronghold of settlement – and the accompanying depiction of court as a process that increases hostility – over the conduct of legal professionals. For example, Davis, Cretney and Collins analysed over eighty financial family matters. Many of the legal practitioners they interviewed said that court increased feelings of 'tension and bitterness' between parties.⁶⁷ Similarly, Sarat and Felstiner's observations of divorce hearings revealed a view amongst lawyers and their clients that settlement was 'the appropriate alternative' to adjudication.⁶⁸ The influence of settlement has not weakened in the 21st century and Semple recently identified a 'settlement mission' in family law, defined as 'the informal and unregulated encouragement or pressure to settle.'⁶⁹ He argues that professionals in the family justice system actively promote settlement⁷⁰ based on 'a presumption that settlement is in the best interests of the family.'⁷¹ The settlement mission remains apparent throughout

⁶³ Helen Reece, *Divorcing Responsibly* (Hart Publishing 2003) 127, 146.

⁶⁴ In Reece's words, 'divorce is a golden opportunity for intervention.' *ibid* 156-157.

⁶⁵ Christine Piper (n 36) 5.

⁶⁶ Dewar describes these two objectives as 'the informalisation or delegalisation of divorce' and 'behaviour modification' respectively. See John Dewar, 'The Normal Chaos of Family Law' 61(4) *Modern Law Review* 467, 475.

⁶⁷ Gwynn Davis, Stephen Cretney and Jean Collins, *Simple Quarrels: Negotiating Money and Property Disputes on Divorce* (Clarendon Press 1994) 211-212.

⁶⁸ Austin Sarat and William L F Felstiner, *Divorce Lawyers and their Clients: Power & Meaning in the Legal Process* (Oxford University Press 1995) 108.

⁶⁹ Noel Semple, 'Mandatory Family Mediation and the Settlement Mission: A Feminist Critique' (2012) 24(1) *Canadian Journal of Women and the Law* 207, 234.

⁷⁰ For instance, the Child Arrangements Programme 'is designed to assist families to reach safe and child-focused agreements for their child, where possible out of the court setting.' See 12B PD Family Procedure Rules rule 1.2.

⁷¹ Noel Semple (n 69) 235.

the family justice system, including at court where parties are encouraged to negotiate outside the courtroom.⁷²

The rise of settlement has a direct effect on contemporary access to justice. On the one hand, Smith and Trinder have recognised that settlement procedures could amount to ‘a more efficient, managed and consistent system’.⁷³ Settlement might streamline the resolution of legal problems and, moreover, bestow parties with the autonomy to resolve their family problems. On the other hand, there are concerns (often coupled with a neoliberal critique, considered later in this chapter) that settlement may hinder access to justice because of the structural pressures it places on legal professionals to complete a case.⁷⁴ If the legal system – including court, legal professionals and other dispute resolution procedures – has a strong impetus towards settlement, the end agreement may lack full scrutiny and lead to an unfair outcome. Thus, the needs and rights of disputants may be overlooked entirely in preference for agreement. Yet surely this signals a departure from the substantive justice which appeared fundamental to access to court as access to justice? Both arguments raise critical issues, which leads to an arguably vital proposition: settlement is a valuable aspect of modern family justice, though must not be sought to such an extent that other crucial factors, including equality and fairness, are overlooked. Baitar reaches a similar conclusion and submits that agreement is not automatically synonymous with party satisfaction nor, more specifically, access to justice.⁷⁵ While the settlement objective is a welcome response to the concerns around the adjudication process, questions arise as to whether its promotion has gone too far.

1.2.3 *The attack on legal aid*

The third and final policy concern was that legal aid had become too extensive. The number of individuals eligible for legal aid has dropped over time, from between seventy to eighty percent of the population when the scheme was introduced, to 63 percent in 1976 and 29 percent in 2007.⁷⁶ Throughout this period, parties were increasingly expected to contribute money to

⁷² Liz Trinder and others (n 31) 35.

⁷³ Leanne Smith and Liz Trinder, ‘Mind the gap: parent education programmes and the family justice system’ (2012) 24(4) *Child and Family Law Quarterly* 428, 443.

⁷⁴ Davis, Cretney and Collins submit that the settlement objective is so infused in family legal practice that many lawyers view a contested hearing as ‘tantamount to an admission of professional failure.’ See Gwynn Davis, Stephen Cretney and Jean Collins (n 67) 212.

⁷⁵ Rachid Baitar and others, ‘Post-divorce wellbeing in Flanders: Facilitative professionals and quality of arrangements matter’ (2012) 18(1) *Journal of Family Studies* 62, 64.

⁷⁶ Henry Brooke, ‘The History of Legal Aid 1945-2010’ (Fabian Society 2017) <www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission-Appendix-6-F-1.pdf> accessed 3 April 2020 23.

their dispute, establishing new rhetoric that legal aid should only be available in its entirety to those in *need*.⁷⁷

The Law Commission recognised that the rise in divorce petitions following the Divorce Reform Act 1969 generated ‘a rapid escalation in legal aid expenditure’.⁷⁸ In their 1988 ‘Facing the Future’ paper, the organisation advocated for a comprehensive no-fault divorce system that acknowledged the complexities of family life.⁷⁹ The John Major Conservative government responded in 1993 with the ‘Looking to the Future’ consultation paper and reiterated the need for divorce reform to ‘eliminate [the] unnecessary distress’ often caused through adjudication.⁸⁰ Intriguingly, the government claimed that divorce law must ‘keep to the minimum the cost to the parties and the taxpayer’, including the financial interests of the latter in its deliberations.⁸¹ This was not the first example of a cost-saving imperative in family law policy; the 1985 Matrimonial Causes Procedure Committee previously mentioned ‘the desirability of achieving greater simplification and the saving of costs’.⁸² Nevertheless, the ‘Looking to the Future’ paper rendered the attack on legal aid more explicit and brought the interest of the taxpayer to the forefront of reform.

The decision to use the term ‘taxpayer’ appears to have been a strategic move that placed access to justice in opposition to cost. As mentioned in the ‘Looking to the Future’ White Paper in 1995:

‘The Government believes that the costs of dissolving a marriage, like those of forming one, should be borne by a couple themselves. This recognises the responsibility of individuals; it also provides appropriate disincentives against wasteful disputes which merely dissipate a couple’s assets.’⁸³

The perspective taken by the state was clear: individuals were responsible for their family matters and the costs arising from them. This rhetoric ties into the move away from a court-centred approach to out-of-court settlement, bolstering the calls for a privatised vision of family disputes. The following year, the Lord Chancellor’s Department published ‘Striking the Balance’. It labelled the proposed cuts to legal aid as ‘radical’ but nonetheless justified on the

⁷⁷ Felicity Kaganas, ‘Justifying the LASPO Act: authenticity, necessity, suitability, responsibility and autonomy’ (2017) 39(2) *Journal of Social Welfare and Family Law* 168, 176-180.

⁷⁸ Law Commission (n 43) para 2.6.

⁷⁹ ‘The law is, of course, used to deciding whether or not a crime has been committed. It is much less well-suited to engaging in the complex and sensitive factual and moral judgments which would be necessary accurately to reflect the relative blameworthiness of the parties to a marriage.’ See *ibid* para 3.6.

⁸⁰ Lord Chancellor’s Department (n 52) para 1.1.

⁸¹ *ibid* para 1.4.

⁸² Matrimonial Causes Procedure Committee (n 50) para 3.1.

⁸³ Lord Chancellor’s Department, *Looking to the Future: Mediation and the ground for divorce* (Cm 2799, 1995) para 6.1.

grounds of public spending.⁸⁴ The paper frequently referred to the ‘interests of the taxpayer’ and argued that legal aid was only justified in cases of ‘genuine need’.⁸⁵ This painted a picture of a legal aid scheme that had become too extensive in its current format. In line with this submission, Wiggan argues that framing the changes to legal aid as protecting the rights of taxpayers implies that they were once ‘abused’.⁸⁶ The abused taxpayer rhetoric is then used to justify the withdrawal of legal aid as reform merely seeks a return to the original legal aid scheme. Thus, the focal point of public policy from the 1990s and onwards shifted from supporting legal aid recipients to protecting the interests of the taxpayers who funded the scheme.

Unsurprisingly, the state did not frame their cost-savings analysis as an attack on access to justice. Cuts to funding were not presented as an attack on legal aid, but rather an important component of a robust family justice system that only granted support based on need. Sommerlad likewise maintained that the ‘resilience of social democratic discourse’ seen in legal aid policy acted as a disguise for ‘a meaner and more conditional form of legal aid’.⁸⁷ While the state continued to promote state support in cases of need, its careful phrasing symbolised a grand plan to limit legal aid. The withdrawal of support for legal aid continued under New Labour, with the 1998 ‘Modernising Justice’ report arguing that civil and family legal aid should focus on providing resources ‘where they are most needed’.⁸⁸ In the report, the Lord Chancellor’s Department commented that they aimed to ‘bring about a significant increase in access to justice’, albeit a justice that secured ‘the best value for the taxpayers’ money’.⁸⁹ ‘The Fairer Deal for Legal Aid’ report, written by the Department for Constitutional Affairs in 2005, similarly supported a new legal aid system provided through a ‘competitive market’, again adopting the language of ‘taxpayer value for money’.⁹⁰ The interests of the taxpayer, therefore, remained prominent themes in early 21st-century policy.

⁸⁴ Lord Chancellor’s Department, *Striking the Balance: The Future of Legal Aid in England and Wales* (Cm 3305, 1996) 5.

⁸⁵ *ibid* para 1.1.

⁸⁶ Jay Wiggan, ‘Telling stories of 21st century welfare: The UK Coalition government and the neo-liberal discourse of worklessness and dependency’ (2012) 32(3) *Critical Social Policy* 383, 390.

⁸⁷ Hilary Sommerlad, ‘Reflections on the Reconfiguration of Access to Justice’ (2008) 15(3) *International Journal of the Legal Profession* 179, 180.

⁸⁸ Lord Chancellor’s Department, *Modernising Justice* (Cm 4155, 1998) para 3.6.

⁸⁹ *ibid* para 1.9.

⁹⁰ Department for Constitutional Affairs, *A Fairer Deal for Legal Aid* (Cm 6591, 2005) para 3.1.

1.3 The solution: family mediation

It is clear that demand for reform around family law, particularly divorce, became the norm during the late 20th century. The family justice system was in a precarious position, subjected to criticism throughout the political and academic circles. At the same time, interest began to grow around an alternative dispute resolution process called conciliation, later renamed mediation. Parkinson was one of the early advocates of conciliation, praising the process for introducing a therapeutic element into the legal process.⁹¹ Conciliation was centred on ‘solutions’, rather than the ‘blame’ seen in court, and encouraged co-operation between separating parties.⁹² The following discussion shows that the state saw conciliation as a clear solution to the three policy concerns outlined above.

1.3.1 *The humble beginnings of family mediation*

The 1974 ‘Finer Report’, written by the Committee on One-Parent Families, was the first endorsement of family conciliation in policy.⁹³ The Committee highlighted the disjointed application of the law relating to family breakdown and the reality that many parties had no choice but to unwillingly engage in direct negotiation or issue proceedings post-separation. It recommended that the family law courts should be reorganised ‘to provide the best possible facilities for conciliation’.⁹⁴ The report stressed that reconciliation was the ‘reuniting of the spouses’, whereas conciliation involved:

‘...assisting the parties to deal with the consequences of the established breakdown of their marriage, whether resulting in a divorce or a separation, by reaching agreements or giving consents or reducing the area of conflict... arising from the breakdown which calls for a decision on future arrangements.’⁹⁵

Shortly after the Finer Report, conciliation was piloted in England and Wales through the Bristol Courts Family Conciliation Service (BCFCS).⁹⁶ The results of this 1978 pilot and late 20th-century research on family mediation will be considered in *chapter two*. It is sufficient for the current

⁹¹ Lisa Parkinson, *Conciliation in Separation and Divorce* (Routledge 1986) 6.

⁹² *ibid* 67-69. The psychological benefits of mediation are also reported by Robert Mnookin and Lewis Kornhauser (n 60) 956-957.

⁹³ Committee on One-Parent Families, *Report of the Committee on One-Parent Families: Volume 1* (Cmd 5619, 1974).

⁹⁴ *ibid* para 4.283.

⁹⁵ *ibid* para 4.288.

⁹⁶ Anne Bottomley, ‘Resolving family disputes: a critical review’ in Michael Freeman (ed), *State, Law, and the Family* (Tavistock Publications 1984) 294; Lisa Parkinson (n 91) 72.

discussion to acknowledge that conciliation was quickly introduced throughout England and Wales.⁹⁷

The Home Office was positive about conciliation in their 'Marriage Matters' report, particularly when comparing the process to court:

'Whereas the function of the courts is judicial, the main purpose of the conciliation service would be to help individuals and couples to sort out their views, attitudes and feelings, make decisions which are most beneficial to the mental and emotional health of themselves, their spouses and their children, and begin to adapt themselves to the implications of those decisions.'⁹⁸

Even in the early stages of conciliation's development, the state undoubtedly perceived the process as a comprehensive solution to the negative effects of the traditional adjudication system.⁹⁹ Conciliation was said to avoid the bitterness and hostility felt in court, instead 'engendering common sense, reasonableness and agreement'.¹⁰⁰ The process was also praised for its strong alignment with settlement. In 1985, the Matrimonial Causes Procedure Committee promoted conciliation, stressing that 'responsibility remains at all times with the parties themselves to identify and seek agreement'.¹⁰¹ It recommended that parties to divorce proceedings should receive information on divorce, local counselling and, in particular, conciliation services.¹⁰² Policy additionally praised conciliation in terms of its costs. This was evident in the 1990s, with the Lord Chancellor's Department praising conciliation for supporting parties through relationship breakdown whilst reducing costs.¹⁰³ In concluding the 'Looking to the Future' White Paper, the Lord Chancellor's Department called for further promotion of mediation – adopting this term over conciliation in order to avoid confusion with reconciliation – within a simplified divorce system.¹⁰⁴

Family mediation was a perfect fit for the three concerns of late 20th-century policy. First, mediation avoided the bitterness and hostility caused in court. Second, the process was a tool through which to promote the self-resolution of disputes. Third, the state could make savings

⁹⁷ Robert Dingwall, 'Some Observations on Divorce Mediation in Britain and the United States' (1986) 1986(11) *Mediation Quarterly* 5, 7.

⁹⁸ Home Office (n 55) para 7.10.

⁹⁹ The same benefit was acknowledged in the USA, where mediation was introduced at the start of the 20th century. Mediation was said to situate disputes within its social context (the family) and supported a 'marginal clientele' that faced long delays in court and a lack of legal support. See Jerold Auerbach, *Justice without Law? Resolving Disputes without Lawyers* (Oxford University Press 1983) 97, 120.

¹⁰⁰ Committee on One-Parent Families (n 93) para 4.305.

¹⁰¹ Matrimonial Causes Procedure Committee (n 50) para 3.10.

¹⁰² *ibid* para 4.1.

¹⁰³ Lord Chancellor's Department (n 52) paras 7.5 and 7.20.

¹⁰⁴ Lord Chancellor's Department (n 83) para 9.8.

not only in terms of legal aid but also by moving disputes out of the public court setting into a private family sphere. Mediation was highly appealing to the state, although the centrality of court in access to justice remained.

1.3.2 The introduction of mediation as an alternative process: its impact on access to justice

Family mediation was introduced as an alternative to, not a replacement for, the adjudication system. This was demonstrated through the lexical decision to label mediation as a form of *alternative dispute resolution*, reinforcing court as the *conventional* route for legal matters. The same discourse was noticeable at a policy level. In response to the Law Commission's 1990 consultation on whether parties should be required to attempt mediation before attending court, the majority of the respondents voiced concerns that such a proposal would remove the voluntary aspect of mediation and potentially compel the parties to settle. The Law Commission consequently warned of the 'dangers in relying too heavily upon conciliation' and stressed the importance of court:

'It is important that, whatever encouragement is given by the system to alternative methods of dispute resolution, the courts are not deterred from performing their function of determining issues which require to be determined.'¹⁰⁵

The Law Commission and its consultation respondents equated access to justice with access to court instead of mediation, consistent with the historical understandings of substantive justice. This was because court carried out a specific function – determining issues that need to be determined – that could not be provided through alternative dispute resolution.

This is not to say that mediation sat outside the family law system and was entirely disconnected from the legal decisions reached in court. Mnookin and Kornhauser argued that divorcing parties, or those in negotiations in general, do not negotiate free from all external factors, but 'bargain in the shadow of the law'.¹⁰⁶ They coined the term 'shadow of the law' to explain the influence of the law and legal judgments on negotiations. The law provides parties with 'bargaining chips' that enables them to negotiate based on the likely outcome if the case was heard in court. Legal precedent and legislation, therefore, have some influence in out-of-court dispute resolution. The shadow of the law has been applied in this context by many family law academics, although Mnookin and Kornhauser's article was more nuanced than what many

¹⁰⁵ Law Commission (n 63) para 5.34.

¹⁰⁶ Robert Mnookin and Lewis Kornhauser (n 60) 968.

references suggest.¹⁰⁷ This is because most academic discussion on the shadow of the law overlooks the four additional factors that Mnookin and Kornhauser claimed would influence negotiations: parental preferences, uncertainty in the law, transaction costs and strategic behaviour. Batagol and Brown developed these factors in a later publication and argued that the power dynamic between the parties also influenced the outcome.¹⁰⁸ Overall, the shadow of the law can act as a standard through which to understand how far mediation has achieved access to justice as in access to a legally correct outcome. This potentially provides a normative measure of the existence of both procedural and substantive justice within the mediation sphere.¹⁰⁹

Regardless, the judiciary still indicates a preference for access to court. In 2010, Neuberger claimed that there was no constitutional 'right of access to a mediation'.¹¹⁰ He commented:

'A proper and greater commitment to ADR... serves the public good. But it only does so within the context of a commitment that sees the first two doors [of law and equity] to the temple of justice kept firmly open to those who need to enter by them.'¹¹¹

While the end of the 20th century cast a new spotlight on family mediation, the process was designed to complement the formal family justice system that had been in place long before it. Mediation was valuable but could not infringe upon the right to access court, as to do so would involve a significant departure from the dominant conceptualisation of access to justice. There was thus a hierarchy of dispute resolution procedures within family and civil law. In line with this argument, Murch and Hooper described the family justice system as comprising two 'zones'.¹¹² In the inner zone was a focus on litigation and the courts. The outer zone then contained advice and alternative dispute resolution, including mediation. By keeping mediation out of the inner zone, the court's centrality in family justice remained, and the belief in access to court as access to justice continued.

¹⁰⁷ Anne Barlow and others (n 20).

¹⁰⁸ Becky Batagol and Thea Brown, *Bargaining in the Shadow of the Law* (Themis Press 2011) 52, 266.

¹⁰⁹ Roberts discusses how the 'normative framework' in mediation provides legal guidance alongside increased party power. See Simon Roberts, 'Mediation in Family Disputes' (1983) 46(5) *Modern Law Review* 537, 546.

¹¹⁰ David Neuberger, 'Keynote Address: A View From On High' (Civil Mediation Conference, London, 12 May 2015) para 9.

¹¹¹ David Neuberger, 'Equity, ADR, Arbitration and the Law: Different Dimensions of Justice' (The Fourth Keating Lecture, London, 19 May 2010) para 45.

¹¹² Mervyn Murch and Douglas Hooper, *The Family Justice System* (Family Law 1992) 60-61.

1.4 The Legal Aid, Sentencing and Punishment of Offenders Act 2012

In more recent times, family mediation has slowly crept into the inner zone of family justice. Despite the process being originally envisioned as an *alternative* to court, mediation has been heavily promoted in policy and legislation as the *primary* dispute resolution process for separating couples and their families. The state's intention to make mediation the primary process for family matters was first evident in the 1993 'Looking to the Future' consultation, where the Lord Chancellor's Department openly stated that '[t]he aim would be for mediation to become the norm rather than the exception'.¹¹³ Before going on to set out the LASPO reforms, this section will briefly outline the first legislative steps that cemented mediation's centrality in contemporary family justice.

Towards the end of the 1990s, the promotion of mediation went beyond public policy and moved into legislation. Part One of the Family Law Act 1996 intended to introduce no-fault divorce, a period of reflection and, crucially, mandatory meetings that included information about mediation.¹¹⁴ Under these provisions, a court could only approve an application for divorce (notwithstanding certain exceptions) if the parties had attended an information meeting.¹¹⁵ However, these reforms were considered too radical, with little evidence that they improved the divorce process.¹¹⁶ The majority of the Family Law Act 1996 was subsequently scrapped. Nevertheless, Part Three of the legislation remained in force and introduced legal aid for family mediation. To encourage the take-up of publicly funded mediation, section 29 of the Family Law Act 1996 stipulated that a party could not receive legal aid for family law court proceedings unless they attended an intake meeting. This meeting was similar to the information meeting envisioned in Part One, although intake meetings were specifically carried out by a mediator to determine whether mediation was appropriate.¹¹⁷ Reece, who investigated the 1996 legislation in detail, saw the promotion of mediation as a continuation of the behaviour modification objective that taught parties 'how to divorce responsibly'.¹¹⁸

Civil mediation was promoted throughout the same period. Lord Woolf disapproved of the formal court system, arguing that adjudication should be a 'last resort' and reserved for a small

¹¹³ Lord Chancellor's Department (n 52) para 7.11.

¹¹⁴ Anne Barlow and others (n 20) 11.

¹¹⁵ Family Law Act 1996, s 8.

¹¹⁶ Anne Barlow and others (n 20) 11.

¹¹⁷ Research was commissioned to assess the effectiveness of the intake meeting. This study, alongside other empirical research on family mediation in England and Wales, will be considered in detail in *chapter two*. See Gwynn Davis and others, *Monitoring Publicly Funded Family Mediation: Report to the Legal Services Commission* (Legal Services Commission 2000).

¹¹⁸ Helen Reece (n 63) 149.

number of claims where intervention was deemed necessary.¹¹⁹ Echoing the view of the Committee on One-Parent Families from two decades earlier, Woolf recommended the expansion of alternative dispute resolution for civil disputes. His proposals culminated in the Civil Procedure Rules 1998, which gave judges the power to force parties to *attempt* alternative dispute resolution.¹²⁰ This requirement applied to family disputes and is now enshrined under Part Three of the Family Procedure Rules.¹²¹ The Family Law Act 1996 and Civil Procedure Rules were the earliest legislative attempts to promote mediation in family and civil justice, revealing a heightened state interest in alternative dispute resolution.

It is important to consider how these reforms changed the rhetoric around access to justice. The promotion of mediation in legislation weakened formal justice as it intended to move disputes out of the court process. The state placed less emphasis on adjudication, transferring the responsibility for resolution to the parties. This introduced different types of justice for family law matters, as demonstrated through Hitchings' 'paradigm of justice'.¹²² Hitchings sets out three forms of justice in the family law landscape. The first form, *official justice*, signifies formal justice through the courts, whereby 'defined legal principles' govern agreement.¹²³ Official justice continues a full representation model as parties tend to rely on a 'trained insider', specifically a lawyer, to navigate the (typically adversarial) system.¹²⁴ Although official justice can include negotiations outside the courtroom, it reflects the centrality of legal norms in the discourse around access to justice. Hitchings' second form of justice, *operative justice*, begins to afford parties more power over the outcomes of their dispute.¹²⁵ Legal oversight is reduced, including judicial approval and legal advice provided by a solicitor. As the power of resolution moves from a third party to the disputants, personal responsibility for settlement increases.¹²⁶ Operative justice is said to underpin mediation as the process promotes party autonomy and individualised outcomes. The third form, *outsider justice*, is a significant departure from the traditional, official approach. In this sphere, the parties resolve family breakdown alone. Hitchings explains that the parties occupy a delegatised space in which there

¹¹⁹ Harry Woolf, *Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales* (HMSO 1996) 4.

¹²⁰ *ibid* 107.

¹²¹ Family Procedure Rules, SI 2010/2955, r 3.4.

¹²² Emma Hitchings (n 61).

¹²³ *ibid* 363. Galanter previously described court as an 'official forum' for determining disputes, commenting that 'justice is not primarily to be found in official justice-dispensing institutions.' See Marc Galanter (n 25) 3, 17.

¹²⁴ *ibid* 367.

¹²⁵ *ibid* 367.

¹²⁶ *ibid* 370.

is effectively no state or legal oversight, making it challenging for individuals to understand their legal rights and obligations.¹²⁷

Acceptance of both operative and outsider justice follows a presumption that the parties are well-positioned and fully capable of constructing their own individualised justice with minimal assistance. Nevertheless, the family law system must recognise that outsider justice is harmful in many instances. The parties may apply an incorrect interpretation of the law or rely on social notions of justice without any support. Furthermore, issues of power imbalances or vulnerability need a high level of oversight that outsider justice cannot provide. Outsider justice thus provides flexibility as to the outcome but may limit procedural or substantive justice. While mediation is poised as providing a form of operative justice, it is questioned whether the issues with outsider justice also plague its operative counterpart if there are problems in its application. As the state increasingly encourages parties to use mediation, they simultaneously promote an operative form of justice outside the legal system that rests at odds with the full representation model. This reduces the level of oversight for family disputes if the parties cannot access legal support, and may become particularly problematic if more vulnerable parties are not screened out of mediation. This trend towards operative (and, at times, outsider justice) has become apparent in recent years, most notably demonstrated through the 2013 LASPO reforms.

1.4.1 The LASPO reforms

In March 2011, the interim Norgrove Review, formally known as the ‘Family Justice Review’, argued that the family justice system was neither ‘coherent’ nor effectively ‘managed’.¹²⁸ Reasons included delay, high costs and a lack of public trust in the court system, as well as low take-up of mediation.¹²⁹ The final Norgrove report, published eight months later, rebranded *alternative dispute resolution* as *dispute resolution*.¹³⁰ Norgrove criticised the adjudication system, commenting: ‘[i]t should become the norm that where parents need additional support to resolve disputes they would first attempt mediation or another dispute resolution service.’¹³¹ The same year, the Ministry of Justice announced plans to reform legal aid.¹³² Proposals were released under the Conservative-Liberal Democrat Coalition and headed by

¹²⁷ *ibid* 372.

¹²⁸ Family Justice Review, *Family Justice Review: Interim Report* (Crown 2011) para 2.61.

¹²⁹ *ibid* paras 2.27-2.60.

¹³⁰ Family Justice Review, *Family Justice Review: Final Report* (Crown 2011) para 115.

¹³¹ *ibid* para 115.

¹³² Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales* (Cm 7967, 2010).

Jonathan Djanogly, the Under-Secretary of State for Justice in charge of reducing the legal aid budget. While LASPO was not the first assault on legal aid, it was undoubtedly one of the most significant in terms of both scope and impact. LASPO had four key objectives:

- (a) discourage unnecessary and adversarial litigation at public expense;
- (b) target legal aid to those who need it most;
- (c) make significant savings in the cost of the scheme; and
- (d) deliver better overall value for money for the taxpayer.¹³³

These aims will be considered in order, combining (c) and (d) into a cost-saving objective. It is discovered that they broadly reflect the three family justice policy concerns in the late 20th century: to discourage litigation, promote individual responsibility, and perceive dispute resolution in economic terms. The discussion will then turn to how LASPO has placed family mediation, and family justice in general, in a position of considerable uncertainty.

1.4.1.1 Discouraging unnecessary and adversarial litigation

Kaganas previously argued that legal aid was introduced in England and Wales at a time when policymakers saw the problems within the legal system as ‘inequality in access to justice’, and refrained from placing the fault of – and responsibility for – family matters on disputants.¹³⁴ The original approach portrayed affordable legal advice, representation and access to the court as fundamental rights upheld by the state. Building on Kaganas’ analysis, it is submitted that the LASPO regime was vastly different from the traditional legal aid scheme. In the LASPO proposal paper, the Ministry of Justice portrayed legal aid as an extensive system that had gone beyond its means:

‘...we also believe in light of the way the scheme has expanded since its establishment, that it is right in principle to reduce [the] scope [of legal aid]... in many matters, we would expect individuals to work to resolve their own problems, rather than resorting to litigation at a significant cost to the taxpayer.’¹³⁵

The LASPO reforms aimed to reduce what the Ministry of Justice described as ‘unnecessary and adversarial litigation’.¹³⁶ In response to the House of Commons Justice Committee, Djanogly criticised family justice for becoming ‘too lawyer-based and too court-based’, later describing

¹³³ Ministry of Justice, *Reform of Legal Aid in England and Wales: the Government Response* (Cm 8072, 2011) para 10.

¹³⁴ Felicity Kaganas (n 77) 172.

¹³⁵ Ministry of Justice (n 132) para 4.3.

¹³⁶ Ministry of Justice (n 133) para 10.

mediation as ‘less contentious, less adversarial and actually where the parties buy into the results.’¹³⁷ Mediation was promoted throughout the LASPO proposals on the basis that it was ‘cheaper, quicker and less acrimonious’ than court.¹³⁸ This echoed the dichotomy between court and mediation constructed in late 20th-century policy. Policy portrayed court as an overburdened process that increased bitterness, and mediation as a positive experience for family disputants. The discourse around family justice promoted individual responsibility for disputes and, furthermore, construed the number of cases reaching the court system as an unjustified strain on the public purse. It therefore established a high hurdle for those seeking relief or protection from court, limiting the primacy of official justice.

The Ministry of Justice proposed to remove legal aid provision for private family law cases in court. They justified this stance on the basis that there was ‘no reason to believe that such cases will be routinely legally complex’, except in instances of domestic abuse.¹³⁹ However, it was proposed that state support for private family matters should remain through family mediation. This funding was justified on the basis that legal aid would help parties ‘to take responsibility for resolving such issues themselves’.¹⁴⁰ Mediation was portrayed as the solution to the problems in court and further demand for settlement, duplicating earlier policy.

A particular point of interest in the proposal documents was the decision to prioritise funding for family mediation over legal advice and representation. The Ministry of Justice wrote: ‘in order to assist individuals to resolve children and family matters between themselves, we propose to continue providing access to mediation’.¹⁴¹ The phrase ‘providing access’ can be seen as a retreat from earlier policy that conflated access to justice with access to court. The LASPO proposals, in effect, justified cuts on the grounds that funding would be redirected from legal assistance to family mediation. This was a significant departure from the dominant conceptualisation of access to justice as access to court, coupled with access to a lawyer. The LASPO proposals therefore portrayed mediation (in addition to settlement) as an appropriate route to justice for the majority of disputes, providing a form of operative justice that limited state oversight via the law.

¹³⁷ House of Commons Justice Committee, *Government’s proposed reform of legal aid: Volume II* (HC 2010-11, 681-II) 69, 73.

¹³⁸ Ministry of Justice, *Government Response to Justice Committee’s Third Report of Session 2010/11: The Government’s proposed reform of legal aid* (Cm 8111, 2011) para 45.

¹³⁹ Ministry of Justice (n 132) para 4.207.

¹⁴⁰ *ibid* para 4.210.

¹⁴¹ *ibid* para 4.212.

1.4.1.2 Targeting legal aid

The second justification for LASPO was that legal aid should be 'targeted to those who need it most'.¹⁴² The Ministry of Justice criticised the expansion of legal aid, claiming that the scheme had gone beyond its means and funded a 'very wide range of issues' that did not always warrant legal support.¹⁴³ Legal aid was framed as a 'last resort', echoing the Woolf report published 14 years prior.¹⁴⁴ The state no longer aspired towards funding the majority. Instead, they indicated a preference for a system that only supported those in need, or, in the words of the Ministry of Justice, the *vulnerable*.¹⁴⁵ To limit the number of eligible applicants, the Ministry of Justice narrowly interpreted the term and concluded that the majority of separating parties were not vulnerable, despite the emotional and practical consequences of relationship breakdown.¹⁴⁶

While protecting the rights of the vulnerable (or those in need) is a fundamental element of access to justice, the use of this terminology throughout public policy, including LASPO, is problematic. Kaganas outlines how classifying users of legal aid as 'vulnerable' portrays them as lacking the ability and thus the autonomy to resolve their disputes alone.¹⁴⁷ Diduck additionally considers vulnerability as 'the friendly face of dependency'.¹⁴⁸ The work of both Kaganas and Diduck leads to a strong argument that LASPO further entrenches a distinct identity for legal aid recipients. By separating the vulnerable and dependent (legal aid users) from the resilient and independent (the taxpayer), the Ministry of Justice could justify its restricted welfare state. This was not the first time the state negatively portrayed legal aid recipients, with the taxpayer analogy first being used in the 1993 'Looking to the Future' consultation. In considering all this evidence, it is clear that LASPO was not a one-off attack on legal aid. Rather, LASPO embodied a long-standing agenda by successive governments to reduce state support in family matters, and only provide public funding in exceptional circumstances.

The LASPO proposals also targeted legal aid in terms of legal advice and representation. The Ministry of Justice retreated from the understanding of access to justice as dependent on accessible legal advice:

¹⁴² *ibid* para 2.2.

¹⁴³ *ibid* para 2.7.

¹⁴⁴ *ibid* para 4.25.

¹⁴⁵ *ibid* para 4.12.

¹⁴⁶ *ibid* para 4.207.

¹⁴⁷ Felicity Kaganas (n 77) 177.

¹⁴⁸ Alison Diduck, 'Autonomy and vulnerability in family law: the missing link' in Julie Wallbank and Jonathan Herring (eds), *Vulnerabilities, Care and Family Law* (Routledge 2014) 97.

‘Access to justice should not simply be equated to access to government funded legal advice. Courts should be seen as the last resort, not the first. The Government is satisfied that LASPO does not undermine access to justice.’¹⁴⁹

Traditionally, legal support was regarded as a vital element in navigating the complex adjudication system. By contrast, this written submission implied that few family matters merited legal support, reducing the possible pool of legal aid recipients. The Ministry of Justice then claimed that mediation did not involve ‘government funded legal advice’ but still ensured access to justice. The lack of discussion as to how mediation was to generate justice is deeply concerning. This is not to suggest that mediation cannot engender access to justice; on the contrary, this thesis suggests that more must be done to recognise the justice that mediation can provide or support. But the Ministry of Justice did not explain why access to mediation was prioritised over access to government funded legal advice. This begins to reveal the limited assessment of family mediation and its connection in substantive terms with modern access to justice.

1.4.1.3 Saving costs and delivering value for the taxpayer

As part of the post-2008 Financial Crisis austerity programme, the Conservative-Liberal Democrat coalition announced proposals to reduce the Ministry of Justice budget by 23 percent.¹⁵⁰ The third and fourth objectives of LASPO, to reduce the cost of legal aid and provide better value for money for the taxpayer, aimed to reduce state expenditure across family, civil and criminal justice. A cost-saving analysis was evident in both late 20th-century policy and the LASPO proposals, confirming that the latter was, ultimately, one part of a long-sustained effort to reduce state involvement in family matters.

In the LASPO consultation document, the Ministry of Justice attributed the expansion of legal aid to the large number of cases heard in court (echoing the first policy concern) which caused an unnecessary cost to the taxpayer and the justice budget.¹⁵¹ Echoing earlier policy, their emphasis on the taxpayer devalued and deprioritised claims for social justice.¹⁵² As demonstrated in a foreword written by Djanogly:

¹⁴⁹ Ministry of Justice, ‘Written evidence from the Ministry of Justice (LAS 73): Impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012’ (Parliament.UK 2014) <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/impact-of-changes-to-civil-legal-aid-under-laspo/written/8982.pdf>> accessed 3 April 2020 2.

¹⁵⁰ HM Treasury, *Spending Review 2010* (Cm 7942, 2010) 10, para 2.68.

¹⁵¹ Ministry of Justice (n 132) para 2.8.

¹⁵² A similar argument is made by Sarah Moore and Alex Newbury (n 15) 35; also see Jess Mant (n 14) 254.

‘...today’s legal aid system too often encourages people to bring their problems before courts, even when they are not the right place to provide good solutions, and sometimes for litigation that people paying from their own pocket would not have pursued.’¹⁵³

Djanogly’s statement constructed a negative, almost criminal, picture of legal aid recipients who pickpocket money from the taxpayer to fund an egocentric legal venture they would not pay for themselves. Under this interpretation, litigants are viewed as selfish individuals who waste valuable taxpayer resources, whereas mediation users are justified in seeking funding for their dispute.¹⁵⁴ Unsurprisingly, the Ministry of Justice did not explain why legal aid recipients for family mediation were any different from those wishing to attend court. A probable answer is that mediation, and its users, follows an operative form of justice. In the operative justice sphere, responsibility for resolution is shifted from the state to the individual. Hence, the expectation that the state would finance family matters was reduced, justifying the LASPO proposals and cuts to funded legal support.

1.4.2 The implementation of LASPO

LASPO was given Royal Assent in 2012 and implemented in April 2013, with its relevant provisions still applicable at the time of this thesis. The majority of private family law court proceedings are no longer eligible for legal aid, although funding remains for those attending family mediation.¹⁵⁵ Public funding for family mediation is a relatively new concept, introduced 16 years before LASPO through the Family Law Act 1996. Thus, family mediation’s shift from the outer to inner zone of family justice was a relatively swift episode in the history of modern family law. In particular, its transition was accelerated by demand to resolve the three broad concerns in policy.

Under the assumption that some – not many – parties are vulnerable, legal aid funding for private family law proceedings remains available in a small number of cases, specifically instances of domestic violence (including harm or risk of harm to a child).¹⁵⁶ This exception carries an implicit understanding that adjudication is preferable in more complex disputes.

¹⁵³ Ministry of Justice (n 138) 3.

¹⁵⁴ A similar admission is made by Clarke, who writes that New Right politics in the late 20th century separated the *citizen* into three identities: *taxpayer*, *scrounger* and *consumer*. He argues that this distinction was used in politics to pit taxpayers against the scroungers and consumers, emphasising the interests of the former. See John Clarke, ‘Dissolving the Public Realm? The Logics and Limits of Neo-liberalism’ (2004) 33(1) *Journal of Social Policy* 27, 39.

¹⁵⁵ Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 8, s 11.

¹⁵⁶ *ibid* sch 1, para 12(1); Civil Legal Aid (Procedure) Regulations 2012, SI 2012/3098 reg 33.

However, access to court is heavily dependent on the interpretation of the terminology used in the legislation. The definition of domestic violence was a key source of contention as LASPO progressed through Parliament. Critics of the legislation described the domestic violence criteria as a ‘high hurdle’ that excluded most cases where a party felt overpowered by their ex-partner.¹⁵⁷ By contrast, its advocates adopted a cost-saving analysis. Djanogly argued that the state must ‘prioritis[e] our resources so that legal aid will be available for the cases in which the most serious issues are at stake.’¹⁵⁸ Kenneth Clarke, the Secretary of State for Justice throughout the LASPO proposals, further acknowledged the tension between protecting domestic abuse victims and reducing unnecessary litigation:

‘We have a clear, wide definition trying to catch the variety of circumstances that will evidence recent domestic violence so that the argument that the victim should not have to face her abuser without having legal representation can be countered. But we do not want to shift the vast majority of private family law cases away from mediation into publicly funded adversarial litigation.’¹⁵⁹

Despite Clarke’s claim of a ‘wide’ interpretation, evidence suggests that the domestic abuse exemption is limited to a very small pool of cases. In 2015, Women’s Aid reported that few victims fell under the exemption.¹⁶⁰ A notable cause was the 24-month limit on evidence of abuse for receiving legal aid. This time limit was extended to 60 months in 2016 and completely removed in 2018, five years after LASPO was enacted.¹⁶¹ Regardless, critique of the safety net remains widespread.¹⁶² Many victims of domestic abuse are unable to claim the court exemption and effectively forced into mediation. This is a particular area of interest for this thesis as it raises questions around the role of the mediator in the post-LASPO landscape, as explored in *chapter two*.

LASPO attempted to render family mediation the first option for private family law matters, with the Ministry of Justice predicting an extra 10,000 mediation cases each year.¹⁶³ However, the impact of LASPO was drastically different. This is because the state failed to take into

¹⁵⁷ Legal Aid, Sentencing and Punishment of Offenders Bill Deb 6 September 2011, col 358.

¹⁵⁸ *ibid* col 232.

¹⁵⁹ HC Deb 17 April 2012, vol 543, cols 220-221.

¹⁶⁰ House of Commons Justice Committee, *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012* (HC 2014-15, 311) para 66, para 69.

¹⁶¹ Civil Legal Aid (Procedure) (Amendment) Regulations 2016, SI 2016/516 reg 2(2); Civil Legal Aid (Procedure) (Amendment) (No. 2) Regulations 2017, SI 2017/1237 reg 2(2)(a).

¹⁶² For further detail on the impact of LASPO on domestic abuse cases, see Shazia Choudhry and Jonathan Herring, ‘A human right to legal aid? – The implications of changes to the legal aid scheme for victims of domestic abuse’ (2017) 39(2) *Journal of Social Welfare and Family Law* 152.

¹⁶³ Ministry of Justice and Legal Aid Agency, *Implementing reforms to civil legal aid* (HC 2014-15, 784) para 2.8.

account that solicitor referrals were the primary route into family mediation.¹⁶⁴ By limiting the scope of legal aid, most parties could no longer obtain funding for legal advice at the outset of their dispute. Fewer parties saw a solicitor, and access to justice in terms of legal support was reduced. Alongside the lack of high quality and accessible information on family dispute resolution, mediation uptake plummeted.¹⁶⁵ In the year following LASPO, the number of legal aid family mediation starts dropped by 38 percentage points from 13,609 to 8,438.¹⁶⁶ Publicly funded family mediation intake remains poor: the lowest number recorded was 6,302 in 2017-18, and an increase of 233 cases the following year shows little improvement.

Soon after the fall in mediation intake, the government enacted the Children and Families Act 2014. Under a 2011 Pre-Application Protocol, all parties in private family law matters were expected to attend a Mediation, Information and Assessment Meeting (MIAM), analogous to the intake meetings envisioned in the Family Law Act 1996.¹⁶⁷ The objectives of the MIAM were to, first, educate potential users about mediation, and, second, screen their dispute for suitability. The Pre-Application Protocol, however, had little impact on the number of people attending either a MIAM or mediation. During the Children and Families Bill's passage in the House of Commons, Djanogly stated that statutory enforcement of MIAMs would prevent courts from 'overlook[ing] the need... to go to mediation'.¹⁶⁸ Mandatory MIAMs were subsequently introduced under the Children and Families Act.¹⁶⁹ From April 2014, most applicants to court for private family law matters (including child arrangements orders) were *required* to attend a MIAM.¹⁷⁰

Statutory MIAMs create an additional hurdle for individuals seeking to resolve their family problems in court. Doughty and Murch assert that their introduction bestowed mediators with 'a new quasi judicial court gate-keeping function': parties can attend court, but must first cross the mediation hurdle.¹⁷¹ This makes mediation the starting point for family matters. While a mediator cannot compel the parties to attend mediation, parliamentary debates reveal that the extension of mandatory MIAMs (beyond legal aid recipients) was intended 'to reduce unnecessary litigation'.¹⁷² This returns to the original policy concerns in family justice.

¹⁶⁴ House of Commons Justice Committee (n 160) para 142.

¹⁶⁵ *ibid* para 144.

¹⁶⁶ Ministry of Justice, 'Legal aid statistics England and Wales tables July to September 2020' (Gov.UK 2020) <www.gov.uk/government/statistics/legal-aid-statistics-july-to-september-2020> accessed 22 March 2021 table 7.2.

¹⁶⁷ 3A PD Family Procedure Rules.

¹⁶⁸ HC Deb, 25 February 2013, vol 559, col 71.

¹⁶⁹ Children and Families Act 2014, s 10.

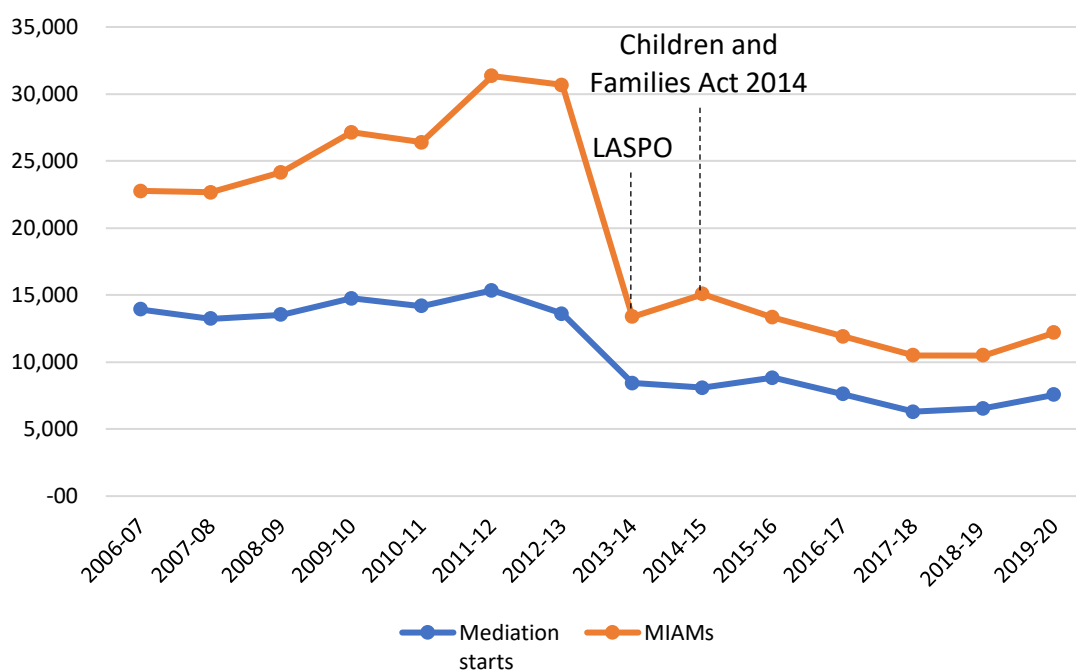
¹⁷⁰ Respondents are *expected* to attend a MIAM. See Family Procedure Rules, SI 2010/2955, PD 3A para 2.

¹⁷¹ Julie Doughty and Mervyn Murch, 'Judicial Independence and the restructuring of family courts and their support services' (2012) 24(3) *Child and Family Law Quarterly* 333, 354.

¹⁷² Children and Families Bill Deb 14 March 2013, col 261.

Nevertheless, the Children and Families Act has not achieved its intended effect, and the amount of publicly funded MIAMs is analogous to the drop in legal aid family mediation starts. The number of MIAMs decreased by 56.33 percentage points from 30,665 to 13,390 after LASPO, falling to 10,490 in 2017-18 (*graph one*).¹⁷³ The amount of MIAMs and family mediation starts under legal aid has seen some improvement in recent years, though it is too early to determine whether this is a long-term trend.

Graph one: Number of family mediation starts and MIAMs through legal aid, by financial year



Family law practitioners criticise LASPO and the Children and Families Act for a dual effect that lengthens disputes and strengthens the procedural barrier to court by requiring parties to first consider mediation.¹⁷⁴ The government promotes mediation as an appropriate process for all family disputes, with few exceptions, because it in theory enables parties to determine their agreement. From this perspective, the law is no longer the key driving force in negotiations, and mediation ‘offer[s] a new vision of procedural and substantive justice’.¹⁷⁵ This means that official, formal justice has weakened in the contemporary climate, with the state preferring parties to seek operative justice.

Despite the intention of the state, mandating MIAMs and withdrawing support for legal advice has not reduced the number of individuals settling their disputes in court. Another consequence of LASPO was the spike in individuals attending court without legal representation, known as Litigants in Person (LiPs). As a general population, LiPs struggle to

¹⁷³ Ministry of Justice (n 166) table 7.1.

¹⁷⁴ Grant Cameron, ‘Family justice reforms: how are they working in practice?’ (2015) 45(9) *Family Law* 1025.

¹⁷⁵ Thomas O Main (n 30) 374.

navigate the court process. Trinder and others previously argued that there was ‘no clear relationship’ between LiPs’ education and their ability to manage proceedings.¹⁷⁶ The problem is exacerbated by the complexity of family law disputes, many of which involve welfare concerns, substance abuse and poor mental health.¹⁷⁷ The full representation model, used in the official justice sphere, acknowledges the reality of family matters (to some degree) and provides litigants with independent legal advice. However, use of the full representation model is sporadic after LASPO. Between July to September 2020, 36 percent of private family court cases involved two LiPs, compared to 21 percent with two represented parties.¹⁷⁸ The former statistic is an increase of 23 percentage points compared to January to March 2013. In the post-LASPO landscape, LiPs dominate the family law court, and the most recent statistics show that 79 percent of private family law cases in court now involve at least one LiP. The full representation model is inaccessible to many in the contemporary post-LASPO landscape, questioning the strength of official justice in the adjudication process.

The rise in LiPs reflects the broader issue surrounding unmet legal need after LASPO. Data from 2014 shows that 45 percent of respondents with a family problem obtain legal advice.¹⁷⁹ This is a large reduction from the early 2000s when 96 percent of respondents with a justiciable problem sought advice for divorce, followed by 97 percent for relationship breakdown.¹⁸⁰ A fundamental problem in the post-LASPO climate is consequently how access to justice can be achieved with limited access to legal support through a lawyer. While the state envisioned mediation as a major driving force behind a new approach to justice, many separating families opted – and continue to opt – to attend court without representation. This raises an important issue: has the reframing of access to justice as access to mediation, not court, transcended into practice?

1.5 Situating policy in academic thought

A follow-up question arises: how, and to what extent, is family mediation understood and conceptualised as a process that supports access to justice? The promotion of family mediation in policy should not be followed blindly, but the potential of mediation to deliver access to

¹⁷⁶ Liz Trinder and others (n 31) 24.

¹⁷⁷ *ibid* 29.

¹⁷⁸ Ministry of Justice, ‘Family Court Statistics Quarterly: July to September 2020’ (Gov.UK 2020) <www.gov.uk/government/statistics/family-court-statistics-quarterly-july-to-september-2020/family-court-statistics-quarterly-july-to-september-2020> accessed 22 March 2021.

¹⁷⁹ Ramona Franklyn and others, *Findings from the Legal Problem and Resolution Survey, 2014-15* (Ministry of Justice 2017) 57.

¹⁸⁰ Pascoe Pleasence and others, *Causes of Action: Civil Law and Social Justice* (Legal Services Commission 2004) 58.

justice, and the circumstances necessary for it to do so, deserves a full investigation. Yet much of the academic literature around contemporary family justice has overlooked the importance and potential value of family mediation within England and Wales, instead focusing on LiPs and the political climate, in particular *neoliberal theory*.

Neoliberal theory emerged in the 1970s and 1980s in response to declining state involvement and support. A neoliberalist approach promotes the unregulated free market, viewing 'human action' in economic terms.¹⁸¹ This cost-based analysis is felt across society and even applied to non-economic policies.¹⁸² Academic commentators such as Giddings and Robertson have recognised that legal concepts fundamental to the welfare state, including legal aid and access to justice, become 'clothed in marketspeak' under neoliberalism.¹⁸³ To quote Harvey: 'neoliberalism has meant, in short, the financialization of everything.'¹⁸⁴

Connotations of neoliberal thought are apparent throughout the policy covered in this chapter. In the mid to late 20th century, the divorce rate rose, placing a strain on public spending. The subsequent reduction of legal aid and upsurge of mediation occurred alongside various economic and social policies under late 1970s Thatcherism that limited the power of trade unions, reduced taxes and furthered the privatisation of previously public institutions.¹⁸⁵ In the words of Barlow and others, family mediation was not a 'neoliberal Trojan horse', but quickly became 'co-opted' into its agenda.¹⁸⁶ Mediation fitted neatly with neoliberalist thought, first and foremost because it was understood to be a cost-effective process that reduced public expenditure and increased individual responsibility for family matters. Webley also commented that mediation resolved the apparent 'litigation culture' that occurred at the expense of the taxpayer.¹⁸⁷ There was thus a clear connection between LASPO and neoliberal theory as the legislation reduced state involvement in family (and other legal) matters, reinforcing the three concerns in earlier policy.¹⁸⁸ In effect, LASPO was the amalgamation of several decades of neoliberal disdain for legal support and access to justice as access to court.

¹⁸¹ David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2005) 2-3.

¹⁸² Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (MIT Press 2015); Jess Mant (n 14) 247-248.

¹⁸³ Jeff Giddings and Michael Robertson, "'Lay people, for God's sake! Surely I should be dealing with lawyers?'" Towards an assessment of self-help legal services in Australia' (2002) 11(2) *Griffith Law Review* 436, 438.

¹⁸⁴ David Harvey (n 181) 33.

¹⁸⁵ *ibid* 22.

¹⁸⁶ Anne Barlow and others (n 20) 16.

¹⁸⁷ Lisa C Webley (n 10) 2353.

¹⁸⁸ Hunter, for instance, describes the LASPO agenda as 'heavily influenced by neoliberal ideology.' See Rosemary Hunter, 'Inducing demand for family mediation – before and after LASPO' (2017) 39(2) *Journal of Social Welfare and Family Law* 189, 192.

The settlement objective (discussed earlier in this chapter) faces similar criticism as a neoliberal apparatus. Diduck applies Semple's settlement mission to the family justice system, criticising the movement for creating 'a new, separate but increasingly primary system designed to provide individualised justice'.¹⁸⁹ She advances that this approach views family disputes as outside the judiciary's, and subsequently state's, remit. Hitchings and Miles further warn of a family law system predicated on settlement 'regardless of whether settlement is achievable' or, moreover, desirable.¹⁹⁰ Davis, writing two decades earlier, voiced a similar concern that a settlement culture could 'override traditional legal values so that the negotiation process becomes no more than a search for compromise.'¹⁹¹ Many families require some form of state intervention: the move towards out-of-court family dispute resolution does not lessen parties' need for help with the complex and legal aspects of their dispute. Unfortunately, these parties generally struggle to resolve their disputes alone or through a mediator, limiting access to justice.¹⁹² There has therefore been a long-standing concern that the promotion of settlement under neoliberalism removes proper checks and balances to ensure access to justice, instead prioritising cheap and fast agreement.

1.5.1 Changing focus: justifying a study on family mediation post-LASPO

LASPO was a manifestation of a neoliberal agenda. However, the academic critique of family justice should not be confined to one strand of political thought. By solely viewing mediation as a process that advanced a neoliberal agenda, the possible benefits of, and original intentions behind, its introduction are forgotten. The final section of this chapter reveals how the debates around reform have lost sight of how mediation was originally a response to valid concerns about the shortcomings of the family justice system and could genuinely support parties in the post-LASPO landscape.

The future for family justice appears bleak. In early 2019, the Ministry of Justice published its post-implementation review of LASPO. The review showed little change in the state's perception of legal aid (and access to justice in general). The Ministry of Justice continued to value mediation based on its ability to deter parties from unnecessary litigation.¹⁹³ Whilst the

¹⁸⁹ Alison Diduck, 'Autonomy and family justice' (2016) 28(2) *Child and Family Law Quarterly* 133, 135.

¹⁹⁰ Emma Hitchings and Joanna Miles, 'Mediation, financial remedies, information provision and legal advice: the post-LASPO conundrum' (2016) 38(2) *Journal of Social Welfare and Family Law* 175, 180.

¹⁹¹ Gwynn Davis, Stephen Cretney and Jean Collins (n 67) 273.

¹⁹² Jess Mant and Julie Wallbank, 'The Mysterious Case of Disappearing Family Law and the Shrinking Vulnerable Subject: The Shifting Sands of Family Law's Jurisdiction' (2017) 26(5) *Social & Legal Studies* 629, 642.

¹⁹³ Ministry of Justice, *Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)* (CP 37, 2019) para 609.

organisation admitted that LASPO had caused a drop in solicitor referrals into mediation, they provided no solution to the problem.¹⁹⁴ Instead, the Ministry of Justice announced plans to provide a further £3m to support LiPs and £5m to fund innovative forms of legal support.¹⁹⁵ In March 2021, the institution announced a £1m 'Family Mediation Voucher Scheme' which provides up to £500 in mediation costs for individuals.¹⁹⁶ This new initiative is promising, but two contrasting concerns emerge: will the scheme be taken up by different providers and their clients, or is the million pound investment actually insufficient to meet demand? Regardless, public funding for family law is not set to return to its pre-LASPO levels.

It is easy to view the late 20th century as a golden age where funding was prevalent and met legal need. However, real problems that existed within the traditional system would remain even if legal funding and support were to be restored. It cannot be forgotten that the academic sphere voiced similar concerns to policy regarding the effectiveness of court. Davis, Cretney and Collins questioned why financial and property matters heard in court were prolonged despite often being 'simple quarrels'.¹⁹⁷ Individuals were regularly put under pressure by their solicitor to settle, even if the party felt the agreement was unfair.¹⁹⁸ The authors identified a number of problems within the legal divorce process, including overburdened lawyers and a lack of predictability in court.¹⁹⁹ In a similar vein, Sarat and Felstiner found that lawyers tended to keep their clients at a distance, preferring to only engage with the legal aspect of the case.²⁰⁰ After high levels of procrastination amongst solicitors and their clients, court cases became drawn-out and complex.²⁰¹ These factors heavily limited the amount of emotional support available to parties, creating further frustration and upset. Research by Eekelaar, Maclean and Beinart further suggested that solicitors would often minimise allegations of violence as one-off events.²⁰² Similar problems with solicitor negotiation are also recognised in more recent research, such as Barlow and others' 'Mapping Paths' project.²⁰³

Legal support is not a panacea to resolving family disputes, much like mediation. In calling for a return to accessible legal aid and legal advice, the broader family law literature has

¹⁹⁴ *ibid* paras 613-618.

¹⁹⁵ Ministry of Justice, *Legal Support: The Way Ahead. An action plan to deliver better support to people experiencing legal problems* (CP 40, 2019) 26, 34.

¹⁹⁶ Gov.UK, 'Family Mediation Voucher Scheme' (Gov.UK 2021) <www.gov.uk/guidance/family-mediation-voucher-scheme> accessed 30 March 2021.

¹⁹⁷ Gwynn Davis, Stephen Cretney and Jean Collins (n 67) 139.

¹⁹⁸ *ibid* 69.

¹⁹⁹ *ibid* 253-254.

²⁰⁰ Austin Sarat and William L F Felstiner (n 68) 45-48, 57.

²⁰¹ *ibid* 59. This is supported by Gwynn Davis (n 14) 107.

²⁰² John Eekelaar, Mavis Maclean and Sarah Beinart, *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing 2000) 86.

²⁰³ Anne Barlow and others (n 20) 114-115.

overlooked the original problems within the court process that mediation aimed to resolve. It has also neglected to consider the possibility of better solutions for some disputes. Mediation promoted the self-resolution of family matters by facilitating communication between disputants and typically avoided the lengthy negotiations seen in court.²⁰⁴ In effect, mediation was in part a response to the imperfections within the court process that often operated to the benefit of its practitioners rather than its users. The same problem is noticed by Goriely, who emphasises the ‘pressing need to rethink the way advice and legal services are provided’, rather than advocate for their reinstatement.²⁰⁵ This thesis submits that academics, policymakers and the legal professions must consider alternative solutions to restoring legal funding and support in the post-LASPO climate.

Court and mediation both deserve a place in modern family justice. Moore and Newbury argue that a holistic view of access to justice recognises the potential injustices and harm caused through court and adversarialism, but warn that this claim has been ‘misappropriated’ to advance cuts to legal aid and state responsibility.²⁰⁶ Building on Moore and Newbury’s analysis, it is advanced that policy has blindly treated mediation as the new panacea for private family disputes. This is demonstrated by the House of Commons Justice Committee, which wrote in its 2015 report that it was ‘desirable’ for mediation to become the first option for family disputants without considering how far the procedure could achieve access to justice.²⁰⁷ Nevertheless, the problem is not necessarily with family mediation per se, but its misappropriation by successive neoliberalist governments. The same can also be said of the general criticisms against the court process. Parties are provided with ‘misleading images’ of both processes, as mentioned by Piper and Sclater, meaning that few individuals make a fully informed choice as to which procedure is most appropriate for their dispute.²⁰⁸ Thus, a fundamental question is how to claim back family dispute resolution from the neoliberal state and best utilise these procedures to engender access to justice in the post-LASPO era.

Regretfully, the modern family justice literature has largely overlooked the value of mediation and placed most focus on the rise of LiPs. Moore and Newbury note that academics, policymakers and media outlets have continued to focus on the cases heard in court, rather than the ‘behind-the-scenes legal work and support services’.²⁰⁹ The work on LiPs is extremely

²⁰⁴ Lisa Parkinson, *Family Mediation: Appropriate Dispute Resolution in a new Family Justice System* (2nd edn, Family Law 2011) 6.

²⁰⁵ Tamara Goriely (n 6) 562.

²⁰⁶ Sarah Moore and Alex Newbury (n 15) 11-12.

²⁰⁷ House of Commons Justice Committee (n 160) para 59.

²⁰⁸ Christine Piper and Shelley Day Sclater, ‘Changing Divorce’ in Sclater S D and Piper C (eds), *Undercurrents of Divorce* (Ashgate Publishing Company 1999) 240.

²⁰⁹ Sarah Moore and Alex Newbury (n 15) 6.

valuable and justified because of their prevalence within modern family justice. Nonetheless, more must be done to reach the same level of empirical understanding around family mediation. In written evidence submitted to the House of Commons Justice Committee's inquiry into the LASPO proposals, Moorhead focused his discussion on LiPs in the family law system. In justifying his focus, he mentioned: 'I am assuming that the Committee will be receiving significant evidence from other sources on the administration's approach to mediation'.²¹⁰ Unfortunately, only 10 out of the 47 written evidence submissions published in that report mentioned mediation, most of which considered family mediation in little detail. Whilst this inquiry is not representative of all discussions surrounding LASPO, it alludes to a widespread and false assumption that mediation is subject to the same levels of scrutiny as LiPs.²¹¹

Across the remaining six chapters, this thesis considers what can be done to reform family mediation and further access to justice in the modern climate. Its starting argument is that the low level of post-LASPO investigation into the mediation process is troubling. In particular, there has been little discussion around the equivalent of LiPs in mediation, as many participants now attend out-of-court family dispute resolution without supplementary professional legal advice. Debate must not overlook the fact that the reforms covered in this chapter, namely the introduction and subsequent promotion of mediation, were also based on an intention to improve the delivery of family law.

At a broader level, the focus on neoliberalism and LiPs in the wider family law literature reveals a gap in the academic literature around how mediation could ensure access to justice post-LASPO. Mediation sits at the heart of the family justice system after LASPO, but the access to justice discourse has not caught up to recognise this development. Research must therefore investigate how far this understanding (of family mediation as a key service in access to justice) has transcended into the contemporary understanding of family mediation itself. In simpler terms, it is asked whether (and, if so, how) the *conceptualisation* of family mediation, including the role of the mediator, has developed, and, in turn, provides access to justice in the current climate. This is a question of both practice and theory: if mediation is no longer the alternative, but effectively the replacement, for court and traditional legal support, is this reflected in the modern conceptualisation of the process?

²¹⁰ House of Commons Justice Committee, *Government's proposed reform of legal aid: Volume III* (HC 2010-11, 681-III) 51.

²¹¹ Another example of this misassumption is the Joint Committee of Human Rights' 2018 paper. They dedicated a large section of the report to the impact of LiPs on access to justice but were silent on mediation and non-court family dispute resolution. See Joint Committee on Human Rights, *Enforcing Human Rights* (2017-19, HL 171, HC 669).

1.6 Conclusion

The current family justice landscape is the result of several decades of policy and legislation that aimed to withdraw state responsibility for family matters. This agenda was first visible in the 1960s, with policy that sought to minimise the alleged bitterness caused in court. Successive governments continued this discourse alongside a preference for party control over settlement and an aversion to an overly excessive legal aid scheme. Family mediation was a clear solution to these three policy concerns: it was distinct from court, case outcomes were decided by the parties, and it was said to be cheaper. The process has since crept to the centre of family justice, most notably demonstrated by the recent LASPO reforms. LASPO represented a continuation of the three earlier policy concerns and sought to discourage unnecessary litigation, target legal aid and save costs (with particular regard to the taxpayer). The majority of parties to private family law proceedings can no longer receive legal aid unless they attend mediation. In effect, family mediation is now the primary option for private family matters.

This transition has not come without its critics. Much of the academic discussion criticises family mediation as a neoliberalist tool and calls for a return to – or places emphasis on – orthodox access to justice as access to court and legal advice, concentrating on the impact of LiPs. These concerns are justified as LiPs are a large population that place further pressure on the court process. Even if orthodox access to justice, supported by accessible legal support, resolves this issue, its reinstatement is highly unlikely in the current climate. Thus, academic critique must be pragmatic when considering the potential ways forward in the post-LASPO landscape.

In line with this submission, this thesis considers the dominant conceptualisation of family mediation (and the role of the family mediator) in the contemporary family justice system in order to understand how far the process can support access to justice post-LASPO. The next two chapters consider the traditional conceptualisation of family mediation and family mediators within empirical research (*chapter two*) and mediation theory (*chapter three*).

Chapter 2. The call for flexibility in mediator practice

This chapter considers the development of family mediation in practice as the process moved from the outer to inner zone of family justice. It also examines developments in the focus and findings of empirical research on mediation. The chapter first reveals a heavy focus on policy-led goals in earlier empirical research with little appraisal of the mediator. This introduces the idea of the traditional, *limited* mediator, a neutral professional that is confined to a circumscribed set of practices (such as information-giving). However, it recognises that the lack of investigation surrounding the limited mediator was foreseeable in light of mediation's largely homogeneous client base at the time, combined with a prevalence of solicitors to provide supplementary legal advice. Reference is then made to a slight shift in context during the 1990s. A more heterogeneous clientele, less often supported by legal advice, meant demand began to stretch beyond what the limited mediator provided. The second section of this chapter considers the new focus in research on the challenges facing mediation in the 21st century, particularly following LASPO. The limited mediator is subsequently contrasted with the *modern* mediator, the latter of whom can provide the flexibility that is highly sought within academic commentary. The final section of this chapter focuses on a recent debate as to whether mediators should be allowed to draft consent orders. In doing so, it reveals a serious dilemma: the modern mediator needs to provide a flexible service, but cannot depart from her traditional and neutral role.

2.1 Establishing family mediation: the late 20th century

Chapter one previously tracked the rise of family mediation in policy following three particular concerns: the efficiency of court, the settlement mission and the expansion of legal aid. Thus, mediation was established in a policy context that encouraged out-of-court settlement with minimal state support. It was, then, inevitable that mediation would be understood according to (and measured against) these values. In 1981, a group of mediators defined family mediation as:

‘...helping separating and divorcing couples to reach agreed decisions on matters arising from the breakdown of their marriage, especially matters concerning children.’¹

¹ Lisa Parkinson, ‘Family Mediation in Practice: ‘A Happy Concatenation?’ in John Westcott (ed), *Family Mediation: Past, Present and Future* (Jordan Publishing 2004) 43-44.

Settlement sits at the heart of this definition. It means that beyond the policy sphere, family mediation providers too envisioned mediation as a process through which to foster self-resolution. Another factor underpinning their conceptualisation was the promotion of a positive post-separation relationship, which distinguished mediation from the traditional adjudication process.²

The settlement-oriented approach to mediation underpinned the design of the first key studies on family mediation in England and Wales, which took place from 1978 to 1993. These studies, discussed below, focused primarily on measuring settlement rates. As will be seen, research did not reflect on the dominant conceptualisation of family mediation and its mediators.

2.1.1 An outline of the early family mediation pilots and their findings

As acknowledged in *chapter one*, the Committee on One-Parent Families first advocated for family mediation, previously known as conciliation, in 1974.³ Their report prompted several pilots that tested the effectiveness and efficiency of mediation, starting with the BCFCs. Established in 1978, the BCFCs provided mediation for child-related matters and was funded by the Nuffield Foundation.⁴ This service was the sole focus of the first research study on family mediation. Findings from Davis' report, published in 1980, showed that full or partial agreement had been reached in 78 percent of mediation cases.⁵ Factors associated with settlement included 'helpful solicitors' and 'personal maturity', though Davis did not expand on the latter, rather value-laden term. In contrast, the likelihood of settlement was reduced when parties resented their ex-partner, were unwilling to engage or refused to accept the end of the marriage. The Bromley Conciliation Bureau, established in 1979, was the focus of the second empirical project on mediation, again led by Davis. This scheme attained lower levels of settlement with 63 percent of its cases reaching full or partial agreement.⁶ The reason for the comparatively low rate is unclear and was not discussed by the researchers.

² This also broadly reflected the policy objectives set out in *chapter one*.

³ Committee on One-Parent Families, *Report of the Committee on One-Parent Families: Volume 1* (Cmd 5619, 1974).

⁴ Lisa Parkinson, *Family Mediation: Appropriate Dispute Resolution in a new family justice system* (2nd edn, Family Law 2011) 6; Gwynn Davis, *Partisans and Mediators: The Resolution of Divorce Disputes* (Clarendon Press 1988) 16.

⁵ 35 percent of cases reached full agreement, and 43 percent partial agreement. Gwynn Davis, *Report of a Research to Monitor the Work of the Bristol Courts Family Conciliation Service in its First Year of Operation* (University of Bristol 1980) 6.

⁶ Gwynn Davis and Marian Roberts, *Access to Agreement* (Open University Press 1988) 51.

Nevertheless, the pilots were regarded as highly successful, and mediation was rolled out across England and Wales as a collection of not-for-profit, voluntary services.⁷

Several prominent studies continued to measure mediation's success through settlement rates.⁸ The third research project covered in this section is the Conciliation Project Unit (CPU), established in 1985. This research project assessed several in-court and out-of-court mediation services.⁹ Led by Ogus, Walker and Jones-Lee, the CPU was the most extensive family mediation study of its time.¹⁰ The study involved questionnaires and interviews with legal professionals, mediators and its users, as well as an analysis of case files.¹¹ Despite the breadth of its research methods, the CPU continued to focus on settlement. Its findings showed that 71 percent of parties reported partial or full agreement, though the researchers did not break this statistic down into the different types of mediation services.¹² Another part of the CPU report used a graph to show that fewer agreements were reached via in-court mediation where a judicial professional (including a judge) was present.¹³ Whilst specific agreement rates are unavailable, the graph indicated that roughly 75 percent of cases using out-of-court mediation reached at least partial agreement. Ogus, Walker and Jones-Lee reasserted settlement as critical to mediation's success and praised the process for giving parties the decision-making power to reach an agreement:

‘...[mediation’s] distinguishing feature should be to enable couples to retain control of the decision-making process consequent on separation and divorce, encouraging them to reach their own agreements.’¹⁴

The CPU project consequently recommended that mediation should be extended to cover financial matters.¹⁵ This was concluded in light of a settlement-oriented focus, with the project portraying mediation as a successful process that engendered autonomous agreements over family matters.

⁷ Lisa Parkinson, ‘Bristol Courts Family Conciliation Service’ (1982) 12(1) *Family Law*, 13.

⁸ Stylianou describes this as an ‘early wave of empirical research in the 1980s and 1990s’: Katherine Stylianou, ‘Teaching Family Mediation in Higher Education – What an Academic Family Mediation Course could look like’ in Marian Roberts and Maria Federica Moscati (eds), *Family Mediation: Contemporary Issues* (Bloomsbury Professional 2020). Also see Janet Walker, ‘Conciliation Research’ in Thelma Fisher (ed), *Family Conciliation within the UK: Policy and Practice* (2nd edn, Family Law 1992) 156.

⁹ Anthony Ogus, Janet Walker and Michael Jones-Lee, *The Costs and Effectiveness of Conciliation in England and Wales* (University of Newcastle 1989).

¹⁰ Janet Walker (n 8) 157.

¹¹ Anthony Ogus, Janet Walker and Michael Jones-Lee (n 9) paras 7.3-7.5, 7.71-7.75.

¹² *ibid* para 17.1.

¹³ *ibid* 16.13.

¹⁴ *ibid* para 20.19.

¹⁵ *ibid* para 20.19.

In the early 1990s, all-issues (or comprehensive) mediation was piloted in the English and Welsh family justice system. This model allowed mediators to mediate both financial and child-related disputes. Sims recently described the introduction of all-issues services as a 'defining moment in the development of family mediation' because it broadened the scope of mediator practice.¹⁶ The fourth and final major study from the late 1970s to early 1990s was funded by the Joseph Rowntree Foundation.¹⁷ Walker, McCarthy and Timms examined five all-issues mediation pilots through case records, observations, surveys and interviews from 1990 to 1993.¹⁸ They then compared the outcomes from the all-issues services to a child-focused model. Results showed that 80 percent of all-issues cases reached an agreement compared to 60 percent of the child-focused comparison group.¹⁹ Walker, McCarthy and Timms recognised the need for settlement, but also underscored the importance of improving the party dynamic between the parties:

'Family mediation is a process in which an impartial third person, the mediator, assists couples considering separation or divorce to make arrangements, to communicate better, to reduce conflict between them, and to reach their own agreed joint decisions... The mediator has no stake in any disputes, is not identified with any of the competing interests, and has no power to impose a settlement on the participants, who retain the authority to make their own decisions.'²⁰

Thus, two key objectives in family mediation were identified: *settlement*, and *improving communication and conflict resolution*. As alluded to throughout this discussion, the early mediation pilots consistently praised family mediation as a process that successfully encouraged settlement and a healthy post-separation relationship.²¹ This understanding arguably helped establish further acceptance of mediation in the family justice system. Mediation was then a settlement-focused process, whereas court was widely understood in policy and some academic commentary as an adversarial process that increased bitterness and hostility. This suggests that the dominant findings from the late 20th-century mediation

¹⁶ Andrew Sims, 'Exploring the Scope of Family Mediation in England and Wales' in Marian Roberts and Maria Federica Moscati (eds), *Family Mediation: Contemporary Issues* (Bloomsbury Professional 2020) 297. The introduction of all-issues mediation is also discussed by Lisa Parkinson (n 1) 44.

¹⁷ Janet Walker, Peter McCarthy and Noel Timms, *Mediation: The Making and Remaking of Co-operative Relationships: An evaluation of the effectiveness of comprehensive mediation* (Relate Centre for Family Studies 1994) 13.

¹⁸ *ibid* 14-25.

¹⁹ *ibid* 71.

²⁰ *ibid* preface.

²¹ While Walker, McCarthy and Timms focused on settlement, they mentioned that mediation helped to achieve other objectives, including a better relationship, clarifying areas of disagreement, and reducing costs. See *ibid* 79-80.

pilots were largely in line with the policy concerns from the same era (identified in *chapter one*), paving the way for mediation to be increasingly accepted and promoted by the state.

2.1.2 The missing appraisal of the family mediator

Of course, the mediator was crucial to the mediation process. She was generally construed in the early studies as a third party with little power to intervene because the parties 'retain[ed] control of the decision-making process', in the words of Ogus, Walker and Jones-Lee above. An earlier quote by Walker, McCarthy and Timms further described the mediator as 'an impartial third person' who 'assists'. If parties were expected to reach their own decisions, it stood to reason that the mediator could not impose a particular outcome and must only facilitate settlement. Thus, it is apparent that the earlier research on family mediation projected an image of a mediator with a narrow role, confined to neutrality and assistance. This particular, traditional conceptualisation of the mediator will hereinafter be referred to as the *limited mediator*: a professional bound to an absolute vision of her neutrality. The strict interpretation of mediator neutrality will be considered further in *chapter three*. For the current discussion, it is sufficient to acknowledge that neutrality was understood as an unfaltering concept that could not be departed from in any circumstance. The limited mediator was in line with the policy context at the time: to ensure out-of-court and party-driven settlement, the third party could not dominate discussions or impose a decision.

An interesting feature of these earlier family mediation studies was their minimal critique of the mediator; mediator practice, behaviour and values (as well as those of the clients who mediated) received little to no attention in published work. While Davis' analysis of the BCFCs included interviews with solicitors and case records, no conversations with mediators or their clients took place. In a later article, Davis criticised the 'painfully wide' gap between the aims of his research and its findings.²² A similar criticism was voiced by Dingwall who said that the BCFCs pilot revealed a lack of information on 'what conciliators have done and how this has contributed to, or impeded, the resolution of the material dispute.'²³ Dingwall's statement applies to much of the late 20th-century research on family mediation. The role of the limited mediator was, in effect, taken for granted. Nevertheless, it was understandable that the early mediation pilots did not critique the role of the mediator. These projects were designed to generate data on the benefits of family mediation, and these measured benefits were based

²² Gwynn Davis, 'A Research Perspective' in John Westcott (ed), *Family Mediation: Past, Present and Future* (Jordan Publishing 2004) 60.

²³ Robert Dingwall, 'Some Observations on Divorce Mediation in Britain and the United States' (1986) 1986(11) *Mediation Quarterly* 5, 19.

on normative understandings that aligned with family policy. By focusing on settlement and satisfaction rates, research accepted without question the narrow role of the limited mediator. Whether or how mediation could support (or perhaps even hinder) access to justice, either as a process or substantive outcome, was largely overlooked for these reasons.

Two crucial contextual factors that shaped mediation practice in the late 20th century provide further explanation for the lack of focus on the limited mediator. These factors also act as justifications as to why the limited mediator role was largely accepted. First, mediation's homogeneous population that brought relatively straightforward claims, and, second, the availability of legal support through a solicitor. The demand for mediators to adapt to diverse client needs, or to find ways of keeping challenging disputes moving forward, was low as a result, and the constraints placed upon the limited mediator were left unquestioned.

2.1.2.1 The original client base

Most family mediator users tended to come from a high socio-economic class. This was apparent in the early BCFCs pilot, where Davis suggested that 'the values and social skills of middle-class clients ma[d]e them better suited to independent negotiation'.²⁴ Davis provided no detail on this reasoning other than a brief recognition that most fathers in the pilot were in intermediate managerial, administrative or professional occupations (listed as Grade B or middle class under the NRS social grade). The solicitors in BCFCs acknowledged the 'complexity of many cases' but identified several factors associated with agreement.²⁵ These included a willingness to reach a settlement, a child-focused approach and amicability between the parties. Some variance in the mediation population became apparent over time, with Ogus, Walker and Jones-Lee describing the parties in the CPU project as a 'heterogeneous population in terms of both social and personal circumstances'.²⁶ The mediation population was somewhat varied in Walker, McCarthy and Timms' all-issues pilot, though the sample remained skewed towards the middle class: 56 percent of its mediation users were in high socio-economic occupations, compared to 9 percent in semi-skilled or unskilled manual work.²⁷

Despite some variation in clientele, the mediation services in these pilots consistently expressed a preference for a homogeneous, high socio-economic client base. For instance,

²⁴ Gwynn Davis (n 5) 5.

²⁵ *ibid* 3.

²⁶ Anthony Ogus, Janet Walker and Michael Jones-Lee (n 9) paras 7.71-7.75, para 20.6.

²⁷ Janet Walker, Peter McCarthy and Noel Timms (n 17) 44.

one mediator in Walker, McCarthy and Timms' all-issues study stated that those best suited to mediation were 'well-educated and articulate'.²⁸ The researchers summarised the ideal mediation case as involving:

'...two well-educated, middle-class people, both in employment, jointly owning a house in which there was sufficient equity to provide a reasonable home for each of them... and who were both sufficiently sure that the marriage had ended...'²⁹

The evidence alludes to a widespread assumption that parties from high socio-economic background streamlined the mediation process. For example, 'well-educated' individuals were considered best suited to the negotiation process as they had the skills to negotiate effectively. Furthermore, if the parties were 'middle-class', 'in employment', and had 'sufficient equity' for both to acquire a home after separation, the pool of assets to divide between them was, relatively speaking, abundant. It is submitted that this partiality towards a homogeneous client base led to a narrow role for the mediator in practice. With fewer concerns around the *needs* of both parties, a factor that is particularly important in financial matters, negotiations were simplified and demand for intervention was low. The limited mediator suited the needs of a standardised client base, and the restrictions surrounding her role were therefore justified.

2.1.2.2 The prevalence of solicitors in family mediation

The promotion and reliance on legal professionals in family mediation was prevalent across the early pilots. During the late 20th century, solicitor support was widespread and most parties would appoint a solicitor before mediation.³⁰ In the Bromley Conciliation Bureau project, all but two of 51 participants attending mediation had consulted a solicitor about their divorce.³¹ The mediators were therefore reliant on solicitors as the primary gatekeepers to family mediation.³² Similarly, over half of solicitors interviewed as part of the CPU project referred their parties to mediation.³³ This gatekeeper role also meant a solicitor only referred parties to mediation if they felt the process was appropriate for their dispute. Complex cases were consequently screened out of mediation, contributing to the streamlining of the process. Self-referral appeared to increase over time, with only 33 percent of mediation users

²⁸ *ibid* 122.

²⁹ *ibid* 122.

³⁰ *ibid* 132.

³¹ Gwynn Davis and Marian Roberts (n 6) 28.

³² Also see *ibid* 3.

³³ Anthony Ogus, Janet Walker and Michael Jones-Lee (n 9) para 19.2.

from Walker, McCarthy and Timms' all-issues project being referred by a solicitor.³⁴ However, this statistic is misleading if read alone, as many parties in the study had only referred themselves to mediation after meeting with a solicitor.

The role of solicitors in family mediation extends beyond gatekeeping to offering parallel partisan support. As acknowledged in *chapter one*, substantive justice is supported in court through legal representation and advice.³⁵ The lawyers are actors who negotiate for the parties, the latter becoming the audience. Yet in mediation, the parties are the actors with full decision-making power over their dispute. The mediator is the audience in this interactive theatre; she can break her silence to facilitate discussions and give *information* but cannot impose an outcome. In this setting, solicitors are prompters who guide the actors behind the scenes. This was recognised by McEwen, Maiman and Mather who mentioned that solicitors 'recede into the background' within mediation.³⁶ As a partisan third party, the solicitor supports their client through the legal elements of the process, frequently providing *advice*. Walker, McCarthy and Timms similarly identified lawyers as 'supporting cast', not 'leading actors'.³⁷ Thus, the solicitor was originally envisioned to have a crucial role in family mediation, though negotiating power remained with the parties at all times.

A crucial distinction made in the previous paragraph is that a mediator *informs*, whereas a lawyer *advises*. The divide between information and advice is crucial to understanding the distinct, traditional family mediator and why her role was limited. Returning to policy from 1995, the Lord Chancellor's Department described information as 'an abstract statement of legal principles and procedures', whilst advice involved 'an explanation of how the law applies'.³⁸ A mediator could only give information, as emphasised more recently by an FMC representative:

'...[Mediators] can give legal information, but not advice. They are confident that there is the availability of sensible legal advice for their clients... It is very important for those clients to be able to go and take their legal advice and to know that the decision they come to is sensible and legal.'³⁹

³⁴ Janet Walker, Peter McCarthy and Noel Timms (n 17) 30.

³⁵ Liz Trinder and others, *Litigants in person in private family law cases* (Ministry of Justice 2014) 53.

³⁶ Craig A McEwen, Nancy H Rogers and Richard J Maiman, 'Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation' (1995) 79 *Minnesota Law Review* 1317, 1371.

³⁷ Janet Walker, Peter McCarthy and Noel Timms (n 17) 135.

³⁸ Lord Chancellor's Department, *Looking to the Future: mediation and the ground for divorce* (Cm 2799, 1995) para 7.9.

³⁹ Legal Aid, Sentencing and Punishment of Offenders Bill Deb 12 July 2011, col 57.

By creating a sharp distinction between information and advice, mediators and solicitors were presented as providing two distinct but complementary services. The former became reliant on the latter to provide further support and, ultimately, access to justice. Under the orthodox interpretation, legal advice provided certainty and fairness by situating the mediated settlement in its legal context. The mediator supported discussions and gave information, while the solicitors advised their clients (preferably before, during and after mediation). Family mediation was not designed to replace legal advice but work alongside it, rendering the solicitor integral to mediation's success.⁴⁰ In this context, the role of the limited mediator as a neutral information-provider made perfect sense.

Solicitors are also expected to draft consent orders. At the end of a mediation, the mediator usually prepares a Memorandum of Understanding. This is a written document that sets out the mediation outcome, proposed settlement and potential areas where legal advice is desirable.⁴¹ The Memorandum of Understanding is not legally binding and cannot be used in court to enforce the legal rights or obligations of either party. Instead, the parties can seek a consent order, traditionally written by a solicitor, that renders settlement legally binding following approval by a judge. Thus, mediation is also dependent on the legal profession to create legally binding outcomes. Barlow, Hunter, Smithson and Ewing subsequently describe legal advice alongside mediation as the 'optimum process'; if the parties cannot access a solicitor, legal oversight is reduced and unjust outcomes may occur.⁴² However, the earlier mediation literature did not acknowledge this as an issue because most users had legal support. There was little thought about what would happen if legal support was absent, and solicitors remained vital to the rise of family mediation in the late 20th century.

2.1.2.3 The contextual creation of the limited mediator

The separation of roles between solicitors and mediators was not accidental. During the 1970s and 1980s, family mediation providers had to prove that the process warranted government funding through high satisfaction and settlement rates.⁴³ Mediation also needed the approval of the legal profession to maintain referrals. If mediation had been presented as

⁴⁰ Mather comments that 'divorcing parties engaged in mediation often still require or seek out the help of a lawyer' in the USA context. See Lynn Mather, 'Changing Patterns of Legal Representation in Divorce: From Lawyers to Pro Se' (2003) 30(1) *Journal of Law and Society* 137, 141.

⁴¹ A Memorandum of Understanding can include the terms of settlement for financial or children's matters. For further information, see Lisa Parkinson (n 4) 302-304.

⁴² Anne Barlow and others, *Mapping Paths to Family Justice: resolving family justice in neoliberal times* (Palgrave Macmillan 2017) 133.

⁴³ Marian Roberts, *Mediation in Family Disputes: Principles of Practice* (3rd edn, Ashgate Publishing 2008) 49.

a replacement to advice, the legal profession might have viewed the process as an attack on their central position in family justice. The best tactic, therefore, was to avoid opposition and conceptualise family mediation in a way that did not infringe upon the work of solicitors. Family mediation became a 'social workers' movement' with a particular focus on child welfare, as acknowledged by Davis.⁴⁴ Mediators subsequently operated in a niche arena of child-related matters. By contrast, solicitors could focus their efforts on financial disputes.⁴⁵ The reach of the limited mediator was also restricted by their largely homogeneous clientele, reducing the demand for flexibility. The success of this traditional conceptualisation of family mediation was reflected in the early pilots, with solicitors in BCFCs having 'no fear' that mediation would become 'an alternative source of legal advice'.⁴⁶ Solicitors in the CPU project were similarly positive about the 'non-partisan, controlled environment' in mediation.⁴⁷ This is a vital factor in explaining why the limited family mediator was considered sensible in the early pilots: mediators did not provide a complete set of skills, but rather worked alongside solicitors to ensure a complete service for disputants.

This is not to suggest that the two professions always acted in harmony. Tensions still existed; for instance, mediators in the all-issues pilots were 'anxious' that lawyers would control mediation.⁴⁸ At the same time, solicitors feared that mediators would gain legal knowledge over time. Both groups were afraid of their work being invaded by the other profession, rendering their skills redundant. Nevertheless, Walker, McCarthy and Timms acknowledged that these fears had 'largely subsided' and both professions felt a 'sense of interdependence' and collegiality by the end of the pilots.⁴⁹ This is another important, albeit overlooked, detail about mediation practice which continues to influence how the process is understood today.

Figure one visualises the traditional roles of solicitors and (limited) mediators through a Venn diagram. Solicitors bring an element of law and scrutiny into the mediation process via the shadow of the law. They draft consent orders and additionally act as gatekeepers into mediation. By contrast, the mediator is neutral and limited to providing legal information, as well as assisting discussions. Webley summarises this separation of powers: 'solicitors have been perceived to be partisan advisers and advocates, and mediators as dispute settlement

⁴⁴ Gwynn Davis (n 4) 53.

⁴⁵ Walker mentions that child-related issues were 'handed over to social workers and counsellors in the guise of mediators', while financial matters were 'considered by lawyers to require expert legal knowledge and skills'. See Janet Walker, 'Is There a Future for Lawyers in Divorce?' (1996) 10 *International Journal of Law, Policy and the Family* 52, 55.

⁴⁶ Gwynn Davis (n 4) 3.

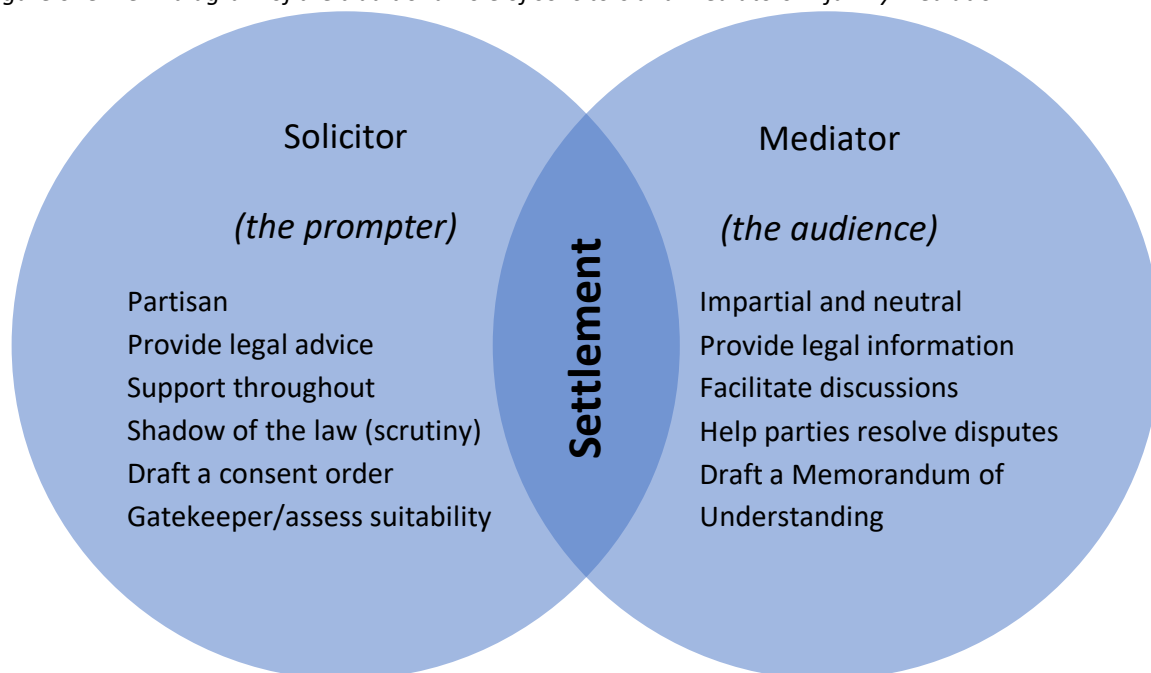
⁴⁷ Anthony Ogus, Janet Walker and Michael Jones-Lee (n 9) para 19.4.

⁴⁸ Janet Walker, Peter McCarthy and Noel Timms (n 17) 116.

⁴⁹ *ibid* 116.

facilitators'.⁵⁰ Building upon Webley's analysis, it is important to recognise that solicitors and mediators both work towards settlement. The settlement objective was a prominent concern in policy, as discussed in *chapter one*, and was also visible in the mediation pilots considered in this chapter. As a whole, the Venn diagram demonstrates the ideal mediation case where parties have access to their respective solicitors and a mediator, two professions that provide different services but work towards the same objective of settlement.

Figure one: Venn diagram of the traditional role of solicitors and mediators in family mediation



A crucial line of investigation is whether these traditional roles (particularly the limited mediator) are still upheld. Later sections in this chapter and thesis as a whole will demonstrate how the mediator takes on a larger role in the post-LASPO climate. For instance, mediators are now expected to redress power imbalances. This task was previously reserved for the legal professions, with solicitors being widely perceived to level the playing field between disputants. The legal profession navigates individuals (many of whom have not been involved in a family dispute before) through family justice. Solicitors complete relevant forms and financial documents for parties, streamlining the process.⁵¹ Within mediation, they provide legal advice and support throughout the process.⁵² But mediators' ability to respond to the party dynamic has been developed in recent decades in light of an increasingly diversified client base (considered below). The FMC in fact even specifies that mediators must

⁵⁰ Lisa C Webley, *Adversarialism and Consensus? The Professions' Construction of Solicitor and Family Mediator Identity and Role* (Quid Pro 2010) 4.

⁵¹ For further information on LiPs in family justice, see Liz Trinder and others (n 35).

⁵² It must be recognised that independent legal advice does not automatically prevent a 'bad deal', as a party is not obliged to follow it. See Sharon Thompson, *Prenuptial Agreements and the Presumption of Free Choice* (Hart Publishing 2015) 165.

attempt to redress power imbalances in its Code of Practice, though does not provide any further detail on this responsibility.⁵³ Thus, there are signs that the reach of the mediator has broadened over time, paving the way for a new type – a *modern* type – of mediator. The modern mediator will be fully considered later on in this chapter.

2.1.3 *The turning point: was the limited mediator truly ideal?*

Whilst the traditional approach to mediation was based on a solid idea of triage between mediators and solicitors, teething problems remained. Even in the late 20th century, some began to question whether the role of the limited mediator was truly realistic. Davis scrutinised the two professions in a later monograph, arguing that the role of the mediator was ‘more complex than we might at first suppose’.⁵⁴ He criticised the naivety in assuming that mediators were ‘gifted, self-effacing facilitators’ and made particular reference to the credibility of mediator neutrality. Over time, empirical research has uncovered the difficulties in balancing the image of a neutral, non-imposing mediator with the conceptualisation of family mediation as a process that engendered settlement. Users within the all-issues mediation project from 1990 to 1993, for instance, were frustrated that mediators could not intervene in negotiations.⁵⁵ Walker, McCarthy and Timms thought this frustration was foreseeable: if mediation was advertised as settlement-orientated, the parties would come to expect explicit support from the mediator. The researchers subsequently identified a gap in empirical research as to how mediators use their ‘knowledge and expertise’ to promote agreement and simultaneously uphold their neutrality.⁵⁶ The theoretical tenets of family mediation are fully considered in *chapter three*. At this point in discussion, it is clear that late 20th-century academic commentary began to perceive mediator neutrality as a somewhat ambiguous concept, bringing questions about the role of the limited mediator into the spotlight.

Whilst the clear-cut, albeit interconnected, roles of solicitors and mediators were fundamental to family mediation’s introduction and development, the introduction of all-issues mediation signalled a change in direction. The all-issues model symbolised increased trust in mediators – from a variety of perspectives, including policy and the legal profession –

⁵³ It is argued in *chapter three* that mediators are expected to combat power imbalances, although their ability to do so is heavily restricted by the concept of mediator neutrality. *Chapter five* will also consider these conflicting dilemmas in family mediation Codes of Practice. See Family Mediation Council, *Code of Practice for Family Mediators* (FMC 2018) para 6.3.2.

⁵⁴ Gwynn Davis (n 4) 70.

⁵⁵ Janet Walker, Peter McCarthy and Noel Timms (n 17) 56.

⁵⁶ *ibid* 57.

to mediate beyond children's matters. Mediation became a more comprehensive process, with financial disputes no longer reserved to the solicitors' arena. All-issues mediation placed the spotlight on the relationship between solicitors and mediators, leading to what Walker described as 'boundary-crossing'.⁵⁷ Mediators increasingly took on financial work that was traditionally carried out by lawyers, and the distinction between the two groups slowly began to blur. At the same time, Walker, McCarthy and Timms questioned whether mediators would continue to see a homogeneous client base if all-issues mediation was rolled out across England and Wales.⁵⁸ They felt that a change in client base was somewhat inevitable, as mediation would 'need to be accessible to a wider range of separating and divorcing couples' if state support were to continue.⁵⁹

This led to a particular turning point for family mediation in the late 1990s. The Family Law Act 1996 (covered in *chapter one*) introduced legal aid for family mediation and mandatory intake meetings for applicants to private family court proceedings seeking public funding. The government commissioned a three-year pilot to test the effectiveness of these intake meetings. Led by Davis and others, the pilot showed that parties attending mediation following a section 29 intake meeting were less likely to settle.⁶⁰ Their findings confirmed a change in clientele: while most mediation users before the pilot were described as 'articulate' and 'rational', reflecting an ideal demographic, new clients were 'less interested, less knowledgeable, and less motivated'.⁶¹ The demands placed on mediators had intensified as a result, showing some departure from the ideal mediation case.

The role of the mediator was scrutinised more closely in the section 29 pilot compared to earlier research. Screening now took up a significant amount of time for mediators.⁶² As a general rule, mediators screened cases out of mediation where there was abuse (or risk of abuse) or one party refused to cooperate.⁶³ Under the traditional approach, screening was conducted by solicitors, suggesting that the heterogeneous client base in the intake meeting pilot placed new pressures on mediators to extend their role. Hester, Pearson and Radford, however, doubted the effectiveness of mediator screening.⁶⁴ Their 1995 survey showed that both court welfare officers and out-of-court family mediators regularly equated domestic

⁵⁷ Janet Walker (n 45) 58.

⁵⁸ Janet Walker, Peter McCarthy and Noel Timms (n 17) 122.

⁵⁹ *ibid* 122.

⁶⁰ Gwynn Davis and others, *Monitoring Publicly Funded Family Mediation: Report to the Legal Services Commission* (Legal Services Commission 2000) 37.

⁶¹ *ibid* 202-203.

⁶² *ibid* 208.

⁶³ *ibid* 58-60.

⁶⁴ Marianne Hester and others, *Domestic violence: A National Survey of Court Welfare and Voluntary Sector Mediation Practice* (The Policy Press 1997) 40.

abuse with physical harm, and generally assumed that victims of abuse were screened out of mediation (either by themselves or a lawyer).⁶⁵ As mediators began to take on a number of new roles, such as screening for suitability, demand for a fresh critique of the profession became apparent. The belief that the mediator must be confined to a neutral position, a practice left unscrutinised by the mediation early pilots,⁶⁶ clearly created problems for the profession. This brought into question the effectiveness of family mediation in achieving access to justice beyond a small, niche market. Challenges to the sustainability of the limited mediator role had begun, only two decades after the original BCFCs pilot.

2.2 Family mediation in the contemporary justice system

At the start of the 21st century, it became apparent that mediation did not appeal to the majority of the separating population. Only one-fifth of individuals applying for legal aid in family breakdown matters (between October 2004 and March 2006) had attempted mediation, with many unaware of the process despite having a solicitor.⁶⁷ Peacey and Hunt interviewed 41 divorcing or separating parents as part of a larger study on contact problems from 2006 to 2007.⁶⁸ Half of the divorcing parents, and none of the separating (non-married) parents, had previously attended mediation.⁶⁹ This was largely attributed to low awareness of mediation, an issue that was originally recognised by Walker, McCarthy and Timms during the all-issues pilots.⁷⁰ There was thus some evidence that solicitors' gatekeeping role had declined in both importance and impact. Similar concerns around awareness levels and the lack of information around family mediation continued into the 2010s,⁷¹ although Barlow and others have since counterargued that many parties simply view mediation – a process in which you negotiate with your ex-partner – as an unattractive option at the onset of separation.⁷²

⁶⁵ *ibid* 44.

⁶⁶ Lisa Parkinson (n 4) 327.

⁶⁷ Legal Services Commission, *Legal aid and mediation for people involved in family breakdown* (HC 2006-07, 256) paras 1.11, 2.7.

⁶⁸ Victoria Peacey and Joan Hunt, *I'm not saying it was easy... Contact problems in separated families* (Gingerbread 2009) 13.

⁶⁹ *ibid* 138.

⁷⁰ Janet Walker, Peter McCarthy and Noel Timms (n 17) 6.

⁷¹ In oral evidence to the House of Commons Justice Committee, Sir James Munby stated: 'there is a desperate lack of information available to those coming into the system'. See Justice Committee, 'Oral evidence: Impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, HC 311 Monday 1 December' (Parliament.UK 2014) <[http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/impact-of-changes-to-civil-legal-aid-under-laspo/oral/16072.pdf%20\(Q280\)](http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/impact-of-changes-to-civil-legal-aid-under-laspo/oral/16072.pdf%20(Q280))> accessed 26 June 2020 para 142.

⁷² Anne Barlow and others (n 42) 207.

Interestingly, the shift in research focus from the relative benefits of mediation to public awareness and understanding of it reveals a rising (and implicit) acceptance of the process itself. The question facing early 21st-century research was not whether mediation was a suitable alternative for family matters, but rather how to make it accessible to the majority and increase awareness. But if mediation was to become more accessible, this would vary the types of clients attending mediation and therefore give new responsibilities to the limited mediator. As mediation moved from the periphery to the centre of family justice, this proposition became a reality.

Mediators face two key issues in the contemporary climate: the withdrawal of legal advice, and the diversification of their client base. This has led to increasing critique of the limited mediator, giving rise to a fundamental question: can the role of the mediator be changed to respond to the current family justice climate?

2.2.1 The withdrawal of solicitor support

Chapter one identified the negative image of court used in policy to justify the withdrawal of legal aid. This criticism extended beyond the courtroom and was also applied to the legal profession. In 2000, Lewis identified a negative image of solicitors throughout policy documents.⁷³ Solicitors were portrayed as aggressive third parties that prevented agreement and reinforced adversarial notions of conflict.⁷⁴ Lewis' findings were later echoed by Barlow and others who recognised a long-standing discourse 'aimed at marginalising and discouraging the use of solicitors'.⁷⁵ The Lord Chancellor's Department, writing in 1995, criticised 'uncontrolled access to lawyer representation' in mediation.⁷⁶ They said that lawyers should not 'shadow' mediation if 'suitable quality assurance mechanisms' were put in place, depicting legal advice alongside mediation as redundant and superfluous.⁷⁷ It was only in cases of *need* that funding for legal support was justified, similar to the LASPO proposals covered in *chapter one*.

Unsurprisingly, the role of solicitors in family justice has diminished over several decades. 'Mapping Paths' was the most extensive study into family dispute resolution in England and Wales in recent years. Led by Barlow and others, the project was conducted from late 2011 to

⁷³ Phillip Lewis, *Assumptions about Lawyers in Policy Statements: A Survey of Relevant Research* (Lord Chancellor's Department 2000).

⁷⁴ *ibid* 10.

⁷⁵ Anne Barlow and others (n 42) 24.

⁷⁶ Lord Chancellor's Department (n 38) paras 6.17, 6.21.

⁷⁷ *ibid* para 6.21.

early 2014 and examined three family justice procedures: mediation, collaborative law and solicitor negotiation.⁷⁸ The research design comprised of a national survey, party and practitioner interviews, as well as observations.⁷⁹ Their findings corroborated earlier research on the settlement, improving communication and conflict resolution objectives within family mediation.⁸⁰ However, they found that the context in which these objectives operated had changed dramatically. Whilst solicitors were originally gatekeepers and advisers, 47 percent of Barlow and others' questionnaire sample (comprising separating couples between 1996 and 2011) had not obtained legal advice.⁸¹ This finding was supported by data from the practitioner interviews, with many legal professionals expressing a concern that the LASPO proposals would render advice even more inaccessible.⁸² Similarly, Hitchings, Miles and Woodward interviewed 16 family mediators (from late 2012 to early 2013) as part of a larger study on financial settlement. The mediators reported that it was particularly difficult to mediate where only one party had legal advice.⁸³ Hitchings and Miles later wrote that mediators' limited ability to provide information (but not advice) placed them in an awkward position when the parties had no legal representation.⁸⁴ Without accessible legal advice, mediators felt 'a great obligation' to provide additional support.⁸⁵ This was particularly concerning where a large proportion of mediators did not have a legal background or extensive legal training. The separation of roles for lawyers and mediators created noticeable problems post-LASPO, bringing the value of the limited mediator into question.

The inaccessibility of supportive legal advice has only been exacerbated after LASPO. It has already been established that mediation and MIAM intake plummeted once LASPO was enacted.⁸⁶ In response, the Ministry of Justice commissioned research on the use of MIAMs (a preliminary meeting to inform parties about mediation and also determine if the process is appropriate for their dispute, as discussed in chapter one). The first report by Bloch, McLeod and Toombs considered the perceptions, experiences and impact of MIAMs post-LASPO.⁸⁷ A

⁷⁸ Anne Barlow and others (n 42).

⁷⁹ *ibid* 60, 62, 64.

⁸⁰ *ibid* 165.

⁸¹ This also suggests that the withdrawal of legal support was a long-standing trend that predated LASPO. See *ibid* 71.

⁸² For example, one interviewee said that 'to expect mediators to operate effectively in a legal advice vacuum is very dangerous.' See *ibid* 134.

⁸³ Emma Hitchings, Joanna Miles and Hilary Woodward, *Assembling the Jigsaw Puzzle: Understanding Financial Settlement on Divorce* (University of Bristol 2013) 124-125.

⁸⁴ Emma Hitchings and Joanna Miles, 'Mediation, financial remedies, information provision and legal advice: the post-LASPO conundrum' (2016) 38(2) *Journal of Social Welfare and Family Law* 175.

⁸⁵ *ibid* 185.

⁸⁶ House of Commons Justice Committee, *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012* (HC 2014-15, 311) para 142.

⁸⁷ Anna Bloch, Rosie McLeod and Ben Toombs, *Mediation Information and Assessment Meetings (MIAMs) and mediation in private family law disputes: Qualitative research findings* (Ministry of Justice 2014) 7.

second report was then written by Hamlyn, Coleman and Sefton.⁸⁸ The reports emphasised that solicitor referrals to mediation diminished after LASPO.⁸⁹ Few individuals obtained legal advice at the onset of their dispute, and even fewer could afford to pay for advice throughout negotiations.⁹⁰ Solicitors were no longer the first port of call for private family matters, and unmet legal need increased.

Alternative sources of support, such as the Citizens Advice Bureaux, remain available to some individuals, but these services have struggled to keep afloat following continued cuts to funding. In the LASPO proposals, the Ministry of Justice claimed that cuts to legal aid were justified because 'alternative forms of advice or assistance' were still available.⁹¹ However, their argument did not take into account the withdrawal of financial support for advice charities during the austerity programme.⁹² In the year following LASPO, nine Law Centres closed, and the number of clients seen by the Citizens Advice Bureaux fell by eight percent.⁹³ As of March 2021, only nine out of 42 Law Centres are listed as providing advice for family matters.⁹⁴ This has intensified the 'legal advice vacuum', as identified by Smith, Hitchings and Sefton.⁹⁵ With solicitors primarily removed from family justice, legal support has become an optional add-on for a small population that can afford the costs involved.

2.2.1.1 Help with Family Mediation

Some legal support remains available to mediation users via the 'Help with Family Mediation' (HwFM) legal aid scheme. Legislation defines HwFM as 'civil legal services provided in relation to family mediation' or 'the issuing of proceedings to obtain a consent order' following mediation.⁹⁶ In simpler terms, HwFM enables lawyers to receive payment when advising a party during mediation or drafting a (financial) consent order.⁹⁷ The idea behind this scheme

⁸⁸ Becky Hamlyn, Emma Coleman and Mark Sefton, *Mediation Information and Assessment Meetings (MIAMs) and mediation in private family law disputes: Quantitative research findings* (Ministry of Justice 2015).

⁸⁹ Anna Bloch, Rosie McLeod and Ben Toombs (n 87) 12.

⁹⁰ *ibid* 13.

⁹¹ Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales* (Cm 7967, 2010) para 4.26.

⁹² Graham Cookson, *Unintended Consequences: the cost of the Government's Legal Aid Reforms* (King's College London 2011) paras 5.4.1-5.4.11.

⁹³ Low Commission, *Getting it Right in Social Welfare Law: The Low Commission's follow-up report* (Low Commission 2015) 20.

⁹⁴ Law Centres Network, 'Law Centres Alphabetically' (Law Centres Network 2020) <www.lawcentres.org.uk/about-law-centres/law-centres-on-google-maps/alphabetically> accessed 23 March 2021.

⁹⁵ Leanne Smith, Emma Hitchings and Mark Sefton, *A study of fee-charging McKenzie Friends and their work in private family law cases* (Cardiff University 2017) 81.

⁹⁶ Civil Legal Aid (Procedure) Regulations, 2012, SI 2012/3098, reg 8.

⁹⁷ Civil Legal Aid (Remuneration) Regulations 2013, SI 2013/422, sch 1 pt 1 para 3.

is promising: it attempts to provide legal advice parallel to that provided by a privately funded lawyer. HwFM supports individuals without legal assistance, enabling the mediator to continue her limited role.

However, the benefits of HwFM have not materialised. Hitchings and Miles acknowledge that the scheme has done little to prevent unmet legal need, describing the HwFM statistics as ‘disturbing’.⁹⁸ They cite the 2014 Family Mediation Task Force which stated that under 30 claims for HwFM (out of a potential 16,000 clients) were made from 2013 to 2014.⁹⁹ It is important to revisit the HwFM statistics in order to provide an up-to-date picture on the availability of legal support in family mediation and, moreover, understand how far lawyers have moved to the peripheral of family justice.

The Ministry of Justice publishes quarterly legal aid statistics, including a detailed overview of all applications to legal aid.¹⁰⁰ 310 rows of HwFM data are listed in the latest release from December 2020. Cases are grouped according to financial year, financial quarter and benefit. These benefits are not defined. The Ministry of Justice defined the benefits following a Freedom of Information request:

- a. ‘Financial benefit’ – the client received or benefited in some way financially from the case. E.g. Client received lump sum/property adjustment.
- b. ‘Non-financial benefit’ – the client received some sort of non-financial benefit from the case. E.g. Client and partner reconciled.
- c. ‘No recorded benefit’. There is only one outcome code that is reported under this term and the description of this outcome code is “Client participated in mediation and no settlement reached”.¹⁰¹

This information is interpreted as meaning that any case logged as having received a ‘financial benefit’, ‘non-financial benefit’ or ‘no benefit’ obtained HwFM funding. Two additional benefits are listed as ‘outcome not known or client ceased to give instruction’, and ‘proceeded under other civil funding’. Both *graph two* and *table one* provides an overview of the data. Based on the above interpretation, 78 individuals received HwFM in the year

⁹⁸ Emma Hitchings and Joanna Miles (n 84) 178.

⁹⁹ Family Mediation Task Force, *Report of the Family Mediation Task Force* (Ministry of Justice 2014) para 54.

¹⁰⁰ This document is less user-friendly, comprising a complete list of all applications to legal aid, ranging from family disputes to immigration. See Ministry of Justice, ‘Legal aid statistics England and Wales detailed civil data July to Sep 2020’ (Gov.UK 2020) <www.gov.uk/government/statistics/legal-aid-statistics-july-to-september-2020> accessed 23 March 2021.

¹⁰¹ Email from Joseph Sapu, Ministry of Justice, to Rachael Blakey (3 August 2018).

following LASPO.¹⁰² This number falls to 67 if excluding cases where the outcome was unknown. HwFM numbers rose to 304 the following year (275 excluding unknown outcomes). This may be the result of government attempts to increase the use of mediation through the introduction of mandatory MIAMS under the Children and Families Act 2014.

Graph two: 'Help with Family Mediation' (HwFM) legal aid cases by year

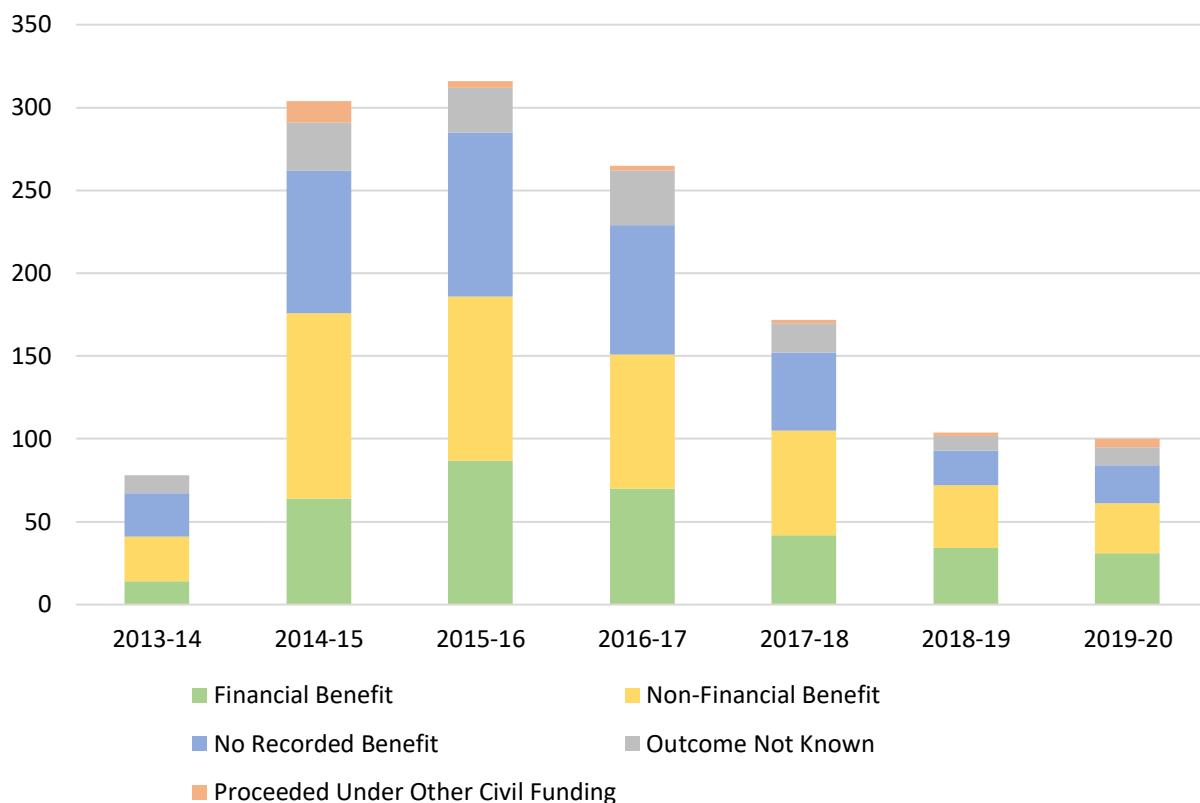


Table one: 'Help with Family Mediation' (HwFM) legal aid cases by year

Year (Financial)	Financial Benefit	Non-financial Benefit	No Recorded Benefit	Outcome not known	Proceeded under other civil funding	Total
2013-14	14	27	26	11	0	78
2014-15	64	112	86	29	13	304
2015-16	87	99	99	27	4	316
2016-17	70	81	78	33	3	265
2017-18	42	63	47	18	2	172
2018-19	34	38	21	9	2	104
2019-20	31	30	23	12	5	101
Total	342	450	380	139	29	1340

Despite this initial incline (and a peak of 316 in 2015-2016), the number of HwFM cases has decreased. The number of financial benefits dropped to 31 in 2019-2020, and non-financial benefits to 30 in the same period. These statistics are disappointingly low. The 2019-2020 figures are similar to those from 2018-2019 which suggests that HwFM numbers have

¹⁰² It is concerning that this statistic is almost triple the number recorded by the Family Mediation Task Force. The reliability of the HwFM statistics is therefore questioned.

stabilised at around 100 cases each year, though the data must be revisited throughout the next decade to confirm this hypothesis. Another area of concern is the high number of cases listed under 'No recorded benefit'. Based on the definition provided by the Ministry of Justice, at least 28.38 percent of all recorded HwFM cases resulted in no agreement.¹⁰³ It is questioned what proportion of these cases would have been screened out of mediation pre-LASPO and, furthermore, how many parties obtained partial or full settlement after mediation was unsuccessful.

The HwFM scheme was promising at first, but why has it been so unsuccessful? One key reason is the lack of incentive for solicitors to take on HwFM work.¹⁰⁴ Lawyers working under the HwFM scheme receive a fixed sum of £150 to advise a party during mediation, and an additional £200 if they draft a (financial) consent order.¹⁰⁵ These remuneration rates are relatively low compared to private practice. The Family Mediation Task Force previously proposed to increase the fixed fee for drafting a consent order from £200 to £300.¹⁰⁶ Simon Hughes (the Minister of State for Justice and Civil Liberties from 2013 to 2015) rejected the proposal, arguing that there was no 'sufficient compelling evidence that making such changes would increase the take-up of mediation.'¹⁰⁷ Hitchings and Miles connected this reasoning to a neoliberal agenda, as Hughes valued legal reform based on how far it could improve mediation numbers (rather than mediation outcomes and access to justice).¹⁰⁸ Hughes' response also ties in with the negative perceptions of solicitors identified in this chapter. He did not view legal support as essential to successful mediation, dismissing the value of legal advice. Unfortunately, it is unlikely that the state will increase fixed fees for solicitors working under HwFM in the short-term, suggesting that there is a significant lack of legal support in family mediation.

The limitations of the HwFM scheme corroborates the findings from recent studies around the dearth of solicitor support. It also raises significant doubts as to whether mediation can engender access to justice post-LASPO without any reform to the limited mediator. When parties attend publicly funded mediation, their settlement is unlikely to receive any legal oversight unless the parties have the private funds to pay for such support themselves. In

¹⁰³ This population potentially reflects a pool of clients with complex disputes who are eligible for legal aid but can no longer obtain funding for court proceedings, discussed below.

¹⁰⁴ For example, Barlow and others said that the low HwFM rates were a 'strong disincentive' for lawyers to take up legal aid work. See Anne Barlow and others (n 42) 159.

¹⁰⁵ Civil Legal Aid (Remuneration) Regulations 2013, SI 2013/422, sch 1 pt 1 para 3.

¹⁰⁶ Family Mediation Task Force (n 99) para 58.

¹⁰⁷ Simon Hughes, 'Family Mediation Task Force Report' (Ministry of Justice 2014) <www.justice.gov.uk/downloads/DOC017.PDF> accessed 1 April 2020 3.

¹⁰⁸ Emma Hitchings and Joanna Miles (n 84) 179.

light of this development, Barlow and others emphasise a 'LASPO gap'.¹⁰⁹ A range of initiatives to support individuals without legal aid (or a paid solicitor) have materialised in recent years, including self-help guides, pro bono schemes and a growing number of 'professional' McKenzie Friends.¹¹⁰ However, these services may be inaccessible (particularly where an individual lacks the emotional capacity to take in information), unavailable or simply unhelpful.¹¹¹ As a result, many individuals are effectively forced to choose between mediation and self-representation in court, if they are to avoid abandoning negotiations entirely. The withdrawal of solicitor support from family mediation is, overall, gravely concerning. It weakens a key justification for the limited mediator, and suggests that her role must be reformed in a way that supports access to justice. In other words, family mediation reform must respond to the dearth of traditional legal support.

2.2.2 A heterogeneous client base

Variance in mediation clientele was first apparent in the mid-1990s but has intensified in recent years. Returning to the MIAM reports commissioned by the Ministry of Justice, self-referral to mediation increased after LASPO.¹¹² This was partly because mediators placed greater emphasis on marketing to advertise their service in response to the decline in solicitor referrals.¹¹³ However, the rise of self-referrals generated 'a greater variety of clients' at MIAMs.¹¹⁴ This development has placed pressure on mediators to adapt to a new heterogeneous client base.

Despite these developments, the ideal mediation client remains. Barlow and others identified several factors associated with successful mediation, including the emotional readiness of both parties.¹¹⁵ Mediation was more successful in their study sample where parties were

¹⁰⁹ Anne Barlow and others, *Mapping Paths to Family Justice: Briefing Paper and Report on Key Findings* (University of Exeter 2014) 33.

¹¹⁰ Mavis Maclean and John Eekelaar, *After the Act: Access to Family Justice after LASPO* (Hart Publishing 2019); Leanne Smith, Emma Hitchings and Mark Sefton (n 95).

¹¹¹ Without 'realistic alternatives' at their disposal, as recognised by Hunter and others, some individuals may feel effectively forced into mediation, removing the voluntary aspect from the process. See Rosemary Hunter and others, 'Access to What? LASPO and Mediation' in Asher Flynn and Jacqueline Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Hart Publishing 2017) 247.

¹¹² Becky Hamlyn, Emma Coleman and Mark Sefton (n 88) 20-21.

¹¹³ Anna Bloch, Rosie McLeod and Ben Toombs (n 87) 14.

¹¹⁴ *ibid* 15. The rise of 'complex' disputes in family mediation was also recognised in family law practitioner journals. See Janet Walker, 'Building a better future for separating families: the search for humanity?' (2016) 46(3) *Family Law* 387, 391; Rosemary Hunter and others, 'Mapping Paths to Family Justice: matching parties, cases and processes' (2014) 44(10) *Family Law* 1404, 1410.

¹¹⁵ This included having sufficient time to process the separation or dispute: Anne Barlow and others (n 109) 7, 14. Hitchings, Miles and Woodward also identify a limited chance of settlement if emotions are heightened: Emma Hitchings, Joanna Miles and Hilary Woodward (n 83) 91.

willing to engage in the process, had high levels of trust and low levels of conflict.¹¹⁶ These findings echoed those of Davis from the original BCFCFS pilot. Barlow and Hunter built on these findings in a later publication, arguing that family mediation has transformed from a 'relatively niche service' for low conflict cases to a 'mass service'.¹¹⁷ It is apparent that mediators now see parties beyond their original, homogeneous client base and must begin to cater for a large range of disputes. Mediators are no longer confined to a niche pool of clients, meaning another contextual justification for the limited mediator is rescinded.

A consequence of the new, mixed client base is that mediators must be thorough when screening cases for suitability. Because fewer people can now afford a solicitor as their first port of call, many attend mediation without previous screening.¹¹⁸ Thus, an additional burden is placed on mediators: to extend their safeguarding role and screen out cases that are unsuitable for mediation.¹¹⁹ Nonetheless, research suggests that mediator screening remains poor in the contemporary climate. Out of 56 mediation users interviewed by Barlow and others, 10 reported not being asked about domestic abuse in their MIAM.¹²⁰ Morris' analysis of 115 mediation sessions, conducted in 2010, adds to this evidence base. She finds that the majority of mediators do not spend enough time screening for suitability, often adopting a narrow interpretation of abuse.¹²¹ Her findings echo the report by Hester and others in the 1990s, suggesting that little has changed to improve mediator screening in practice.¹²²

2.2.3 A much-needed critique of the mediator

This thesis suggests that the traditional conceptualisation of family mediation (reliant on accessible legal support) is unrealistic in the contemporary post-LASPO landscape. The rising heterogeneity of clientele was noticeable long before LASPO. Of course, the original mediation model, involving both mediators and lawyers in the mediation process, has always

¹¹⁶ Rosemary Hunter and others (n 114) 1408.

¹¹⁷ Anne Barlow and Rosemary Hunter, 'Reconstruction of Family Mediation in a Post-Justice world' in Marian Roberts and Maria Federica Moscati (eds), *Family Mediation: Contemporary Issues* (Bloomsbury Professional 2020) 15.

¹¹⁸ Anna Bloch, Rosie McLeod and Ben Toombs (n 87) 14; Becky Hamlyn, Emma Coleman and Mark Sefton (n 88) 43-44.

¹¹⁹ Becky Hamlyn, Emma Coleman and Mark Sefton (n 88) 43.

¹²⁰ The mediation experience for those victims of domestic abuse was further described as 'often deeply traumatic and the outcomes singularly unfair': Anne Barlow and others (n 42) 98.

¹²¹ Paulette Morris, 'Mediation, the Legal Aid, Sentencing and Punishment of Offenders Act of 2012 and the Mediation Information Assessment Meeting' (2013) 35(4) *Journal of Social Welfare and Family Law* 445; Also see Paulette Morris, 'Screening for Domestic Violence in Family Mediation: An Investigation into how Mediators Manage Disclosures of Domestic Abuse and Associated Emotions' (PhD Thesis, Brunel University 2015) 257.

¹²² Marianne Hester and others (n 64).

been an aspiration, rather than reality, for some family disputants. There was never a time where *all* parties attending mediation had access to a solicitor. But this was not a key concern in late 20th-century policy or research as most parties continued to receive legal advice which provided not only assistance, but flexibility.¹²³ The context surrounding mediation practice has changed drastically since this period. A modern family justice system dependent on accessible legal support is, in the words of Hitchings and Miles, 'doomed to fail'.¹²⁴ As the context around mediation has changed, advice provision – as well as legal oversight over negotiated settlements – has become scarce. Questions subsequently arise as to whether mediation is capable of resolving the LASPO gap. However, such a task surely requires a departure from the limited mediator role.

In line with this argument, recent research has begun to consider how far mediators themselves have adapted to the contemporary climate. For instance, Bloch, McLeod and Toombs identified three types of mediators in their qualitative MIAM report.¹²⁵ *Purist* mediators were unlikely to take on complex cases where power imbalances were present. They followed a limited and traditional conceptualisation of their role and felt unequipped to mediate a wide range of cases. By contrast, *realist* mediators mediated difficult disputes, based on the conviction that mediation was the only viable option for parties who would otherwise become LiPs in court. Realists were the most common mediator type in the sample, suggesting that many mediators had responded to the contemporary justice system. Finally, *optimist* mediators also saw complex cases but for different reasons to the realists. Rather than mediate on the grounds of necessity, optimists felt mediation was appropriate as long as the parties were willing to engage with the process. While this third group reveals a rising perception that mediators can handle power dynamics, their open-door policy could cause significant damage to screening procedures. Optimist mediators were more likely to mediate cases that should have been screened out of mediation, potentially leading to an unfair (or no) outcome.¹²⁶ Altogether, the three mediator types reveal a variety of responses to LASPO. At a broader level, the findings allude to increased policy and academic interest around the role of the mediator. Discussion is not confined to what can be achieved through the limited mediator, but rather how the role of the mediator can be reformed to provide flexibility.

¹²³ Janet Walker (n 45) 61.

¹²⁴ Emma Hitchings and Joanna Miles (n 84) 188.

¹²⁵ Anna Bloch, Rosie McLeod and Ben Toombs (n 87) 16.

¹²⁶ *ibid* 31.

2.2.3.1 Critique of the information and advice divide

A particular focus in recent academic commentary is the strict separation of powers between mediators and solicitors. To return to an earlier discussion in this chapter, the former provides *information*, and the latter gives *advice*. This divide has been widely criticised as unrealistic. Maclean and Eekelaar discovered multiple instances in their observational data where mediators provided a form of advice.¹²⁷ They also observed cases where the information provided by a mediator was in the best interests of one or both of the parties.¹²⁸ The researchers argued that this information was equivalent to partisan advice provided by a lawyer, regardless of the mediators' intention. In concluding their work, Maclean and Eekelaar said that the distinction between information and advice (and the roles of mediators and solicitors respectively) was challenging to maintain in practice.

This argument is further supported by Hitchings and Miles' three forms of information-giving, identified through interviews with family mediators.¹²⁹ First, most mediators in their sample used *overviews and open questioning*, claiming that they provided 'neutral legal information and signposting'. To the profession, information was 'more general', while advice was interpreted as 'something tailored to clients'.¹³⁰ This returns to the definitions set out earlier in this chapter: information is generic, whereas advice is personalised to the dispute at hand. However, Hitchings and Miles argued that these broad descriptions rested on the assumption that tailored advice was accessible. Mediators have responded to the post-LASPO climate by *reality-testing*. Reality-testing was the second 'amplified approach' that provided information on specific issues and events. For example, if one party was to pay child maintenance, a mediator may ask, 'Can you afford this?' The two researchers acknowledged that reality-testing was not advice because the mediator did not impose a stance on the parties. Nevertheless, this implicit nudge sometimes had the same effect as partisan support. This demonstrates the blurring between information and advice, as well as the difficulties associated with a binary definition. The *viable options approach* was the final technique identified by Hitchings and Miles. Through this strategy, the mediator made 'positive suggestions' not previously considered by the parties.¹³¹ This was not 'legal advice in the narrow sense' because the mediator was effectively encouraging parties to understand the issues around their dispute. Regardless, the provision demonstrated a more explicit form of

¹²⁷ Mavis Maclean and John Eekelaar, *Lawyers and Mediators: The Brave New World of Services for Separating Families* (Hart Publishing 2016) 124.

¹²⁸ *ibid* 123.

¹²⁹ Emma Hitchings and Joanna Miles (n 84) 176.

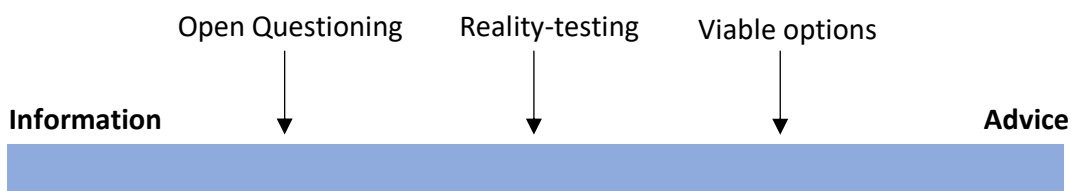
¹³⁰ *ibid* 183.

¹³¹ *ibid* 184.

mediator intervention. A mediator might not impose a settlement on the parties but does, in effect, direct them towards a particular outcome. This continues to cast doubt on the distinction between information and advice.¹³²

Rather than operating as a binary, this thesis suggests that information and advice can be placed on a continuum (*figure two*). Viewing information and advice as two concepts on the same continuum suggests that family dispute resolution professionals, including mediators, have different approaches at their disposal. More specifically, this approach may enable mediators to move comfortably beyond information-provision, ensuring additional support in the post-LASPO landscape. It is unclear how far, if at all, these different forms of information-giving depart from the traditional limited mediator.

Figure two: A continuum of information and advice



2.3 Calls for a new mediator: limitations in the debates

Thus far, this chapter has shown that the professional ambits of mediators and solicitors have blurred in recent years. More specifically, mediators are increasingly conducting work traditionally carried out by lawyers. Maclean and Eekelaar consequently describe the distinction between the two professions as 'unrealistic'.¹³³ As mediation has taken centre stage, solicitors have been moved to the periphery.

Because of the lack of alternatives, it is unsurprising that attention has shifted to how mediation can respond to the LASPO gap. Barlow and others summarised this position in their Briefing Paper for 'Mapping Paths': '[i]n a context in which mediation is effectively the only choice, mediation needs to adapt to provide more tailored and specialised services.'¹³⁴ They reiterated this argument several years later, concluding their monograph with the following statement:

¹³² The distinction between information and advice has also been criticised in other contexts, such as LiPs in court. See Richard Moorhead and Mark Sefton, *Litigants in person: Unrepresented litigants in first instance proceedings* (Department for Constitutional Affairs 2005) 217.

¹³³ Mavis Maclean and John Eekelaar (n 127) 125.

¹³⁴ Anne Barlow and others (n 109) 25.

‘There is an urgent need to consider how mediation can be re-designed to operate more effectively and can re-establish the interdisciplinary linkages it needs to provide a better service in these neoliberal times.’¹³⁵

The withdrawal of solicitors has slowly seeped into family mediation, reviving discussion around the role of the mediator post-LASPO. Hitchings and Miles summarised this position aptly: ‘[i]f there is no legal advice for those mediating, what, if anything, can mediators do about that?’¹³⁶ These different commentaries for flexibility hint at demand for a new type of mediator. More specifically, there is demand for an up-to-date conceptualisation of the role of the mediator: the *modern* mediator. Whilst the limited mediator was both logical and reasonable when mediation was first introduced in England and Wales, the justifications for such a hands-off approach have weakened over time. The modern mediator can adapt to these developments within family justice by going beyond the limited provision of information to provide more advisory assistance (where appropriate). In general, the idea behind the modern mediator is better suited to the contemporary landscape.

Nevertheless, a particular problem arises: how can a mediator’s practice develop to fit the new landscape if doing so departs from the limited role prescribed for her? There may be demand for the modern mediator, but the limited mediator continues to command discussions around mediation and potential reform. In particular, the modern mediator is unable to materialise due to the continued support for absolute neutrality. This issue is notably demonstrated through the recent debate around mediators drafting consent orders.

2.3.1 The consent order debate

The drafting of consent orders is not a reserved activity but typically carried out by a solicitor because of its legal significance.¹³⁷ This dominant position was called into question in 2015 when the Solicitors Regulation Authority (SRA) explicitly recognised that a lawyer could draft a consent order when acting in their capacity as a mediator:

¹³⁵ Anne Barlow and others (n 42) 211.

¹³⁶ Emma Hitchings and Joanna Miles (n 84) 179.

¹³⁷ Legal Services Act 2007, s 12 and sch 2.

‘In limited circumstances when you are not advising clients [acting as a solicitor]... but simply reflecting the agreement [acting as a mediator]... it may be possible to agree a very specified and defined retainer [draft a consent order].’¹³⁸

The SRA guidance was unexpected and sparked intense debate around mediating drafting consent orders. On the one hand, Braithwaite contended that the unaffordability of legal support for many was not a ‘viable reason to move away from the need for separate legal advice’.¹³⁹ Her argument stemmed from the traditional mediation practice where mediators and lawyers are both involved in the process. On the other hand, the FMC Code of Practice did not explicitly prohibit mediators from drafting, and anecdotal evidence suggested mediators were under increasing pressure to do so post-LASPO.¹⁴⁰ Edwards argued that mediation services must be ‘consumer-driven’ and address the retraction of legal advice.¹⁴¹ While Braithwaite’s stance adhered to the ideal full representation model – involving two parties with independent legal advice at their disposal – Edwards felt that this was a myth rather than a reality.

The FMC responded to the SRA guidance by consulting its members (accredited and trainee family mediators in England and Wales) on consent orders. Titled ‘Family Mediators Drafting Consent Orders’, the 2016 consultation set out the ‘traditional model of family mediation’ in which a mediator notified parties about the law but not how it applied to the agreement.¹⁴² The FMC acknowledged that more clients were asking mediators to prepare a consent order,¹⁴³ and asked three questions in relation to both financial and children matters:

- ‘1. Would the role of a mediator as an impartial third party in mediation be jeopardised by that mediator drafting a consent order, once a mediated agreement has been reached?
2. Is it possible to draft a consent order without giving advice on its terms?
3. Is it appropriate to draft a consent order without giving parties advice on its terms?’¹⁴⁴

¹³⁸ Solicitors Regulation Authority, ‘Question of ethics: August 2015’ (SRA August 2015) <<https://web.archive.org/web/20170709174548/www.sra.org.uk/solicitors/code-of-conduct/guidance/questionofethics/August-2015.page#>> accessed 11 August 2020.

¹³⁹ Anne Braithwaite, ‘Mediators drafting consent orders’ (2016) 46(11) *Family Law* 1362, 1362.

¹⁴⁰ Jo Edwards, ‘Closer collaboration between the judicial and mediation communities Part 1: Mediation/ MIAMs – how they work in practice’ (2016) 46(9) *Family Law* 1168, 1169.

¹⁴¹ *ibid* 1169.

¹⁴² Family Mediation Council, ‘Consultation: Family Mediators Drafting Consent Orders’ (FMC 2016) <www.familymediationcouncil.org.uk/wp-content/uploads/2016/11/Consultation-Family-Mediators-Drafting-Consent-Orders-30.11.16.pdf> accessed 5 March 2020 1.

¹⁴³ *ibid* 2.

¹⁴⁴ *ibid* 5.

Even at this stage, it was apparent that the result of the consultation rested on whether the mediator could depart from her conventional role. The consultation emphasised the importance of mediator neutrality and the strict divide between information and advice. Moreover, the selected wording for question two insinuated that it was inappropriate for a mediator to draft a consent order if it involved giving advice, returning to the traditional dependency on solicitors for legal support.

The responses to the two-month consultation were published in May 2017 (*table two*).¹⁴⁵ Out of 53 responses, over half of mediators thought that drafting jeopardised their neutrality. 49 percent felt that drafting a consent order did not require giving advice. Whether it was appropriate to draft a consent order without advice was met with similar responses, with 45 percent saying it was inappropriate.

Table two: Responses to the FMC consultation on mediators drafting consent orders

	Yes		No		No Answer Provided	
	Number	% of total answers	Number	% of total answers	Number	% of total answers
<i>Question One: Does drafting jeopardise the role of the mediator?</i>	30	56.60%	18	33.96%	5	9.43%
<i>Question Two: Is it possible to draft without giving advice?</i>	20	37.74%	26	49.06%	7	13.21%
<i>Question Three: Is it appropriate to draft without giving advice?</i>	22	41.51%	24	45.28%	7	13.21%

The written responses by the four Member Organisations provide further insight into these statistics.¹⁴⁶ Two organisations followed the traditional conceptualisation of family mediation. The Family Mediators Association (FMA) rejected the debate, preferring to focus on ‘how mediation can be supported by (cost) effective advice by lawyers.’¹⁴⁷ From their perspective, neutrality was ‘the heart and soul of mediation’, promoting the role of the limited mediator. National Family Mediation (NFM) likewise favoured separate, independent legal advice. The organisation highlighted that a mediator could not address any inequalities or unfairness within a clause without departing from neutrality and straying into advice-giving.¹⁴⁸ While

¹⁴⁵ Family Mediation Council, ‘Overview of Consultation Responses: Family Mediators Drafting Consent Orders’ (FMC 2017) <www.familymediationcouncil.org.uk/wp-content/uploads/2017/05/FMC-Overview-consultation-responses-family-mediators-drafting-consent-orders.pdf> accessed 5 March 2020 2.

¹⁴⁶ The FMC did not receive responses from the College of Mediators or ADRgroup (the latter of which was later removed from the list of Member Organisations). See *ibid* 1.

¹⁴⁷ *ibid* 17.

¹⁴⁸ *ibid* 10.

NFM acknowledged the need for a 'more holistic service', they argued that allowing mediators to draft orders was neither a replacement for independent legal advice, nor was it appropriate.¹⁴⁹

By contrast, Resolution and the Law Society advanced that a mediator could draft a consent order without infringing upon her neutrality. Resolution emphasised the 'effective symbiotic partnerships' between mediators and lawyers but acknowledged that this had become inaccessible for many disputants post-LASPO.¹⁵⁰ It further argued that a mediator would not automatically depart from her neutrality by drafting a consent order: as long as a 'framework of standards' was introduced, she would become a 'neutral drafts person'.¹⁵¹ In a similar vein, the Law Society wrote that a mediator could draft a consent order, although it must be clarified to the parties that they can only receive advice through a solicitor.¹⁵² In effect, Resolution and the Law Society adopted the view that mediators should adapt but must still remain bound by the traditional view where neutrality dominates. It was unsurprising that these Member Organisations were more open to mediators drafting consent orders, as their memberships largely (or solely, in the case of the Law Society) consisted of legal professionals who drafted consent orders in the context of their legal work. In comparison, FMA and NFM typically represented mediators from a non-legal background.

While the consultation reveals a variety of responses as to whether mediators should draft consent orders, the majority of respondents seemed to adhere to the idea of the limited mediator who was prohibited from giving any form of advice. This indicates a general understanding that the role of the mediator is largely the same as it was when the process was in its infancy during the late 20th century. Whilst responses from Resolution and the Law Society appear to demonstrate demand for the modern mediator type, they continue to place significant confines on the role of the mediator. In the minds of many consultees, family mediation remains – and should remain – distinct from the legal services provided by lawyers.¹⁵³ Thus, while demands for mediators to adapt and become flexible in their practice

¹⁴⁹ *ibid* 16-17.

¹⁵⁰ Resolution, 'Family Mediators Drafting Consent Orders: Resolution's response to the Family Mediation Council' (Resolution 2017) <www.resolution.org.uk/site_content_files/files/resolution_response_to_fmc_mediators_drafting_consent_orders_january_2017.pdf> accessed 11 July 2018 paras 3-4.

¹⁵¹ *ibid* para 4.

¹⁵² Law Society, 'Law Society response to Family Mediation Council consultation on family mediators drafting consent orders' (Law Society 2017) <www.lawsociety.org.uk/policy-campaigns/consultation-responses/documents/family-mediation-council-consultation-on-family-mediators-drafting-consent-orders/> accessed 3 April 2020 para 19.

¹⁵³ As summarised by a respondent to the consultation, 'mediation is not a legal service, or legal skill. It is a distinct professional skill set with a distinct purpose from that of a lawyer.' See Family Mediation Council (n 145) 18.

(i.e. to shift from the limited mediator to the modern mediator) have heightened in recent years, the stronghold of the conventional mediation model hinders debate and reform.

2.3.2 A stagnant debate

The lack of critique around the role of the mediator in the late 20th century has caused significant problems for mediator practice today. Recent academic commentary and research, as well as consultations, have responded by calling for mediation to become more *flexible*.¹⁵⁴ This shift in academic focus involves a re-appraisal of the limited mediator. For instance, Barlow and others noted that although there was evidence of flexibility in mediator practice, this could be furthered. They recommended the expansion of various mediation models, including hybrid mediation where solicitors attend the mediation sessions.¹⁵⁵ Parkinson reiterated this position, arguing that mediators 'cannot cater for the complex family issues' now seen in mediation.¹⁵⁶ Demand for the modern mediator clearly exists.

However, family mediation reform is at a standstill. The FMC consultation on consent orders is a prime example of this stagnation. First, a low sample size of 53 respondents suggests that the debate has not fully captured the interests of family mediators. Second, the consultation itself is inconclusive as to the next appropriate step for the FMC and its members.¹⁵⁷ Some of its responses suggested that mediators should draft consent orders, albeit within the strict confines of information and neutrality. However, it is questioned whether this written agreement would simply become a duplication of the Memorandum of Understanding, lacking the legal scrutiny provided by a solicitor. Mediation's regulatory bodies and its mediators are subsequently at a dead-end.

This leads onto a larger issue within these debates: while the circumstances around family mediation practice have changed, the general perception of the mediator has not. In fact, there is a stagnant discussion around the appropriate role of the post-LASPO mediator. The role is largely described in the same manner as it was in the late 20th century when mediation

¹⁵⁴ Janet Walker (n 114); Lisa Parkinson and Alison Bull, 'Separate meetings and confidentiality in family mediation' (2015) 45(1) *Family Law* 1268; Henry Brown, 'Standards and survival: enhancing the practice model: Part 1' (2015) 45(2) *Family Law* 202.

¹⁵⁵ Anne Barlow and others (n 109) 30.

¹⁵⁶ Lisa Parkinson, 'Expanding the model without breaking the mould: developing practice and theory in family mediation' (2016) 46(1) *Family Law* 110, 110.

¹⁵⁷ The FMC has not published guidance on drafting consent orders as of March 2021. A strategic plan from 2018 states that the organisation will continue to engage with its members, Ministry of Justice and other government bodies on the matter. See Family Mediation Council, 'Summary of Two-Year Strategic Plan, 2018/2019' (FMC 2018) <www.familymediationcouncil.org.uk/wp-content/uploads/2018/03/Summary-of-FMC-Strategic-Plan-2018-19.pdf> accessed 11 March 2020.

was the alternative dispute resolution process in family justice. If the context surrounding mediation has changed, so too must the powers and responsibilities of its professionals. This is only intensified where mediators are increasingly asked to become flexible and respond to the post-LASPO landscape. If a mediator is unable to adapt to the contemporary landscape because she cannot depart from the traditional understanding of her role, the only solution is to reconsider how her role is now carried out and reshape our understanding in light of any changes. Consequently, this thesis argues for a sophisticated notion of the modern mediator, departing from the traditional limited mediator, that can create the space for discussion and development of a more flexible role that is increasingly demanded.

2.4 Conclusion

This chapter has made frequent reference to the (previously absent) critique of the mediator. The early mediation pilots focused on promoting mediation as a process that responded to the main concerns in policy. Thus, there was little consideration of the role of the mediator. Even if this had been considered, limitations on the mediator were appropriate given the context of the late 20th century where parties came with more straightforward claims and tended to have legal support. Yet family mediation faced a turning point in the late 1990s and has since moved to the heart of family justice. Consequently, research focus shifted to how to make the process more accessible or, more recently, flexible. This is a particular concern following rising heterogeneity in mediation's client base and the withdrawal of legal advice. As the role of the mediator has come under increasing scrutiny, academic commentary and research have questioned whether mediation can effectively support its users in the post-LASPO climate.

Mediators were traditionally bound by the idea of neutrality, but this chapter has acknowledged a shift in academic commentary that has begun to question whether the limited mediator role can still be justified. This line of investigation was also evident in the consent order debate. Initially, FMA argued that the consent order consultation 'underplayed the very serious issues at stake' after LASPO.¹⁵⁸ They wrote that before resolving the consent order debate, reform must first focus on the 'core principles' and 'boundaries' of family mediation. Unlike FMA, the majority of responses to the FMC consultation are indicative of a dialogue that only captures mediation at a surface level. Neither prohibiting mediators from

¹⁵⁸ Family Mediators Association, 'Conflicts and Consent Orders – initial overview for FMA members' (FMA 2016) <<https://thefma.co.uk/news/conflicts-consent-orders-initial-overview-fma-members/>> accessed 5 March 2020.

drafting consent orders nor permitting such orders – so long as it does not extend to advice – will provide the desired flexibility post-LASPO. Simply asking for increased flexibility wrongly assumes that this can be achieved without reconsidering mediation (and the mediator) at an intrinsic, theoretical level. As such, *chapter three* will therefore explore how mediation theory contrasts with the call for flexibility, and wrongly continues the image of the traditional limited mediator.

Chapter 3. Mediation at its core: a theoretical analysis

This chapter explains the theoretical framework adopted in this thesis. Importantly, it exposes the need for further research into the dominant, contemporary conceptualisation of family mediation in order to understand how the process can evolve to ensure access to justice post-LASPO. The discussion considers two theoretical perspectives which helps to inform a new theoretical lens, developed further in *chapter five*, through which the intrinsic problems in family mediation can be identified and evaluated. This chapter first describes the value of Riskin's facilitative to evaluative continuum which captures the range of practices employed by mediators.¹ It then examines orthodox and prevalent interpretations of mediator neutrality, according to which mediators are bound to facilitate resolution whilst remaining neutral at all times. Within these accounts, all forms of evaluation and intervention are cast aside as prohibited practice that is incompatible with absolute mediator neutrality. The limited mediator is subsequently reinforced.

It is submitted that such approaches are problematic. They create a major neutrality dilemma for mediators faced with a heterogeneous client base with reduced access to legal support after LASPO. The demand for the modern mediator to break absolute neutrality and provide flexibility, as recognised in *chapter two*, is, in actuality, a demand for an open, fluid continuum of mediator strategies. In particular, evaluative practices (which are largely understood to conflict with the imperative of mediator neutrality) must be understood as vital to the functioning of the modern mediator. The chapter then sketches out research findings that reveal the existence of evaluation in mediator practices, supporting Riskin's assertion that mediators conduct both facilitation and evaluation. The chapter concludes that access to justice can only be supported in the post-LASPO environment if family mediation is reconceptualised. More specifically, if the demand for mediator neutrality is no longer understood as a call for absolute, unflinching neutrality, it seeks the same objective as those calling for flexibility: the facilitation and evaluation of negotiation by mediators.

3.1 The theory behind mediation

Chapters one and *two* acknowledged that mediation was originally designed to provide parties with unhindered decision-making power over their dispute, supported by legal advice and oversight through a solicitor. Strict confines were placed on the role of the family mediator –

¹ Leonard Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1 *Harvard Negotiation Law Review* 7, 7.

the limited mediator – as a result. The discourse surrounding mediation reform is, unfortunately, circular and stagnant. There is demand for the modern mediator, but this role cannot be provided without departing from the essential characteristics of the limited mediator. To refuse reform hinders access to justice, but to permit it is seen to violate the role of the mediator as traditionally conceived. The following discussion first investigates the theorisations of mediation presented by Riskin through a continuum of mediator strategies. It then goes on to consider the almost sacrosanct concept of mediator neutrality.

3.1.1 The facilitative to evaluative continuum of mediator strategies

In 1996, Riskin proposed a continuum to describe ‘the strategies and techniques that the mediator employs to achieve her goal of helping the parties address and resolve the problems at issue’.² On one end of Riskin’s continuum was *facilitation*. A facilitative strategy aimed to help parties settle (and also understand the strengths and weaknesses of their claims), following the presumption that the parties were best placed to understand their dispute and subsequently shape their agreement, promoting autonomy.³ The mediator could ask the parties to consider the consequences of settlement, whether a similar outcome would be reached in court, or encourage them to communicate. Riskin placed *evaluation* on the other end of the spectrum. Evaluative practices were ‘intended to direct some or all of the outcomes’, bestowing the mediator with more power in negotiations.⁴ She could use her assessments and proposals to assist the parties, taking on a more active and visible role in the mediation room. The mediator could additionally study any relevant documents before mediation commences and, in some instances, give her opinion on the proposed settlement.⁵

Mediators thus have two broad operational frameworks, underpinned by different ideologies, at their disposal.⁶ To make the most of both frameworks, Riskin presented facilitation and evaluation as two interconnecting, fluid strategies. He argued that mediators could start as facilitators but later move to evaluation when further support was desirable, or vice versa if party control could be reinstated. This movement is depicted in *figure three*. A mediator using a facilitative framework has a contained role as she acts in line with the belief that party self-

² *ibid* 23.

³ *ibid* 24, 28.

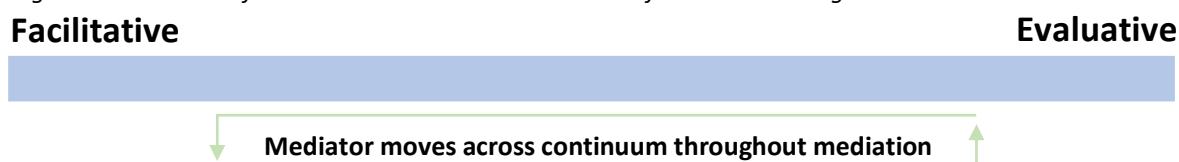
⁴ *ibid* 23-24.

⁵ *ibid* 27.

⁶ Riskin also proposed a second continuum of ‘problem definition’, concerning the range of issues discussed in mediation. At the narrowest approach, the mediator only considers issues that would be decided in court. As her approach widens, she moves beyond the court’s jurisdiction and assesses business, personal and community issues. For further information on the problem definition continuum, see *ibid* 22.

determination should govern mediation. In other words, the parties are best placed to resolve their dispute and intervention should be kept to a minimum. However, one party may require additional support in certain instances, such as where there is a large power imbalance or abuse. The mediator could subsequently move towards evaluation and provide ‘guidance as to the appropriate grounds for settlement’, potentially telling the weaker party that the proposals were not in their best interests.⁷ Evaluation may prevent an unfair outcome, although party control is relinquished as the mediator moves along the continuum.

Figure three: Riskin’s facilitative to evaluative continuum of mediator strategies



The fluidity of the facilitative and evaluative frameworks enables mediators to adapt their strategies and behaviours in response to the party dynamic. If a mediator believes the parties are in a stable position and hold equal power, she withdraws and facilitates. However, if the parties require additional support, as suggested above, she moves towards the evaluative end of the spectrum. This model upholds individualised access to justice, albeit with some checks and balances: party control is preferable, but a mediator can give additional guidance if required.

The terms ‘facilitation’ and ‘evaluation’ are widely used in the mediation sphere. Riskin’s continuum was quickly accepted by the late-1990s American family law literature.⁸ In the United Kingdom, most family law commentators refer to the facilitative and evaluative frameworks when discussing mediator practice, but only engage with Riskin’s article momentarily, if at all. For example, Maclean and Eekelaar describe mediator approaches as facilitative and evaluative, but do not cite Riskin’s work.⁹ Barlow and others also do not reference Riskin but describe mediation as a ‘facilitative’ process at the start of their monograph.¹⁰ By contrast, Webley refers to the facilitative and evaluative ‘styles of mediation’, citing Riskin.¹¹ She examines the professional bodies for family solicitors and mediators,

⁷ *ibid* 24.

⁸ Riskin makes frequent reference to the literature in a later article and comments, ‘The terms “facilitative” and “evaluative” have become part of the language in the field.’ See Leonard Riskin, ‘Decisionmaking in Mediation: The New Old Grid and the New Grid System’ (2003) 79(1) *Notre Dame Law Review* 1, 6.

⁹ Mavis Maclean and John Eekelaar, *Lawyers and Mediators: The Brave New World of Services for Separating Families* (Hart Publishing 2016) 123.

¹⁰ Anne Barlow and others, *Mapping Paths to Family Justice: resolving family justice in neoliberal times* (Palgrave Macmillan 2017) 3-4.

¹¹ Lisa C Webley, *Adversarialism and Consensus? The Professions’ Construction of Solicitor and Family Mediator Identity and Role* (Quid Pro 2010) 65.

describing the latter as facilitative. Hitchings and Miles engage with Riskin's continuum towards the end of their article when setting out the three forms of legal information provided by family mediators, acknowledging that the 'temptation' to evaluate may have increased in the post-LAPSO landscape.¹² In general, the lack of reference to Riskin's work and the meaning of both 'facilitation' and 'evaluation' is disappointing on two grounds. First, there is little explicit acknowledgement of Riskin's original work despite his continuum becoming a common part of the mediation lexicon in the United Kingdom. Second, the continuum has not been fully utilised in academic debate despite Riskin providing a useful framework for explaining and understanding the potential fluidity of mediator practice. This has led to a continued reliance on the vision of the limited mediator, even though the modern mediator could move across the facilitative to evaluative continuum in order to provide flexibility after LASPO.

3.1.2 Mediator neutrality

Neutrality is a long-standing principle throughout legal systems.¹³ Judicial neutrality, for instance, is vital to maintaining public confidence in the legal system. In the words of Lord Devlin: 'those whom change hurts should be able to count on even-handed justice calmly dispensed, not driven forward by the agents of change.'¹⁴ Based on the rule of law, it is assumed that the law will be applied equally if the parties are treated fairly and the judge has no personal interest in the outcome. Neutrality thus promotes both procedural and substantive justice in the court process.

Within much academic literature on mediation, neutrality is a dogma that shapes (and restricts) family mediator practice. Rifkin, Millen and Cobb describe mediator neutrality as a means to an end because it weakens mediator intervention and therefore promotes the self-resolution of family disputes.¹⁵ The researchers recognise that neutrality is also an end in itself because the concept is so central to the work of a mediator that it acts as a form of quality assurance to ensure a fair outcome (following procedural justice). In fact, neutrality has sat at the heart of family mediation since the process was introduced in England and Wales. This is demonstrated by the 1985 Matrimonial Causes Procedure Committee, which stated that the mediator (or conciliator at the time of publication) 'should be neutral not only in the sense that he does not

¹² Emma Hitchings and Joanna Miles, 'Mediation, financial remedies, information provision and legal advice: the post-LASPO conundrum' (2016) 38(2) *Journal of Social Welfare and Family Law* 175, 190-191.

¹³ Hilary Astor, 'Mediator Neutrality: Making Sense of Theory and Practice' (2007) 16(2) *Social & Legal Studies* 221, 221.

¹⁴ Patrick Devlin, *The Judge* (Oxford University Press 1979) 9.

¹⁵ Janet Rifkin, Jonathan Millen and Sara Cobb, 'Toward a New Discourse for Mediation: A Critique of Neutrality' (1991) 9(2) *Mediation Quarterly* 151, 153.

take sides as between the parties, but also in the sense that he does not have a preconceived solution'.¹⁶ This definition stemmed from the long-standing assumption that decision-making power must rest with the parties in the mediation setting. As a result, the (limited) mediator is construed as a guide that cannot take sides, rather than a powerful intervenor with the ability to determine settlement.

Mediator neutrality is widely understood as an 'umbrella term' comprising multiple characteristics, ranging from non-bias to fairness.¹⁷ However, its broad remit has led neutrality to be 'inconsistently defined'.¹⁸ Rifkin, Millen and Cobb acknowledge that this is also caused by the 'limited vocabulary' available to define mediator neutrality with precision. It is, therefore, essential to consider the multiple dimensions of mediator neutrality within orthodox theory.

First, mediator neutrality is commonly associated with *even-handedness*. Under this interpretation, a mediator is neutral when they treat all parties equally. For example, the previous quote from the 1985 Matrimonial Causes Procedure Committee report signalled that a mediator must 'not take sides'. Recent policy also promotes even-handedness in mediation. The Arbitration and Mediation Services (Equality) Bill, proposed by Baroness Cox in 2011, aimed to strengthen discrimination law within arbitration and mediation.¹⁹ Although the specifics of the Bill are outside the remit of this thesis,²⁰ Cox's correlation between even-handedness and mediator neutrality is relevant to the current discussion: '...[Mediation] relied on the genuine consent of the parties, a clear knowledge of what they were entering into and *an understanding that they were equal before the [mediator]*' [emphasis added].²¹ From this perspective, mediation is founded on voluntary participation. This voluntariness is followed by informed consent and, importantly, equal standing before the mediator. In essence, mediator neutrality occurs when all parties are subject to equal treatment.

Second, *neutrality as to the outcome*, but not the process, recognises that mediators can make procedural adjustments to advance negotiations.²² The mediator decides the sequence of speech between the parties, as well as the layout of the room. However, she cannot exert influence over the proposed settlement. Douglas recognises that the distinction between

¹⁶ Matrimonial Causes Procedure Committee, *Report of the Matrimonial Causes Procedure Committee* (Stationery Office 1985) para 3.10.

¹⁷ Orna Cohen, Naomi Dattner and Ahron Luxenburg, 'The Limits of the Mediator's Neutrality' (1999) 16(4) *Mediation Quarterly* 341, 341.

¹⁸ Hilary Astor (n 13) 226.

¹⁹ Also see the Arbitration and Mediation Services (Equality) HL Bill (2016-2017) 18.

²⁰ The Bill is discussed in detail by Sharon Thompson and Russell Sandberg, 'Common defects of the Divorce Bill and Arbitration and mediation Services (Equality) Bill 2016-2017' (2017) 47(4) *Family Law* 425; also see John Eekelaar, 'The Arbitration and Mediation Services (Equality) Bill 2011' (2011) 41(11) *Family Law* 1209.

²¹ HL Deb 27 January 2017, vol 778, col 895.

²² Hilary Astor (n 13) 223.

process and outcome promotes party autonomy over the dispute.²³ Neutrality as to outcome adopts the same pro-autonomy rhetoric found in neutrality as to even-handedness; the mediator cannot influence the outcome because the parties have control over, and are therefore responsible for, settlement.

Third, mediator neutrality is widely interpreted as acting free from *bias*, also known as *impartiality*.²⁴ To return to the example of court, adjudication is founded on 'the impartial application of legal rules to relevant facts'.²⁵ The court system therefore employs multiple strategies to limit the impact of bias in favour of either party.²⁶ In family mediation, bias is enshrined in the conflicts of interest principle.²⁷ If a mediator has a pre-existing relationship with either party, knowledge of the case or a particular interest in the outcome (including financial), she is unable to mediate. Neutrality as lack of bias additionally requires the mediator to remain conscious of their assumptions, beliefs and opinions (including any feelings towards the parties) and take active steps to ensure that these views do not influence her behaviour. For instance, Izumi specifically recognises that a mediator must not act in a way that leads to one party being advantaged over the other.²⁸ Altogether, mediator neutrality as freedom from bias works to prevent an unfair outcome in light of the mediator's previously held dispositions and relationships.

The significance of mediator neutrality must not be understated. The concept is treated by many commentators as a dogma and central to the professional identity of family mediators because it promotes the self-determination of family disputes. Nevertheless, questions arise as to how orthodox mediator neutrality plays out in practice, as this chapter will later investigate. Whilst neutrality is applied in the same manner throughout family justice procedures, the concept creates a particular dilemma for mediators. Absolute neutrality as to the outcome, for instance, prohibits a limited mediator from intervening yet simultaneously requires her to act when inaction would otherwise influence the settlement. By contrast, a relaxed interpretation of mediator neutrality may allow a modern mediator to intervene or

²³ Susan Douglas, 'Mediator Neutrality: A Model for Understanding Practice' (DPhil, University of the Sunshine Coast 2009) 40.

²⁴ This thesis adopts the former term, as impartiality is often understood as a separate concept from mediator neutrality, allowing mediators to act when required. Impartiality will be discussed in detail towards the end of this chapter when considering the alternative concepts to mediator neutrality.

²⁵ Richard Moorhead, 'The Passive Arbiter: Litigants in Person and the Challenge to Neutrality' (2007) 16(3) *Social & Legal Studies* 405, 418.

²⁶ For instance, a judge is bound to apply the law as it is written in statute and interpreted in case law. Judicial judgments are also available to the public and consequently open to scrutiny. See Richard Delgado and others, 'Fairness and formality: Minimizing the risk of prejudice in alternative dispute resolution' (1985) 6 *Wisconsin Law Review* 1359, 1367-1373.

²⁷ Susan Douglas (n 23) 29.

²⁸ Carol Izumi, 'Implicit Bias and the Illusion of Mediator Neutrality' (2010) 34 *Washington University Journal of Law & Policy* 71, 84-85.

refrain from doing so depending on the situation, though it is generally felt that adequate checks and balances must be put in place to ensure the mediator does not dominate discussions. In light of these possible different interpretations, clarifying the meaning of mediator neutrality is crucial.

3.2 The orthodox interpretation of mediation theory in the contemporary landscape

In theory, mediators have a wide variety of tools at their disposal, situated on a continuum from facilitation to evaluation. However, the traditional understanding of family mediation adopts a binary distinction between the two frameworks, placing significant restrictions on the mediator. As the following discussion will demonstrate, the limited mediator role is confined to a facilitative framework. This orthodox approach is strongly underpinned by the allegiance to the idea of absolute neutrality, limiting the opportunity for the flexibility in practice that is essential in achieving access to justice post-LASPO. As a result, the opportunity for discussions to acknowledge and follow the modern mediator – who could provide the evaluative practices needed to ensure flexibility – is reduced.

3.2.1 The bright-line distinction: the attack on evaluative behaviours

A major problem within mediation theory is the strict dichotomy set up between facilitation and evaluation. Riskin's continuum was a ground-breaking theory that cast light on the different strategies and techniques available to mediators. However, the theory has been largely misinterpreted as binary, thereby overlooking the richness and fluidity of the framework. Facilitation and evaluation are understood as opposing strategies, rather than two frameworks located on the same continuum. Many mediators have accepted this 'bright-line distinction' and confined themselves to operating within a facilitative framework, casting evaluation aside as poor practice.²⁹

Welsh summarises the two broad criticisms of mediator evaluation.³⁰ First, it is claimed that evaluation is 'unfettered' and lacks appropriate safeguards. Without adequate checks and balances, an evaluative mediator could completely command the mediation outcome or compel parties to settle. The second criticism is extreme in comparison and argues that the

²⁹ Kimberlee K Kovach and Lela P Love, "'Evaluative' Mediation Is An Oxymoron' (1996) 14(3) *CPR Institute for Dispute Resolution* 31, 32.

³⁰ Nancy A Welsh, 'The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalisation?' (2001) 6 *Harvard Negotiation Law Review* 1, 28-30.

evaluative framework contradicts the idea of mediation itself. Kovach and Love allege that a mediator cannot evaluate as it undermines the ‘primary goals of enhancing understanding’ and reducing party conflict.³¹ The writers subsequently label mediator evaluation an ‘oxymoron’ and reserve the framework for legal professionals when working towards settlement.³² Combined, the two critiques reveal widespread concern about the breadth of mediator evaluation, although the former acknowledges that evaluation is permissible so long as adequate safeguards are in place.

Despite the need for flexibility, the orthodox conceptualisation of family mediation adopts the latter critique and imposes a blanket ban on mediator evaluation. The role of the limited mediator is subsequently endorsed. To return to the policy documents from *chapter one*, the 1974 Committee on One-Parent Families defined mediation as ‘assisting the parties to deal with the consequences of the established breakdown of their marriage’.³³ A decade later, the Matrimonial Causes Procedure Committee reiterated that the mediator was to ‘assist the parties’.³⁴ The same pro-facilitative stance continued to be adopted in post-LASPO policy. In 2017, the Chair of the All-Party Parliamentary Group for Alternative Dispute Resolution, John Howell, argued that any party ‘will experience the enormous amount of power that [mediation] gives people to be able to decide for themselves’.³⁵ The Ministry of Justice later described mediation as a process where a mediator ‘helps individuals’.³⁶ If the limited mediator is an assistant, she does not have the authority – or even ability – to evaluate. More specifically, she is restricted in her powers to support more vulnerable or weaker parties in the mediation process. Thus, the orthodox conceptualisation of family mediation heavily promotes the solely facilitative mediator (rather than a mediator who adopts both facilitative and evaluative frameworks). This is illustrated in *figure four*.

Figure four: Riskin’s continuum as a binary and subsequent limitation placed on the mediator



³¹ Kimberlee K Kovach and Lela P Love (n 29) 31.

³² *ibid* 32.

³³ Committee on One-Parent Families, *Report of the Committee on One-Parent Families: Volume 1* (Cmd 5619, 1974) para 4.288.

³⁴ Matrimonial Causes Procedure Committee (n 16) para 3.10.

³⁵ HC Deb 15 November 2017, vol 631, cols 176WH-177WH.

³⁶ Ministry of Justice, *Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)* (CP 37, 2019) para 603.

A notable cause of this dichotomy is the general tendency to differentiate between the two frameworks, a problem that is inherent in Riskin's work itself. In 2003, Riskin reiterated that mediators 'evaluate *and* facilitate' but expressed disappointment that this fluidity had been overlooked in the mediation literature.³⁷ He admitted that the dichotomy was, to some extent, a consequence of his own writing. By placing facilitation and evaluation at opposite ends of a spectrum and setting out their relative benefits separately, Riskin unintentionally directed his readers to make a distinction between the two frameworks.³⁸ He proposed to replace the words 'facilitative' and 'evaluative' with 'elicitive' and 'directive' respectively, arguing that the newer terms reflected the importance of party autonomy in family mediation. However, the facilitation and evaluation terminology is so entrenched in the language of mediation theory that introducing new jargon could generate ambiguity and confusion. The new terminology may lead to inconsistencies in how the terms are understood and do little to resolve the binary trap. This thesis therefore continues to use the facilitative and evaluative frameworks to understand family mediator practice. The core idea in Riskin's continuum must not be forgotten: some actions are more facilitative, whilst others are more evaluative.

3.2.1.1 An adherence to absolute mediator neutrality: the mediator's dilemma

Nonetheless, the primary cause of the bright-line distinction between the facilitative and evaluative frameworks is the sacred status of (absolute) mediator neutrality. Many mediation advocates view mediator evaluation as a substantial affront to neutrality because it weakens party control: Kovach and Love claim that mediator evaluation goes against the conventional mediation model with 'party self-determination as its primary value.'³⁹ Other sceptics of mediator evaluation argue that the likelihood of bias against one party increases as a mediator strays towards evaluation.⁴⁰ Facilitation is equated with mediator neutrality, strengthening party autonomy, and, consequently, good mediation. By comparison, evaluation is an interventionist method that takes power from the autonomous and departs from absolute mediator neutrality, factors heavily associated with bad mediation. In order for a mediator to provide good mediation, she must take on the role of the limited mediator. To become a modern mediator may provide flexibility, but her neutral image is eroded in the process.

³⁷ Leonard Riskin (n 8) 14.

³⁸ *ibid* 13.

³⁹ Kimberlee K Kovach and Lela P Love, 'Mapping Mediation: The Risks of Riskin's Grid' (1998) 3 *Harvard Negotiation Law Review* 71,75.

⁴⁰ 'In other words, the greater the mediator's direct influence on the substantive outcome of the mediation, the greater the risk that one side will suffer as a result of the mediator's biases.' See Leonard Riskin (n 1) 48.

Yet to a growing number of academic commentators, neutrality is ‘folklore’ and a myth that muddies, rather than illuminates, mediator practice.⁴¹ Earlier in the chapter, it was acknowledged that the general understanding of mediator neutrality encompasses even-handedness, neutrality as to outcome, and lack of bias. Mediator neutrality is criticised here for being unrealistic across all three dimensions. First, the meaning of mediator neutrality as even-handedness is dependent on further consensus around the meaning of equal treatment. To treat parties equally has multiple interpretations, from prohibiting all mediator intervention to allowing the mediator to interrupt (or even criticise) provided she is equally harsh to both participants. Most advocates of family mediation would reject the latter interpretation as it gives the mediator unrestricted power, a stark departure from party self-determination. But prohibiting mediator intervention under the former approach removes any opportunity for the mediator to interfere in cases of power imbalances or abuse. Second, neutrality as to outcome overlooks the inevitable impact of a mediator’s presence on negotiations. If a mediator had no impact on the party dynamic or outcome, the value of mediation as a dispute resolution process would be non-existent. Douglas calls attention to the fact that the presence of the mediator alone establishes an expectation that the parties will settle.⁴² A separate argument is identified by Becker, who submits that omission itself can impact the outcome.⁴³ By refraining to speak about the possible issues in a proposed settlement, the mediator indirectly prioritises one party over the other. An interesting contradiction comes to light: a mediator cannot influence the outcome, but non-action also impacts settlement (or the party dynamic) and could, therefore, still involve a departure from her neutrality. Third, implicit or subconscious bias remains a significant problem in mediation because a mediator’s actions may favour one party, regardless of her intention.⁴⁴ This argument is supported by observations of Smithson, Barlow, Hunter and Ewing (as part of ‘Mapping Paths’) that revealed the ‘lexical choices’ of mediators which often privileged the rights of one party.⁴⁵ As an example, a mediator in one session used phrases that aligned with a party’s terminology, privileging their claim (and version of events) over the other’s. The critique of neutrality as lack of bias echoes the argument made in relation to neutrality as to the outcome, where micro-actions, such as

⁴¹ Janet Rifkin, Jonathan Millen and Sara Cobb (n 15) 152.

⁴² Susan Douglas (n 23) 42. Also see Tony F Marshall, ‘The Power of Mediation’ (1990) 8(2) *Mediation Quarterly* 115, 120. The presence of the mediator also raises an expectation that the parties will behave in a certain way, essentially to ‘divorce well’ rather than ‘divorce badly’. This ties in with Reece’s assessment of divorce law reform, as discussed in *chapter one*: Helen Reece, *Divorcing Responsibly* (Hart Publishing 2003) 127.

⁴³ Daniel Becker, ‘The Controversy over Mediator Neutrality: Input from New Zealand Mediators’ (Master of Laws, University of Otago 2013) 21.

⁴⁴ Carol Izumi (n 28) 102-103.

⁴⁵ Janet Smithson and others, ‘The ‘Child’s Best Interests’ as an Argumentative Resource in Family Mediation Sessions’ (2015) 17(5) *Discourse Studies* 609, 617.

pausing or a minor change in body language, could be perceived to be evidence of bias. Mayer neatly summarises this argument: 'if we are perceived to be biased or non-neutral, then to a certain extent we are'.⁴⁶ Serious concerns around the absolute vision of mediator neutrality are therefore apparent.

The family mediator faces two demands. In *chapter two*, it was recognised that the limited mediator is neutral and can only provide information (in contrast to the solicitor who can give partisan legal advice). Yet the discussion also acknowledged that mediators were now expected to redress power imbalances between the parties. The first demand, remaining neutral, is incompatible with the second, simultaneous obligation to ensure fairness.⁴⁷ The mediator is, simply put, caught in a neutrality dilemma. This dilemma has previously been described in the mediation literature as a 'double bind'⁴⁸ that creates 'chaos for mediators',⁴⁹ and becomes particularly prevalent when a mediator is confronted with a power imbalance (small or large) between the parties).⁵⁰ To quote Becker, 'mediators are struggling to find where neutrality ends and departure begins'.⁵¹ This dominant understanding of mediator practice is visible in policy, research and the general discussions around mediation, as demonstrated in the preceding chapters.

The neutrality dilemma is a direct consequence of the preference for self-determination in orthodox theory and policy, with Mulcahy arguing that mediators should be permitted to take on 'a more active role' when a proposal is unfair to one (or both) parties.⁵² She builds on her argument and suggests that upholding mediator neutrality in order to promote party autonomy over the outcome can, in many cases, result in one party making 'bad decisions' that 'exacerbate existing inequalities'.⁵³ Unfortunately, the mediator is caught in a dilemma, caused by the binary, absolute interpretation of mediator neutrality. This problem has only intensified in contemporary family justice where many individuals can no longer access a solicitor. Barlow and Hunter comment that the neoliberal agenda, seen in the LASPO reforms, places further strain on mediator neutrality as mediators are increasingly expected to adapt to the withdrawal

⁴⁶ Bernie Mayer, 'What We Talk About When We Talk About Neutrality: A Commentary on the Susskind-Stulberg Debate, 2011 Edition' (2012) 95(3) *Marquette Law Review* 859, 863.

⁴⁷ Susan Nauss Exon, 'How Can a Mediator Be Both Impartial and Fair: Why Ethical Standards of Conduct Create Chaos for Mediators' [2006] *Journal of Dispute Resolution* 387, 416.

⁴⁸ Hilary Astor (n 13) 226.

⁴⁹ Susan Nauss Exon (n 47) 416.

⁵⁰ Bogdanoski similarly discussed 'the mediator's perennial dilemma of intervening in the power relationships of the disputants while remaining a neutral third party facilitator throughout'. See Tony Bogdanoski, 'The 'Neutral' Mediator's Perennial Dilemma: to Intervene or not to Intervene?' (2009) 9(1) *Queensland University of Technology Law and Justice Journal* 26, 27.

⁵¹ Daniel Becker (n 43) 83.

⁵² Linda Mulcahy, 'The Possibilities and Desirability of Mediator Neutrality – towards an ethic of partiality?' (2001) 10(4) *Social & Legal Studies* 505, 510.

⁵³ *ibid* 510.

of legal support and a heterogeneous client base.⁵⁴ There is thus a significant access to justice question around whether mediation's dominant conceptualisation should move away from the limited mediator towards the modern mediator, allowing the profession to depart from strict neutrality to provide further support (specifically if failing to do so could incite an unjust, unfair or legally incorrect outcome).

It must be acknowledged that the many power imbalances seen by mediators caught in these dilemmas are gendered.⁵⁵ While the impact of gender is not the central key focus of this thesis, the normative roles of men and women in the traditional family heavily influence the power imbalances and dynamics found in mediation. Both absolute mediator neutrality and the facilitative framework it operates within require mediators to treat parties equally. This is based on the assumption that intervention is unnecessary because the parties are of equal standing. However, the presumption that parties arrive at mediation from an 'equal playing field', possessing the same levels of autonomy, skills and expertise, is problematic.⁵⁶ Guggenheimer's theory of 'feminomics', described as 'the economic consequences of gender', is a prime example of how gender plays a crucial part in negotiations.⁵⁷ Society places men and women into specific roles, grounded in economics. Men are typically breadwinners who generate income, whereas women are typically home carers who make non-monetary contributions to the family unit. Society tends to consider resources that are statistically likely to be held by men, notably work experience and income, as more valuable than the caring and household roles typically associated with women.⁵⁸ These resources, in turn, provide men with greater power and autonomy in dispute resolution. This gendered context is the norm for many families but remains overlooked in traditional mediation theory because it is so embedded in family negotiations.⁵⁹ The strictly neutral, limited mediator may recognise a gendered power imbalance, but she cannot adapt to resolve it.

⁵⁴ Anne Barlow and Rosemary Hunter, 'Reconstruction of Family Mediation in a Post-Justice world' in Marian Roberts and Maria Federica Moscati (eds), *Family Mediation: Contemporary Issues* (Bloomsbury Professional 2020) 17.

⁵⁵ The following argument is based on heteronormative gender imbalances. For a detailed account on mediation and LGBT+ relationships, see Maria Federica Moscati, 'We Have the Method but still there is so much to do: Mediation for Gender and Sexually Diverse Relationships' in Marian Roberts and Maria Federica Moscati (eds), *Family Mediation: Contemporary Issues* (Bloomsbury Professional 2020).

⁵⁶ Alison Diduck, 'Autonomy and vulnerability in family law: the missing link' in Julie Wallbank and Jonathan Herring (eds), *Vulnerabilities, Care and Family Law* (Routledge 2014) 101.

⁵⁷ Leah Guggenheimer, 'A Modest Proposal: The Feminomics of Drafting Premarital Agreements' (1996) 17(2) *Women's Rights Law Reporter* 147, 148.

⁵⁸ Penelope E Bryan, 'Killing Us Softly: Divorce Mediation and the Politics of Power' (1992) 40 *Buffalo Law Review* 441.

⁵⁹ Sharon Thompson, *Prenuptial Agreements and the Presumption of Free Choice* (Hart Publishing 2015) 9; Sharon Thompson, 'Feminist Relational Contract Theory: A New Model for Family Property Agreements' (2018) 45(4) *Journal of Law and Society* 617, 626.

From a feminist perspective, the dominance of absolute neutrality and the facilitative framework can operate in favour of one party over the other, thereby entrenching inequality on gender lines. As Lacey acknowledges, 'gender neutrality' is not synonymous with 'equality'.⁶⁰ This is because, as Fineman argues, absolute neutrality can be blind to 'underlying disparities in position' between genders (further entrenched by normalised gender roles).⁶¹ Consequently, the formal equality endorsed under traditional mediator neutrality does not take these structural inequalities into account. If a mediator must remain neutral throughout mediation, she cannot adapt to support the weaker party, often the women in cases of gendered power imbalance. The same argument was made by Barlow and others who found that formal equality tended to be preferred by mediators over substantive equality.⁶² This led to many women settling for a poor financial deal to 'gain closure' and complete proceedings.⁶³ It thus appears that a large number of mediators may, regardless of their intention, support a male participant because his proposal enhances equal treatment in line with absolute mediator neutrality. Essentially, mediator neutrality favours formal equality as it is less likely to require the mediator to intervene. This problem has potentially worsened in the post-LASPO landscape where mediators are more likely to mediate complex disputes that require intervention. Without reform, there is a risk that the rights of the individual with more financial resources or less unpaid labour in the home (typically the man in the normative heterosexual family) will be prioritised in mediation, leading to unfair outcomes for the other party. This embeds gendered power imbalances even further within the mediation process, making it more difficult for the mediator to address. Thus, redefining neutrality to allow evaluation will help mediators to respond to (the often) gendered power imbalances in family disputes and, in particular, resolve the neutrality dilemma that obscures their work.

3.2.2 Two binary frameworks and access to justice in the post-LASPO landscape

The promotion of mediator facilitation, and the subsequent prohibition of its evaluative counterpart, reflects the state of family justice when mediation was introduced in England and Wales. *Chapter two* showed that late 20th-century research understood the mediator as having a narrow, neutral role which meant they could only *inform*. The profession was dependent on other third parties, particularly solicitors, to *advise*. This separation of roles heavily reflects the divide between facilitation and evaluation. Legal information is facilitative because the

⁶⁰ Nicola Lacey, 'Feminist Legal Theory Beyond Neutrality' (1995) 48(2) *Current Legal Problems* 1, 12.

⁶¹ Martha A Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press 2004) 273-274.

⁶² Anne Barlow and others (n 10) 203.

⁶³ *ibid* 162.

mediator sets out the law or explains how it is intended to work. The parties are then responsible for applying this statement to their dispute. By contrast, legal advice is evaluative as it is geared towards the parties' circumstances. The solicitor can freely give parties the solution and direct the outcome. Riskin's thesis is therefore valuable in understanding why certain activities – such as writing a consent order or encouraging an outcome – tend to be reserved for solicitors: they are regarded as evaluative in nature. To summarise the effect of the binary trap, mediators *facilitate* whereas solicitors *evaluate*.

The strict dichotomy between mediator facilitation and evaluation was largely unproblematic in the late 20th century as evaluation was readily available through a legal professional. Parties accessed both a mediator and solicitor, in other words both facilitative and evaluative support. Access to justice operated relatively successfully in family mediation as a result. While Riskin's thesis was interpreted as a binary, the collaboration between mediators and solicitors ensured that parties received support from both ends of the spectrum, as depicted in *figure five*. Thus, the traditional binary interpretation of Riskin's continuum was satisfactory, though its effectiveness was reliant on the accessibility of legal support.

Figure five: Riskin's continuum as a binary with solicitor support to provide evaluation



The contemporary family justice system is drastically different. The separation of powers between mediators and solicitors, in addition to facilitation and evaluation, has become blurred in recent decades, most notably following the cuts to legal aid in 2013. In particular, LASPO has led to the withdrawal of solicitors from family justice, and only a small pool of individuals can now afford legal support. This means that fewer individuals have the opportunity to receive evaluation over their agreement. Furthermore, mediators now see a wider range of clients, including those who attend mediation as their only viable option other than to self-represent in court. Thus, there is increasing demand for a new, modern mediator who can support parties in new ways. This includes tasks that were typically conducted by solicitors before LASPO, such as writing consent orders.

Chapter two previously recognised the calls for flexibility post-LASPO but submitted that reform would only be successful if there was further engagement with mediation at an intrinsic level. In applying this argument to mediation theory, it is proposed that the calls for flexibility in fact signal a demand to reinstate the facilitative to evaluative continuum of mediator practice. This is crucial if mediation reform is to accept and promote the role of the modern mediator. More

specifically, the modern mediator differs from her limited counterpart in being able to move towards the evaluative end of the continuum. Without allowing the modern mediator to operate this way, the flexibility which is highly sought cannot be provided. The FMC's 'Family Mediators Drafting Consent Orders' consultation was a prime example of this demand as respondents were asked whether a mediator could carry out an evaluative task previously conducted by lawyers.⁶⁴ By moving into advice (or providing a consent order without giving advice, as queried by the FMC), the mediator moves across the facilitative to evaluative continuum. Evaluative actions such as drafting consent orders are, however, prohibited because the dominant, binary understanding of Riskin's continuum limits mediators to a facilitative framework. This is influenced by the strong allegiance to absolute mediator neutrality with the FMC specifically asking mediators whether drafting a consent order would jeopardise their role, thereby insinuating that such a task would only be permissible if a mediator could remain neutral throughout (confining her to the limited role). Reform is desired by many in the mediation sphere, yet the orthodox separation of facilitative and evaluative techniques, as represented in *figure five*, continues to hinder debate. As evaluation increasingly becomes an option reserved for a small population with the private funds to afford a solicitor, the limited mediator has little power to support those without any (or little) legal support.

3.3 Cracks in the binary: actions beyond facilitation and neutrality

Reinterpreting mediation theory does not necessarily involve changing mediator practice. In fact, reform may simply reveal that the modern mediator and her evaluative functions already exist. The final section of this chapter uncovers the idealism and perhaps naivety of the absolute binary division of facilitation and evaluation within mediation theory. Towards the end of this section, it is asked how mediator neutrality can be readjusted to align with the demand for flexibility. This paves the way for the remainder of this thesis, which uses original research to explore the modern conceptualisation of family mediation from a variety of perspectives.

Evidence largely indicates that mediators already evaluate, particularly to protect the rights of the child. Originally, Riskin faced heavy criticism for suggesting that mediators could evaluate. He later clarified that his work was not normative but descriptive as he simply set out the techniques that already existed in practice.⁶⁵ His argument is supported by earlier research on

⁶⁴ Family Mediation Council, 'Overview of Consultation Responses: Family Mediators Drafting Consent Orders' (FMC 2017) <www.familymediationcouncil.org.uk/wp-content/uploads/2017/05/FMC-Overview-consultation-responses-family-mediators-drafting-consent-orders.pdf> accessed 5 March 2020.

⁶⁵ Leonard Riskin (n 8) 7.

family mediation, discussed in *chapter two*.⁶⁶ Users of the Bromley Conciliation Bureau, interviewed by Davis in the early 1980s, claimed that mediators were sometimes ‘active’ and supported the weaker party.⁶⁷ In particular, mediators gave a voice to the children, reminding parents to focus on the needs of the child and reach an agreement.⁶⁸ The welfare of the child is of paramount importance in family law, enshrined in the Children Act 1989.⁶⁹ Piper acknowledges that family mediation and the concept of parental responsibility for child welfare ‘have gone hand in hand’,⁷⁰ and Davis likewise comments that family mediation was largely built on the ‘twin pillars’ of cost reduction and child welfare.⁷¹ Findings from Barlow and others’ ‘Mapping Paths’ project also show that mediators regularly prioritise child welfare over parental autonomy in the contemporary landscape.⁷² Several academic commentators recognise that the paramountcy of child welfare rests at odds with the facilitative framework. Dingwall, for instance, acknowledges an ‘internal contradiction of the claim to a dual role’, with mediators acting as a facilitator for the parties and an ‘agent’ for the children.⁷³ In effect, upholding the welfare of the child departs from the strictly facilitative, and purely neutral, framework. Interestingly, this evaluative strategy is openly accepted.

Mediators are supposedly prohibited from evaluating beyond children’s welfare, despite research that reveals regular evaluation under a facilitative guise. Rifkin, Millen and Cobb conducted a case study on mediation sessions and described how mediators embraced a ‘supportive’ role in private caucuses to help individuals shape their arguments.⁷⁴ This technique, termed ‘equidistance’, was typically used to progress a dispute.⁷⁵ Equidistance could improve the party dynamic or obtain settlement, but nonetheless required the mediator to

⁶⁶ For example, see Janet Smithson and others, ‘The Moral Order in Family Mediation: Negotiating Competing Values’ (2017) 35(2) *Conflict Resolution Quarterly* 173, 178; Janet Rifkin, Jonathan Millen and Sara Cobb (n 15) 154; Jian Wang, ‘Neutral, Biased, or Both? Discursive Construction of a Mediator’s Dual Role’ (2015) 31(1) *Negotiation Journal* 47.

⁶⁷ ‘some of our Bromley informants indicated that the mediators did more than this: they were active; they did challenge; they controlled the ebb and flow of the negotiation; in some cases, the ‘weaker’ party did indeed feel empowered.’ See Gwynn Davis, *Partisans and Mediators: The Resolution of Divorce Disputes* (Clarendon Press 1988) 66.

⁶⁸ *ibid* 80.

⁶⁹ Children Act 1989, s 1(1).

⁷⁰ Christine Piper, *The Responsible Parent: A Study in Divorce Mediation* (Harvester Wheatsheaf 1993) 2.

⁷¹ Gwynn Davis (n 67) 53.

⁷² Anne Barlow and others (n 10) 135-136.

⁷³ Robert Dingwall, ‘Some Observations on Divorce Mediation in Britain and the United States’ (1986) 1986(11) *Mediation Quarterly* 5, 18. Smoron acknowledges the same issue in USA family law, identifying a conflict between mediator neutrality and their ‘duty’ to promote the child’s interests. See Kimberly Smoron, ‘Conflicting Roles in Child Custody Mediation: Impartiality/Neutrality and the Best Interests of the Child’ (1998) 36(2) *Family and Conciliation Courts Review* 258, 269.

⁷⁴ One example is a mediator telling a party (in a one-to-one session) that their situation ‘must be hard to deal with’. See Janet Rifkin, Jonathan Millen and Sara Cobb (n 15) 154-155.

⁷⁵ Rifkin, Millen and Cobb select the term ‘equidistance’ as the mediator uses partiality to ‘assist each person equally’: *ibid* 153.

evaluate and take on an active role in discussions. Rifkin, Millen and Cobb clarified that the mediator retreated to her former neutral and facilitative role once a party sought further (and explicit) approval for their stance. The mediator was thereafter trapped in a never-ending 'paradox', moving between facilitation and evaluation in an attempt to maintain an image of neutrality.⁷⁶ Similarly, Greatbatch and Dingwall recognised 'selective facilitation' whereby a mediator moved parties towards a specific outcome by making that outcome the focus of mediation discussions.⁷⁷ Following a close analysis of mediation sessions, Greatbatch and Dingwall noticed that the mediator did not always adopt a turn-based approach to the views of both parties. Instead, she regularly challenged the strength and plausibility of the proposed settlement, taking the side of one party and consequently bringing her neutrality into question.⁷⁸ Both equidistance and selective facilitation are examples of mediator evaluation, concealed by a facilitative framework. Analogous approaches are adopted by mediators in other jurisdictions, including America and China.⁷⁹

Mediators continue to hide their evaluative framework in the contemporary climate. Smithson and others assessed the use of 'talk' in nine mediation sessions from 2012 to 2014.⁸⁰ They found that mediators brought certain moral values into negotiations to focus on particular areas of the dispute. For example, one mediator in the sample began mediation by stating that the parties were to decide what would be discussed but quickly added 'I know that you both want to talk about the child'.⁸¹ This mediator advanced the expectation that the parties would cooperate to reach an agreement in the best interests of the child. However, hidden evaluation often extends beyond child welfare. Hitchings and Miles' three approaches to mediator information-giving – overviews and open questioning, reality-testing and viable options – shows an increasingly evaluative group of strategies that are used by mediators.⁸² The different techniques require the mediator to, first, assess the proposed settlement, and, second, reveal her conclusion to the parties, albeit in a format that conceals the evaluation. This information could have the same impact as advice, as recognised by Maclean and Eekelaar throughout their interviews with mediators.⁸³ Despite the blanket ban against evaluation, as mentioned earlier

⁷⁶ *ibid* 159.

⁷⁷ David Greatbatch and Robert Dingwall, 'Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators' (1989) 24(4) *Law & Society Review* 613, 636.

⁷⁸ *ibid* 637.

⁷⁹ Nancy A Welsh (n 30); Jian Wang (n 66).

⁸⁰ Janet Smithson and others (n 66) 176.

⁸¹ *ibid* 178.

⁸² These techniques were set out in *chapter two*. See Emma Hitchings and Joanna Miles (n 12).

⁸³ Mavis Maclean and John Eekelaar (n 9) 123-124.

in relation to late 20th-century policy on mediation, recent empirical research suggests that mediator practice is highly complex, alluding to the existence of the modern mediator.

This thesis proposes that the lack of transparency surrounding the modern mediator's evaluative strategies and their potential impact on the mediation outcome, not the strategies themselves, are problematic. Mediator evaluation can protect a disempowered party, provide further guidance for two parties seeking additional support and, ultimately, support access to justice. However, the definitions of family mediation (seen in policy) refuse to allow any movement for mediator evaluation. It is submitted that evaluation is not only concealed in the discussions around mediation, but mediator practice itself. In fact, mediation evaluation is concealed by what can only be described as a *facilitative proxy*. As demonstrated through the research evidence above, mediators appear facilitative but regularly evaluate to continue negotiations. This evaluation is not fully acknowledged due to the lack of engagement with the intrinsic, theoretical underpinnings of family mediation. Regrettably, mediator evaluation is masked by a facilitative (binary) doctrine to ensure harmony with the absolute vision of neutrality. While hidden evaluation is apparent in earlier research, such as Greatbatch and Dingwall's selective facilitation, the lack of transparency is a significant issue post-LASPO as it prevents mediators from openly intervening to support a weaker party. The orthodox conceptualisation, one which is simplistic and conceals the intricacies of mediator practice, prevails in the modern landscape.

3.3.1 *Readjusting mediator neutrality*

Riskin's continuum cannot be reintroduced into the mediation discourse without first redefining mediator neutrality. Several recommendations for reform can be identified within the current literature on mediation. At one extreme, some call for all notions of mediator neutrality to be removed completely from mediation theory.⁸⁴ Exon, for instance, proposes an alternative definition of mediation that does not involve mediator neutrality: 'a conciliatory process of using a third party to assist disputants to reach a desired goal'.⁸⁵ Another response is to replace neutrality with a different concept. A topical debate in the current Australian family law literature is whether the term 'impartiality' is preferable to neutrality, with a large number of mediation Codes of Practice adopting this language.⁸⁶ Those in favour of a shift

⁸⁴ James Coben, 'Gollum, Meet Sméagol: A Schizophrenic Ruminant on Mediator Values Beyond Self Determination and Neutrality' (2004) 5 *Cardozo Journal of Conflict Resolution* 65.

⁸⁵ Susan Nauss Exon (n 47) 419.

⁸⁶ Jonathan Crowe and Rachael Field, 'The Empty Idea of Mediator Impartiality' (2019) 29(4) *Australasian Dispute Resolution Journal* 273, 273.

towards impartiality, such as Boule, argue that a neutral mediator is detached from the outcome and cannot support the weaker party.⁸⁷ By contrast, an impartial mediator is only even-handed as to the process and thus has an interest in the outcome. Advocates of impartiality generally claim that the concept involves fairness (whereas neutrality mandates disinterestedness), so a mediator can intervene where to omit from doing so may produce an unfair outcome for one or both parties.⁸⁸ To this extent, mediator impartiality provides mediators with some space to adopt evaluative strategies and, thus, flexibility.

Neither proposal is satisfactory. If Exon's recommendation were followed, neutrality would be replaced with the idea of 'assistance' or 'conciliation'. These are subjective concepts, much like neutrality, that lack clarity and could generate further inconsistencies in mediation theory or practice. The same criticism is also applicable to mediator impartiality. Crowe and Field argue that neutrality and impartiality are 'more or less synonymous' in practice, with the terms often being used interchangeably in the mediation literature.⁸⁹ Astor supports this argument and contends that presenting impartiality as a 'solution' to the neutrality deficit continues to hide mediator power (and evaluation) in negotiations.⁹⁰ Furthermore, he recognises that simply acknowledging different mediator perspectives is not enough: mediation theory must help mediators to understand how to handle power imbalances whilst remaining facilitative.⁹¹ In other words, mediation theory must find a way to explain and uphold the role of the modern mediator. Rather than acknowledging the issues surrounding mediator intervention and providing a solution to them, replacing neutrality with a different concept risks leaving mediator practice in just as much, if not more, confusion than before. Crowe and Field subsequently describe mediator impartiality as an 'empty' concept that does little to alleviate the problems associated with mediator neutrality.⁹² The goals sought by commentators such as Boule – effectively to enable mediator evaluation – can also be achieved through redefining mediator neutrality and clarifying what is permissible under the concept. Either way, mediation theory needs to provide mediators with clear examples of when a departure from neutrality (or impartiality, if that term is to be adopted in the future) is allowed. This is not readily available under current orthodox theory where mediators are supposedly confined to the dominant facilitative framework. Interestingly, the idea of mediator impartiality will be

⁸⁷ Laurence Boule, *Mediation: Principles, Process, Practice* (2nd edn, LexisNexis 2005) 23-26.

⁸⁸ Shyam Kishore, 'The Evolving Concepts of Neutrality and Impartiality in Mediation' (2006) 32(2) *Commonwealth Law Bulletin* 221, 221.

⁸⁹ Jonathan Crowe and Rachael Field (n 86) 275.

⁹⁰ Hilary Astor (n 13) 227.

⁹¹ *ibid* 227.

⁹² Jonathan Crowe and Rachael Field (n 86) 277.

revisited in *chapter six* with regards to data from the mediator interviews, revealing that some family mediators in England and Wales prefer an alternative interpretation of neutrality.

Another proposal is to view neutrality as an aspiration and a goal, rather than an achievable objective.⁹³ To Mayer, this is ‘the clearest and most meaningful’ interpretation available because it recognises the difficulty in applying neutrality to mediator practice. Similarly, Rothman promotes reflexivity, a social science theory that requires researchers to consider ‘the relationship between self, other, and context’.⁹⁴ A reflexive standard requires its actors to consider the influence of their actions on social life. In line with Rothman, mediators taught to think reflexively would have to consider how neutrality impacts the parties and proposed settlement. However, neutrality as an aspiration still generates confusion and ambiguity.⁹⁵ Mediators would struggle to prove that they upheld neutrality as an aspiration, meaning that the likelihood of mediation being perceived as fair or just is decreased. There is thus a risk that mediator neutrality as an aspiration would become a ticking exercise with little meaning in practice, rendering a mediator unaccountable for her actions.

Mediator neutrality is, in the words of Astor, ‘firmly embedded in the theory and practice of mediation’.⁹⁶ Removing the concept is impossible without creating severe repercussions for family mediators. This thesis takes the position that neutrality is valuable in mediation theory and can be reconstructed in a way that ensures access to justice post-LASPO. Nolan-Haley summarises this proposal: rather than replace or remove neutrality altogether, the ‘real question’ is whether ‘absolute neutrality’ is justified and how it can be reformed.⁹⁷ Mediator neutrality itself is not inherently problematic, but rather its purist, absolute interpretation that dominates discussions and prevents reform. It is thus preferable to consider how the dominant interpretation of mediator neutrality can be reworked to align with the demand for flexibility. This thesis argues that mediator neutrality must be reconceptualised if the modern mediator is to be seen to provide good, rather than bad, mediation. This further requires the facilitative to evaluative frameworks of mediator practice to be reinstated as a continuum. Such reform could potentially support access to justice in the post-LASPO landscape where mediators are increasingly expected to evaluate following the withdrawal of legal support. By reinstating the fluidity of Riskin’s continuum, a mediator can move towards evaluation and carry out some of

⁹³ Bernie Mayer (n 46) 863.

⁹⁴ Jay Rothman, ‘The Reflexive Mediator’ (2014) 30(4) *Negotiation Journal* 441, 443.

⁹⁵ Astor herself acknowledges that reflexivity is ambiguous: Hilary Astor (n 13) 227-228.

⁹⁶ *ibid* 236.

⁹⁷ Jacqueline Nolan-Haley, ‘Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking’ (1998) 74(3) *Notre Dame Law Review* 775, 837.

the tasks previously fulfilled by solicitors, satisfying the increasing demand and need for flexibility.

3.4 Conclusion: justifying the research study

Chapter three has identified numerous weaknesses in the orthodox conceptualisation of mediation theory and the limited mediator. To summarise, the traditional (and dominant) interpretation of mediator practice is binary, confining the mediator to a facilitative framework. This orthodox view – and the continued dominance of the limited mediator role – is a by-product of the sacrosanct concept of absolute mediator neutrality. Yet the strict binary is difficult to apply in practice, as evidence suggests that mediators evaluate. This has led to the use of an evaluative framework that is routinely concealed by a strong adherence to the facilitative doctrine. Many mediators appear to take on the role of the modern mediator, but hide this practice to ensure consistency with the orthodox conceptualisation. The lack of explicit recognition that mediators evaluate is a particular issue in the contemporary climate because it prevents the flexibility desired by many who attend mediation with complex disputes and have little access to legal support. However, existing proposals to replace neutrality with a different concept, or view it as an aspiration, are largely deficient as they continue to shroud mediator practice in ambiguity.

Consequently, this chapter has argued that neutrality must be reinterpreted in a way that is compatible with the reinstatement of the facilitative and evaluative mediation practice frameworks as a continuum along which mediators are permitted to move fluidly. Without reform at a theoretical, intrinsic level, the demand for flexibility cannot be satisfied. This chapter has also shown that the existence of evidence to suggest that mediator evaluation is commonplace (and the idea of absolute neutrality is subsequently flawed) provides a basis for challenging traditionalist conceptualisations of family mediation in the light of contemporary practice and understanding. In order for the modern mediator to fully respond to the post-LASPO climate, she must be allowed to move towards the evaluative end of the continuum. The remainder of the thesis tests, and further develops, these arguments through original research on how regulatory bodies and the mediator profession have conceptualised mediation.

Chapter 4. Methods, methodology and other considerations

Chapter three argued that the traditional theoretical framework around family mediation is problematic because it prevents general discussion from recognising the modern mediator and fails to capture the range of techniques fundamental to conducting mediation in the post-LASPO world. This chapter subsequently contends that the conceptualisation (and thus meaning) of family mediation and the role of the mediator must be investigated through a variety of perspectives. It lays out and justifies the socio-legal nature of a two-stage approach to the empirical work within this thesis: a text analysis of family mediation Codes of Practice and interviews with family mediators. This chapter then explains the data collection, analysis stage and relative benefits of the research. Altogether, these sections demonstrate the overall contribution of this thesis – a fresh and innovative interpretation of the contemporary understanding of family mediation and access to justice.

4.1 A socio-legal study on family mediation

This thesis is *socio-legal* in nature. As the term suggests, socio-legal research examines law *in* society, rather than law *and* society. Eekelaar and Maclean explain that socio-legal scholarship assesses how ‘the form and content of law’ become ‘social reality’.¹ A set of laws is not enough by itself to have meaning; legal rules must somehow translate into social reality and the everyday lives of agents to have effect. This is particularly relevant where family mediation is a form of dispute resolution typically conducted outside of court. In particular, traditional methods of doctrinal legal analysis are incapable of yielding relevant evidence on not only what family mediation means, but how it operates. Rather than investigate the application of doctrinal law, this thesis recognises that the law and family mediation are social phenomena, influenced by actors, and thus must be studied in their social context.

Socio-legal studies are typically supported through empirical research.² The approach tends to use ideas from social sciences as a method through which to collect data, rather than consider the law from a sociological angle.³ This is also true for this thesis, which collects data to

¹ John Eekelaar and Mavis Maclean, *A Reader in Family Law* (Oxford University Press 1994) 2.

² The meaning and reach of socio-legal studies has come into question in recent years. For further information, see David Cowan and David Wincott (eds), *Exploring the 'Legal' in Socio-Legal Studies* (Palgrave Macmillan 2016); Dermot Feenan (ed), *Exploring the 'Socio' of Socio-Legal Studies* (Palgrave Macmillan 2013).

³ Reza Banakar and Max Travers, ‘Introduction’ in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005) x; Reza Banakar and Max Travers, ‘Introduction to Section Six’ in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005) 279.

understand the conceptualisation of family mediation in its legal context rather than its wider social structures. This project could be labelled as ‘policy-driven socio-legal research’, as acknowledged by Travers, which seeks to ‘improv[e] the effectiveness and fairness of legal services.’⁴ It generates data on how the conceptualisation of family mediation has developed, and how the process could support access to justice in the post-LASPO era. This is further demonstrated through the aims and subsequent research questions of this thesis, as set out below.

4.1.1 Research aims

The aim of this thesis is to understand the conceptualisation, effectively the *meaning*, of family mediation, specifically in the contemporary post-LASPO climate. However, meaning cannot be determined by only one stance or perspective. Sarat and Felstiner acknowledge that:

‘...meaning is found and invented in the variety of locations and practices that comprise the legal world... those locations and practices do not exist outside the sites of signification that, in turn, make them meaningful.’⁵

Similarly, there is no single meaning of family mediation. There may be infinite interpretations of the process, particularly because regulatory bodies, mediators and disputants may come to mediation with different goals and expectations. Each meaning holds importance and contributes to the dominant understanding of family mediation post-LASPO. The objective of this thesis is not to examine how mediation is enforced, but how the meaning of mediation (and the role of the mediator) is constructed in the contemporary landscape.

If each actor constructs meaning differently, this thesis must acknowledge the conceptualisation of family mediation from numerous viewpoints. A comprehensive study on the meaning of family mediation would encompass at least three perspectives. First, how are family mediation and the role of the mediator conceptualised by *regulatory bodies*? Second, how do *mediators* understand mediation and their role within it? Third, how do *mediation users* conceptualise mediation and their expectations of the mediator?⁶ Such an expansive project is beyond the remit of this thesis, which was instead designed to focus on the first two groups – regulatory bodies and mediators. Overall, the study adds to the currently lacking evidence base

⁴ Max Travers, ‘Evaluation Research and Legal Services’ in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005) 343.

⁵ Austin Sarat and William L F Felstiner, *Divorce Lawyers and their Clients: Power & Meaning in the Legal Process* (Oxford University Press 1995) 11.

⁶ Additional strands could be added to this empirical research design, such as the conceptualisation of family mediation from the perspective of the state, judiciary, legal profession and general public.

on family mediation post-LASPO and paves the way for future research on the dominant conceptualisation of family mediation from the perspective of its users.

4.1.2 Research questions

Before setting out the methods of this thesis, it is important to return to its research questions. As set out in the *Introduction*, this thesis asks: *what is the dominant conceptualisation of family mediation and the role of the family mediator in the contemporary climate?* It also considers a follow-up question: *how far does this dominant conceptualisation support access to justice within family mediation?* Through these two questions, this thesis aims to understand how far, if at all, mediator neutrality can be aligned with the demand for flexibility (and therefore permit the modern mediator), and, moreover, whether mediation discourse can be reshaped to respond to the need for access to justice in the post-LASPO climate.

4.2 Methodology

It is worth emphasising the strengths of a dual methods approach to data collection and analysis. The original research conducted for this thesis comprises two strands. It first involves a text analysis of family mediation Codes of Practice, followed by interviews with family mediators.

The text analysis study alone does not provide findings on what Webley describes as ‘the subtleties of individual practice’.⁷ Phase two of the research, the mediator interviews, was therefore designed to build upon the Codes of Practice and produce findings on mediators’ conceptualisation of family mediation. Combined, the text analysis and qualitative interviews provide a plethora of data on the dominant conceptualisations of family. Findings are not constrained to one perspective, widening the scope of the research. Eekelaar, Maclean and Beinart adopted a similar approach when they observed the daily work of solicitors alongside interviews as part of a larger study on the daily work of divorce lawyers.⁸ The researchers praised the ‘combination of the two techniques’ for creating ‘an accurate picture of the daily workings of a family law practice’, strengthening the validity of their findings.⁹ Ultimately, the use of dual methods in this thesis provides a much-needed, and wide, insight into access to

⁷ Lisa C Webley, *Adversarialism and Consensus? The Professions’ Construction of Solicitor and Family Mediator Identity and Role* (Quid Pro 2010) 9.

⁸ John Eekelaar, Mavis Maclean and Sarah Beinart, *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing 2000).

⁹ *ibid* 36.

justice and family mediation after LASPO that is currently unavailable in the mediation literature.

4.2.1 Phase One: Regulatory Bodies and Codes of Practice

The first phase of this research for this thesis involved a qualitative text analysis. It analysed the content of Codes of Practice for family mediators in England and Wales. This assessed the conceptualisation of family mediation from the perspective of regulatory bodies post-LASPO and considered its development in the modern family justice system over time. Rather than interview representatives of the different regulatory bodies (such as those sitting on a Board of Trustees), this study sought to generate data on the dominant messages that mediators received from regulatory bodies. As Webley identifies in relation to legal practice, regulatory bodies instil particular values and principles in their members, and these norms are often constructed through Codes of Practice.¹⁰ Some family law research suggests that Codes of Practice influence legal professions. For example, Mather, McEwen and Maiman, through conducting interviews with solicitors, found that Codes of Practice symbolised a 'larger professional community' for lawyers and were a 'source of both identity and esteem'.¹¹ Thus, Codes of Practice may contribute towards the professional identity of family mediators and shape their practice. A text analysis of Codes of Practice was subsequently deemed appropriate for phase one of the research.

Codes of Practice only feature to a limited extent as a source of data in the family law literature. Barlow, Hunter, Smithson and Ewing briefly considered family mediation Codes of Practice in relation to domestic abuse.¹² They commented that allowing domestic abuse cases to be heard in mediation overlooked how severe power imbalances could compromise 'voluntary participation, fairness and safety'.¹³ Maclean and Eekelaar also acknowledged that the distinction between information and advice made in Codes of Practice was difficult for mediators to maintain in their everyday work.¹⁴ These studies drew some useful yet piecemeal insights from Codes of Practice. They did not analyse the Codes of Practice any further or consider how far regulatory bodies conceptualise family mediators as professionals with a

¹⁰ Lisa C Webley (n 7).

¹¹ Lynn Mather, Craig A McEwen and Richard J Maiman, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (Oxford University Press 2001) 46.

¹² Anne Barlow and others, *Mapping Paths to Family Justice: resolving family justice in neoliberal times* (Palgrave Macmillan 2017).

¹³ *ibid* 102.

¹⁴ Mavis Maclean and John Eekelaar, *Lawyers and Mediators: The Brave New World of Services for Separating Families* (Hart Publishing 2016) 79-81.

limited facilitative or modern evaluative remit. Whether, and if so how, Codes of Practice have developed over time has also been overlooked in research. The study conducted for this thesis does each of those things. It builds upon the work of Webley, whose monograph, published in 2010, assessed the approaches of solicitors and mediators in divorce disputes in light of professional training, accreditation and their Codes of Practice.¹⁵ Webley scrutinised two Codes of Practice on family mediation from the Law Society and UK College of Family Mediators (UKCFM) respectively. Her findings showed that the UKCFM (the main regulatory body for family mediation at the time) emphasised facilitation in its Code of Practice, whilst the Law Society adopted a 'half way approach' that enabled some flexibility.¹⁶ The Codes of Practice analysed by Webley have since been superseded. Webley's work remains a valuable backdrop to this thesis, though her discussion of the mediation Codes of Practice was largely descriptive, functioning as a small part of a more broadly conceived study. The study conducted for this thesis goes further by providing a comprehensive analysis of the conceptualisation of family mediation in Codes of Practice over time that is rooted in the theoretical foundations established in *chapters one to three*. In particular, it considers how the Codes of Practice depict evaluative mediation strategies, relative to facilitative strategies, and thus permit the modern mediator.

It is also unclear how far Codes of Practice are scrutinised by the state and regulatory bodies themselves. The 2012 Norgrove Report emphasised the importance of consistent standards throughout mediation to ensure 'effective regulation'.¹⁷ However, Norgrove acknowledged that the FMC had struggled to regulate family mediation.¹⁸ Parts of the subsequent McEldowney Review considered how far regulatory documents published by the Member Organisations were in line with the FMC's Code of Practice.¹⁹ The Committee did not, however, consider how family mediation was conceptualised within these documents. The 2014 Family Mediation Task Force was also silent on this matter: its section on regulation, spanning just four paragraphs, was solely focused on mediator referrals.²⁰ The FMC is currently conducting a Standards Review which covers four broad areas: accreditation; complaints; 'the format and status of all standards, codes and guidance notes'; and, drafting documents.²¹ Unfortunately, there is a lack of information about the review to date. Newsletters are published on the FMC

¹⁵ Lisa C Webley (n 7).

¹⁶ *ibid* 178.

¹⁷ Family Justice Review, *Family Justice Review: Final Report* (Crown 2011) para 4.102.

¹⁸ *ibid* para 4.104.

¹⁹ John McEldowney, *Family Mediation in a Time of Change: FMC Review Final Report* (FMC 2012).

²⁰ Family Mediation Task Force, *Report of the Family Mediation Task Force* (Ministry of Justice 2014) paras 78-81.

²¹ Family Mediation Council, 'FMC Newsletter: September 2018' (FMC 2018) <www.familymediationcouncil.org.uk/wp-content/uploads/2018/09/FMC-Newsletter-September-2018.pdf> accessed 21 April 2020.

roughly every two months and tend to include one paragraph on the Standards Review.²² As of March 2021, it appears that the FMC has focused on accreditation. Phase one of this thesis is thus a timely response to the absence of research around family mediation Codes of Practice and, more specifically, their significance in the post-LASPO climate.

4.2.1.1 Regulatory documents on family mediation: selection and sampling

The piecemeal regulation of family mediation is a significant backdrop to this research. In contrast to the Law Society, a long-standing organisation that has regulated the legal profession since 1845,²³ the FMC became the governing body for family mediation services in 2007,²⁴ nearly 30 years after family mediation was first introduced in England and Wales.²⁵ *Chapter five* tracks the development of the facilitative-to-evaluative framework in Codes of Practice from the mid-1980s to the modern landscape, using a number of regulatory documents from throughout this period.

The following discussion explains how the Codes of Practice were selected for this study. It also provides an overview of the many family mediation organisations – and their Codes of Practice – established in the last four decades. In total, six Codes of Practice were selected for analysis. These documents are separated into two groups. The first group comprises Codes of Practice that are no longer in force and predate the 21st century (1985-1998). This purposive sample of three regulatory documents reflects mediation's introduction into the family justice system and provides a valuable insight into the orthodox understanding of mediation. The second group of documents comprises another three Codes of Practice that were in force at the time of the study (2018-2019). Combined, these sources make up a representative sample to assess regulatory bodies' modern, dominant conceptualisation of family mediation.

²² Family Mediation Council, 'News' (FMC 2020) <www.familymediationcouncil.org.uk/news/> accessed 27 March 2020.

²³ Law Society, 'Our governance' (Law Society 2020) <www.lawsociety.org.uk/about-us/our-governance> accessed 7 September 2020.

²⁴ John McEldowney (n 19) 28.

²⁵ Anne Bottomley, 'Resolving family disputes: a critical review' in Michael Freeman (ed), *State, Law, and the Family* (Tavistock Publications 1984) 294; Lisa Parkinson, *Conciliation in Separation and Divorce* (Routledge 1986) 72.

4.2.1.2 Group one: historical regulatory documents from 1985-1998

Three historical Codes of Practice were selected for analysis. These Codes were identified through examining the literature on family mediation, in particular practitioner guides and historical overviews of the process. It became clear during the data collection that a strong sampling strategy involved sampling all the Codes of Practice published in the late 20th century. Unfortunately, there was a lack of accessible literature on the family mediation movement during the late 20th-century that considered the development of regulatory bodies and Codes of Practice. Two particular problems were encountered. The first issue related to identifying these sources. Most materials on family mediation regulatory bodies were unavailable online and difficult, if not impossible, to locate in a physical format. This particular issue was heightened following the COVID-19 pandemic where university and public libraries were shut for several months.²⁶ This led to the second problem: broadening the selection and sampling strategy in such a manner was particularly time-consuming. It was, simply put, impractical for the researcher to dedicate more time to identifying these sources. The selection and sampling stages were therefore somewhat blurred for the first group of regulatory documents analysed in this study: the three historical Codes of Practice were not necessarily selected over other documents, but remain a valuable source of data for this thesis.

Soon after the early family mediation pilots in the late 1970s and early 1980s, family mediators searched for a single regulatory body. This led to the founding of the National Family Conciliation Council (NFCC).²⁷ Their 1984 Code of Practice was the earliest Code of Practice identified in this project.²⁸ Text analysis was carried out on the NFCC's 'Extended Code of Practice', released the following year in 1985.²⁹ The later version was selected for the study as it provided further information on the expectations of regulatory bodies at the start of family mediation's development.

While the introduction of the NFCC was revolutionary in terms of its potential to bring mediators together, it also reflected the beginning of piecemeal regulation around family mediation. The organisation was renamed the National Association of Family Mediation and Conciliation Services, and later NFM. NFM represented not-for-profit family mediation services, reflecting a time when mediators tended to have a therapeutic background and only mediated

²⁶ Interlibrary loans remain unavailable to students at the researcher's institution at the time of submission.

²⁷ UK College of Family Mediators, *UK College of Family Mediators: Directory & Handbook 1997/98* (Sweet & Maxwell 1997) A4.

²⁸ National Family Conciliation Council, 'The Code of Practice for Conciliation Services' (1984) 14 *Family Law* 107.

²⁹ National Family Conciliation Council, 'Extended Code of Practice for Family Conciliation Services' (1985) 15 *Family Law* 274.

children-related matters. By contrast, mediators working in the private sector or conducting all-issues mediation joined the FMA, created in 1989.³⁰ In 1994, NFM and FMA released a 'Joint Code of Practice' to promote consistency across mediator practice.³¹ This was the second document analysed in the study. As *chapter five* will show, NFM and FMA's Code continued to project a primarily facilitative framework for mediators but permitted some evaluation, and, therefore, a continuum of strategies for mediators to use.

Demand for a unifying set of standards for family mediators was heightened following the introduction of public funding for family mediation after the Family Law Act 1996. Interestingly, the legislation stipulated that any mediator conducting legal aid mediation must follow a Code of Practice.³² In response, the NFM and FMA, alongside Family Mediation Scotland,³³ founded the UKCFM. UKCFM is widely regarded as the first regulatory body for family mediators in England and Wales.³⁴ It established a national accreditation scheme for mediators and its own Code of Practice in 1998.³⁵ This was the third historical document studied in this thesis, although its content largely echoed NFM and FMA's Joint Code of Practice.

Table three summarises these three Codes of Practice. It also lists the sources these documents were discovered in during data collection, such as the NFCC's Code of Practice being located in the Family Law Journal.³⁶ These documents are no longer enforced or used by regulatory bodies but remain crucial to understanding the orthodox conceptualisation of family mediation and mediator during the 1980s and 1990s.

³⁰ Marian Roberts, *Mediation in Family Disputes: Principles of Practice* (3rd edn, Ashgate Publishing 2008) 50.

³¹ UK College of Family Mediators (n 27) A7.

³² Marian Roberts (n 30) 237; Family Law Act 1996, s 27.

³³ Family Mediation Scotland is now part of Relationships Scotland. For further information, see Anne Hall Dick, 'Family Mediation: the Scottish Perspective' in Marian Roberts and Maria Federica Moscati (eds), *Family Mediation: Contemporary Issues* (Bloomsbury Professional 2020).

³⁴ Marian Roberts (n 30) 6.

³⁵ UK College of Family Mediators, *UK College of Family Mediators: Directory & Handbook 1998/99* (Sweet & Maxwell 1998) A169.

³⁶ It is unclear whether the three Codes of Practice were originally published in these sources or alternatively published through them to spread awareness.

Table three: The three repealed Codes of Practice selected for text analysis

No.	Organisation	Title	Year	Source
1	National Family Conciliation Council (NFCC)	'Extended Code of Practice for Family Conciliation Services'	1985	Family Law Journal
2	National Family Mediation (NFM) and Family Mediators' Association (FMA)	'Joint Code of Practice'	1994	UK College of Family Mediators Directory & Handbook 1997/98
3	UK College of Family Mediators (UKCFM)	'Code of Practice'	1998	UK College of Family Mediators Directory & Handbook 1998/99

4.2.1.3 Group two: contemporary documents from 2018-2019

Three current Codes of Practice were then selected for analysis. They were selected according to straightforward eligibility criteria: the Code of Practice was in force at the time of study and published by a family mediation regulatory body (including Member Organisations). In order to create a reliable picture of how regulatory bodies understood mediation at the time of the study, Codes of Practice from the early 2010s were not selected. Rather, it was crucial for the thesis to consider regulatory documents that were currently enforced to understand the conceptualisation of family mediation from the perspective of regulatory bodies during this snapshot in time. Unlike the first group of documents, these sources were relatively easy to locate. They were all available online from their respective regulatory bodies and accessible to the public. Following selection, a representative sample of all three Codes of Practice was analysed.

The FMC was created in late 2007³⁷ to act as a 'unified body for family mediation to negotiate with government and other parties'.³⁸ This replaced UKCFM which later became the College of Mediators.³⁹ For the most part, the rationale behind replacing UKCFM is unclear, though Roberts writes that family mediation training providers 'withdrew their increasingly ambivalent support' for the organisation over time.⁴⁰ She refers to the growing number of memberships available to mediators despite their 'limited arena of practice', meaning competition amongst the profession increased. Thus, evidence suggests that the FMC was introduced to provide a

³⁷ John McEldowney (n 19) 28.

³⁸ Resolution, 'New group will be "voice of mediation" in UK (Resolution 2007) <https://web.archive.org/web/20160913051128/http://www.resolution.org.uk/news-list.asp?page_id=228&page=1&n_id=21&n_year=2007&n_month=10> accessed 3 April 2020.

³⁹ Lorraine Bramwell, 'The UK College of Family Mediators' (2008) 38(2) *Family Law* 172.

⁴⁰ Marian Roberts, 'Quality Standards for Family Mediation Practice' (2010) 40(6) *Family Law* 661, 663.

one-stop-shop for family mediators in relation to their accreditation, training and continuing professional development.

The FMC is described as an ‘umbrella organisation representing the professional bodies of family mediation’.⁴¹ It has five Member Organisations:⁴²

1. FMA: representing private services (traditionally conducting all-issues mediation);⁴³
2. The Law Society: the generalist regulatory body for solicitors in England and Wales;⁴⁴
3. NFM: representing not-for-profit services (traditionally mediating child-related disputes);
4. Resolution: an organisation of predominantly family lawyers;⁴⁵
5. College of Mediators: an organisation for mediators in any area, such as community mediation or workplace mediation.

Most Member Organisations published their own Codes of Practice until the FMC introduced its guidance in 2010. The number of Codes of Practice in England and Wales has dramatically decreased since this date. Maclean and Eekelaar found that the NFM, FMA and Law Society (as well as a previous Member Organisation, ADRgroup) had repealed their Codes of Practice by 2012.⁴⁶ The Codes of Practice currently followed by each Member Organisation are visualised in *table four*. In the post-LASPO context, only two Member Organisations enforce their own Codes of Practice: the College of Mediators and Resolution. These organisations are, however, still bound to follow the FMC’s overarching Code of Practice.

⁴¹ John McEldowney (n 19) 5.

⁴² The ADRgroup was another Member Organisation, removed from the FMC’s list of affiliated institutions in 2019. For a comparison of lists, contrast Family Mediation Council, ‘About Us’ (FMC 2017) <<http://web.archive.org/web/20170925214007/https://www.familymediationcouncil.org.uk/us/>> accessed 3 April 2020, with Family Mediation Council, ‘About Us’ (FMC 2019) <www.familymediationcouncil.org.uk/about-us/> accessed 21 May 2019.

⁴³ Private services are understood as mediation services run by individuals or companies with the intention of making profit.

⁴⁴ Whilst there are no statistics on the number of family lawyer mediators, family law is said to be well represented’ in the Law Society. See Anne Barlow and others (n 12) 21.

⁴⁵ Mavis Maclean and John Eekelaar (n 14) 70-71.

⁴⁶ *ibid* 79.

Table four: The five family mediation Member Organisations in England and Wales

No.	Organisation	Does this Member Organisation publish its own Code of Practice?	Does this Member Organisation follow FMC's Code of Practice?
1	College of Mediators	Yes (see table five)	Yes
2	FMA	No	Yes
3	The Law Society	No	Yes
4	National Family Mediation	No	Yes
5	Resolution	Yes (see table five)	Yes

The fourth, fifth and sixth Codes of Practice analysed in this study are summarised in *table five*. The fourth Code of Practice was the FMC's overarching 'Code of Practice for Family Mediators', last updated in 2018.⁴⁷ As noted above, this document binds all registered family mediators in England and Wales. The fifth document was Resolution's 'Guide to Good Practice', although there was no direct hyperlink to the document on their website as of early 2019, possibly indicating that Resolution no longer intends to enforce their guidance.⁴⁸ The College of Mediators last updated its 'Code of Practice for Mediators' in 2019 and was the final regulatory document selected for this study.⁴⁹

Table five: The three current Codes of Practice selected for text analysis

No.	Organisation	Title	Year	Source
4	FMC	<i>Code of Practice for Family Mediators</i>	2018	www.familymediationcouncil.org.uk
5	Resolution	<i>Guide to Good Practice on Mediation</i>	2018	www.resolution.org.uk/
6	College of Mediators	<i>Code of Practice for Mediators</i>	2019	www.collegeofmediators.co.uk/

4.2.1.4 Data analysis

Codes of Practice were first analysed via qualitative text analysis in Summer 2018, with additional analysis carried out in 2019. In general, the study of texts recognises that a document is a 'product' of an agent (or group of agents) and thus must be understood in its broader social context.⁵⁰ This is recognised by Atkinson and Coffey, who describe documents as 'social facts'

⁴⁷ Family Mediation Council, *Code of Practice for Family Mediators* (FMC 2018).

⁴⁸ Resolution, *Guide to Good Practice on mediation* (Resolution 2018).

⁴⁹ College of Mediators, *Code of Practice for Mediators* (College of Mediators 2019).

⁵⁰ Lindsay Prior, *Using Documents in Social Research* (SAGE Publications 2003) 4.

that are 'produced, shared and used in socially organised ways'.⁵¹ This thesis follows a similar idea by understanding texts as social information that generate data on the perspectives of different groups or organisations. Text analysis is a qualitative method often employed by social scientists to understand the meaning and intended effect of a document. It enables the researcher to not only gather information about a particular practice or event, but their different interpretations.⁵² In the words of Seneviratne, text analysis 'involves an interpreting of texts, and an exploration of how the participants understand their own actions.'⁵³ While a researcher cannot say with absolute certainty whether a particular agent would interpret a text in a particular way, McKee argues that textual analysis involves making reliable and reinforced inferences from the document in such a way that a likely conclusion is reached.⁵⁴ Codes of Practice were thus analysed to understand regulatory bodies' likely conceptualisation of family mediation both before and after LASPO.

The data were coded through the computer program NVivo. Different words, phrases and sections in Codes of Practice were coded into 'nodes'. The majority of nodes involved deductive coding and were predetermined before analysis. This includes *facilitative* and *evaluative frameworks*, *neutrality*, *autonomy*, *settlement* and *the role of solicitors*. Some nodes, in contrast, emerged during analysis (inductive coding), such as *evaluation by facilitative proxy*. Patterns in the data were also uncovered through a cross-tabulation of different nodes.

4.2.2 Phase Two: Interviews with Family Mediators

Interviews are a frequently used research method in socio-legal studies and empirical research in general.⁵⁵ They are a common source of data for family law researchers studying a variety of procedures and concepts,⁵⁶ including mediation.⁵⁷ First and foremost, open or semi-structured

⁵¹ Paul Atkinson and Amanda Coffey, 'Analysing Documentary Realities' in David Silverman (ed), *Qualitative research: Issues of Theory, Method and Practice* (3rd edn, SAGE Publications 2011) 79.

⁵² Alan McKee, *Textual Analysis* (SAGE Publications 2011) 14.

⁵³ Mary Seneviratne, 'Researching Ombudsmen' in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005) 171.

⁵⁴ Alan McKee (n 52) 15.

⁵⁵ Most empirical work uses interviews as a research instrument (to understand the participants' perspectives) rather than a social practice (to understand how the participants provide an account). See Svend Brinkmann and Steinar Kvale, *Interviews: Learning the Craft of Qualitative Research Interviewing* (3rd edn, SAGE Publications 2015) 51.

⁵⁶ Examples include Austin Sarat and William L F Felstiner (n 5); Liz Trinder and others, *Litigants in person in private family law cases* (Ministry of Justice 2014); Leanne Smith, Emma Hitchings and Mark Sefton, *A study of fee-charging McKenzie Friends and their work in private family law cases* (Cardiff University 2017).

⁵⁷ For instance, see Gwynn Davis, *Report of a Research to Monitor the Work of the Bristol Courts Family Conciliation Service in its First Year of Operation* (University of Bristol 1980); Anne Barlow and others (n 12); Emma Hitchings and Joanna Miles, 'Mediation, financial remedies, information provision and legal advice: the post-LASPO conundrum' (2016) 38(2) *Journal of Social Welfare and Family Law* 175.

interviews provide flexibility. Questions asked by the interviewer are usually prepared in advance but can be adapted during the interview to gain further information. Interviews additionally tend to involve a faster turnaround (from data collection to analysis) compared to other research methods, such as observations. Importantly, interviews generate data on why a participant expresses a certain viewpoint, rather than what they do in practice.⁵⁸ It was subsequently decided that interviews were the most appropriate research method to study mediators' conceptualisation of family mediation.

Phase two studied the perspective of mediators through qualitative semi-structured interviews. Interviews are a form of conversation that generate data on a participant's reality and the meaning they attribute to a particular process.⁵⁹ This idea is summarised by Magnusson and Marecek: 'in a research interview, the interviewer asks the participant to explain herself and her world'.⁶⁰ In essence, the objective of the interviews in phase two was to obtain knowledge on mediators' interpretation of family mediation. This includes the potential steps a mediator felt she could take in light of a power imbalance, her approaches to information and advice, and the impact of LASPO. The use of interviews as a research method enabled mediators to have a voice in this thesis and contextualise the many findings uncovered throughout its development. It furthermore aided the researcher in considering and developing any findings arising from the text analysis, specifically the new theoretical framework set out in *chapter five*.⁶¹

4.3.2.1 Selection and sampling

Data collection for the phase two interviews provided flexibility but was more time-consuming than the phase one text analysis. First, mediators were selected for participation in the study. A list of potential participants was collated via the FMC's 'Find a Mediator' tool.⁶² This webpage allows users to search for local mediators and provides information about their service, legal aid provision and length of experience. The contact details of 90 mediators and their services were logged on an encrypted spreadsheet.⁶³ An invitation to interview was sent to 25

⁵⁸ John Eekelaar, Mavis Maclean and Sarah Beinart (n 8) 200.

⁵⁹ Svend Brinkmann and Steinar Kvale (n 55) 3.

⁶⁰ Eva Magnusson and Jeanne Marecek, *Doing Interview-based Qualitative Research: A Learner's Guide* (Cambridge University Press 2015) 6.

⁶¹ 'Interviewing is well suited to the exploration of complex issues... [and is] well matched to explorative studies which seek to develop theories': Alison Bullock, 'Conduct one-to-one qualitative interviews for research' (2016) 27(4) *Education for Primary Care* 330, 330.

⁶² Family Mediation Council, 'Find Your Local Mediator' (FMC 2020) <www.familymediationcouncil.org.uk/find-local-mediator/> accessed 27 March 2020.

⁶³ This spreadsheet was password protected and stored on Cardiff University's encrypted database. It was deleted after data collection was completed.

mediators in June 2019, and a further 13 mediators in July. Three additional mediators were recruited through snowballing. Potential interviewees were selected with the intention of creating a purposive – rather than representative – sample of mediators with a range of backgrounds and experiences. The relevant characteristics were: location, length of experience, professional background, affiliated Member Organisation and legal aid provision. These are set out in the tables below and *appendix one*. While the sample does not account for every individual conceptualisation of family mediation and the role of the mediator as the number of different conceptualisations is effectively infinite, saturation point was reached in relation to mediators’ dominant interpretations.

All mediators were sent a ‘Participant Information Sheet’ (*appendix two*). Interviewees were enthusiastic about the project, often referencing a lack of research in the area. The date, time and location for all interviews were arranged via email.⁶⁴ Mediators were then sent a ‘Consent Form’ one week before their interview (*appendix three*). They were asked to consent to first, being interviewed, second, being recorded and, third, the interview being analysed and used in future academic outputs. A physical copy of the ‘Consent Form’ was signed by the mediator on the day of the interview. All interviews were recorded on an electronic device and followed a predesigned, semi-structured interview schedule (*appendix four*).

17 family mediators were interviewed in total. Interviews were conducted in July and August 2019, with one additional interview in September. The length of interviews ranged from 34 minutes 40 seconds to 1 hour 49 minutes 34 seconds, with an average time of 59 minutes 18 seconds.

Mediators were sampled according to region. While the sample of mediators could have spanned the entirety of England and Wales to potentially provide a full picture of mediators’ perspectives across the two countries, the numbers of mediators from each region would have been relatively low. There would have, therefore, been little opportunity to identify any regional differences in the sample. The scope of the sample by location was subsequently reduced to three areas: South Wales, the South West of England and London. These areas were selected for broadly pragmatic reasons in that they were easier for the researcher to travel to and therefore conduct the interviews. As listed in *table six*, six family mediators were interviewed in South Wales, another six in the South West of England and five in London.

⁶⁴ All interviews were conducted face-to-face.

Table six: Mediators interviewed by region

Region	Number of Mediators
South Wales	6
South West England	6
London	5
Total	17

The sample was also designed to reflect varying levels of experience as a family mediator. An original intention behind the study was to understand how the conceptualisation of family mediation differed between generations of family mediators. However, the number of trainee mediators obtaining accreditation has plummeted in recent years. This is largely said to be a result of the closure of many mediation services post-LASPO, as well as numerous hurdles caused by a lack of funding and affordable mediator training opportunities.⁶⁵ These factors appeared to impact the sample. As listed in *table seven*, most of the sample had practised as a family mediator for over 20 years.⁶⁶ Newly qualified mediators were contacted during data collection, but only one interviewee had under five years' experience and another four participants with experience between five to ten years. Mediators who provided training for those seeking accreditation were also contacted in hopes of gaining participants through snowballing, but no responses were received. It was therefore of no surprise that the lack of newly accredited mediators became a noticeable theme in the data analysis, discussed in *chapter seven*.

⁶⁵ Bramwell discusses the difficulty in obtaining mediator training and accreditation post-LASPO, although her evidence is broadly anecdotal. See Lorraine Bramwell, 'Creative Paths to Practice: Helping New Mediators to Navigate the Route to Artistry' in Marian Roberts and Maria Federica Moscati (eds), *Family Mediation: Contemporary Issues* (Bloomsbury Professional 2020).

⁶⁶ A similar breakdown of mediator experience was found in the FMC's 2019 survey. Out of 122 family mediators who responded, under a third had less than 10 years' experience. Most respondents had over 20 years' experience as a family mediator. See Family Mediation Council, 'Family Mediation Survey 2019 – Results' (FMC 2020) <www.familymediationcouncil.org.uk/wp-content/uploads/2020/01/Family-Mediation-Survey-Autumn-2019-Results.pdf> accessed 27 March 2020.

Table seven: Mediators interviewed by experience

Length of Experience (years)	Number of Mediators
00-05	1
05-10	4
10-15	1
15-20	1
20-25	5
25-30	4
30+	1
Total	17

Whether this skew in the sampling matters depends on whether a mediator's length of experience impacts their conceptualisation of the process. This is unclear. As demonstrated through contrasting statements of interviewees 'Megan' and 'Judith':

'Do you think your practice differs compared to the other generation of mediators?'

Interviewer

'(pause) I don't know. Because the two people that I spent the most time with, shadowing, one was [MEDIATOR] but then she went to maternity leave. The most I've spent is with [MEDIATOR] and he is the older generation. He'll be retiring soon. Actually I've learnt A LOT off him and would have some similar ways of how I would practice. I don't know if I'd be that different. I have probably picked up a lot from him.' **Megan**

'I think sometimes some of my younger colleagues are like that, they don't have any, 'This is how it should be.' I like that and I hope I don't either. But some people do in their fifties, sixties, you know, 'This is how it should be because I've been doing this thirty years.' That's quite sad... I think my lot are beginning to go, and quite rightly. I think the next lot will be really interesting and they will bring this OPENNESS here. Certainly, a multicultural way of looking at it which is really, really helpful.' **Judith**

Megan, a mediator who qualified a year before the data collection began, felt her practice did not differ from her more experienced colleagues as she learnt from them. In contrast, Judith (qualified for over 25 years) suggested that Megan may be unaware of these differences and that newer, typically younger, mediators were more flexible in their approach. Nonetheless, no significant difference in responses amongst mediators with different lengths of experience was identified. This finding must be treated with some caution due to the low sample size of newly

experienced mediators and would have to be verified by further research into the effect of mediator experience on the conceptualisation of mediation. It is submitted that the sample, even if skewed, remains useful to the aims of this thesis, particularly as the study identified a dominant conceptualisation of family mediation adopted by mediators.

The professional background of the mediator, in contrast, had some impact on the findings. Mediators are generally separated into two sub-groups: lawyer mediators and therapeutic mediators. Lawyer mediators are typically solicitors who have later trained as mediators. Therapeutic mediators instead originate from a range of backgrounds. For instance, two mediators in the sample previously worked in the education system and another as a caseworker for a local charity. It was hypothesised that mediator background influenced mediators' perspectives and understandings. Sufficient samples of both groups were therefore reflected in the sample, with ten lawyer mediators and seven therapeutic mediators. However, five lawyer mediators had also taken on some therapeutic training throughout their career or also practised as a therapist, combining the two professions in their mediation practice. For this reason, the lawyer mediator sub-group was separated into participants from a purely legal background and those who had taken additional therapeutic training, as listed in *table eight*. Interestingly, the majority of mediators with a legal background continued their practice as a solicitor, whereas most therapeutic mediators only had a career in mediation at the time of the study.

Table eight: Mediators interviewed by professional background

Professional Background	Number of Mediators	Number practising as original profession
Lawyer	5	4
Therapeutic	7	1
Lawyer with Therapeutic Training	5	3
Total	17	17

Attention was also paid to mediators' affiliated Member Organisation when selecting potential interviewees. All but one of the five Member Organisations were reflected in the sample (*table nine*). The five lawyer mediators were members of the Law Society, whilst most lawyer mediators with therapeutic training joined Resolution. This possibly reflected Resolution's image as an organisation that promoted collaboration amongst the family law professions and was, in their words, 'committed to the constructive resolution of family disputes'.⁶⁷ The seven

⁶⁷ Resolution, 'Resolution – first for family law' (Resolution 2020) <www.resolution.org.uk/> accessed 28 March 2020.

therapeutic mediators were registered with either the College of Mediators or FMA. No mediators from NFM participated in the study, revealing a small limitation in the sample.⁶⁸

Table nine: Mediators interviewed by registered Member Organisation

Member Organisation	Number of Mediators	Background
Law Society	5	5 Lawyer 0 Lawyer with Therapeutic Training 0 Therapeutic
College of Mediators	4	0 Lawyer 0 Lawyer with Therapeutic Training 4 Therapeutic
Resolution	3	0 Lawyer 3 Lawyer with Therapeutic Training 0 Therapeutic
Family Mediators Association (FMA)	5	0 Lawyer 2 Lawyer with Therapeutic Training 3 Therapeutic
National Family Mediation (NFM)	0	N/A
Total	17	17

Participants were additionally selected on the basis of legal aid funding. *Table ten* shows that nine participants provided family mediation through legal aid. Interestingly, only three mediators in the sample never held a legal aid contract, suggesting that publicly funded mediation was more accessible before LASPO. The sample was thus divided into: participants who provided legal aid; participants who had only conducted privately funded mediation, and; participants who stopped providing legal aid work after LASPO. Six out of seven therapeutic mediators in the sample still provided legal aid at the time of interview, compared to one out of five lawyer mediators and two out of five lawyer mediators with therapeutic training.

⁶⁸ It appears the NFM membership has reduced since its introduction as the NFCC in the 1980s. The organisation now focuses on 'NFM Direct', an outreach programme operated across England and Wales. NFM Direct mediators are not necessarily members of NFM. For example, **Jessica** was registered with FMA, but discussed her work with NFM Direct (considered in *chapter seven*). This business model may have influenced the lack of NFM mediators in the sample.

Table ten: Mediators interviewed by legal aid provision

Legal Aid Provision	Number of Mediators	Background
Provides legal aid	9	1 Lawyer 2 Lawyer with Therapeutic Training 6 Therapeutic
Never provided legal aid	3	1 Lawyer 2 Lawyer with Therapeutic Training 0 Therapeutic
No longer provides Legal Aid post-LASPO	5	3 Lawyer 1 Lawyer with Therapeutic Training 1 Therapeutic
Total	17	17

The sample of family mediators reflected a largely female population. 14 participants were female, and three male (*table eleven*). Due to the low sample size of male mediators, this study did not consider the impact of gender on the conceptualisation of family mediation.⁶⁹

Table eleven: Mediators interviewed by gender

Gender	Number of Mediators
Female	14
Male	3
Total	17

4.3.2.2 Data analysis

The interview data were also analysed through coding in NVivo. Transcripts were analysed throughout data collection and later considered altogether via nodes and cross-tabulation in Autumn 2019. The majority of analysis related to the conceptualisation of family mediation and the mediator was deductive. This was because a particular aim of the thesis was to explore how the mediators' own conceptualisations of their practice could be mapped onto the facilitative-to-evaluative continuum. *Chapter five* introduces four mediator functions located in Codes of Practice, which are then identified in the interview data in *chapter six*. As the research in this thesis was conducted in two separate phases, the interviews were designed to understand how mediators themselves interpret these functions.

Though a deductive approach was taken, a number of important findings emerged during analysis. These results were distinct from the data on the facilitative-to-evaluative continuum

⁶⁹ The effect of gender on mediator practice has been studied in the Israeli context: Noa Nelson, Adi Zarankin, and Rachel Ben-Ari, 'Transformative Women, Problem-Solving Men? Not Quite: Gender and Mediators' Perceptions of Mediation' (2010) 26(3) *Negotiation Journal* 287.

within mediators' understanding of mediation. *Chapter seven* considers the emergent themes of contextual and structural problems with family mediation and potential ways forward for reform post-LASPO. Whilst these themes were not the central focus of the interviews, it was apparent during the data analysis stage that the study had generated useful and original findings on the position of family mediators in contemporary family justice. To this extent, the discussion in *chapter seven* takes a grounded theory approach,⁷⁰ presenting themes that were inductively identified at a later stage in the research.⁷¹

4.2.3 Ethical Considerations

Ethical approval for both phases was obtained in June 2018 (*appendix five*). The text analysis stage presented few ethical concerns. This was because these regulatory documents were openly disseminated online (or published in a book available to the public). A text analysis of documents created by large, public organisations was therefore unobtrusive. Anonymisation of the data was also unwarranted because these documents were in the public domain.⁷²

Several ethical considerations arose prior to the mediator interviews. First, all mediators needed to give their *informed consent* to participate in the study. Informed consent is widely regarded as a fundamental standard for ethical research.⁷³ The principle means all participants must fully understand the role of the researcher and the purpose of the study. The researcher must speak to the interviewees about the content of the interview and the ability to withdraw from the research at any point (including after the interview). As mentioned above, potential interviewees were sent the 'Participant Information Sheet' when first contacted via email. They were then sent a copy of the 'Consent Form' one week before the interview to ensure sufficient time had passed and asked to sign the document before the interview commenced. Mediators could ask questions about the project at any point in the study, including after the interview.

⁷⁰ Glaser and Strauss are widely recognised as the pioneers of grounded theory, a research methodology based on generating and selecting theory in light of the data, rather than applying a predetermined theory to data: Barney G Glaser and Anselm L Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine de Gruyter 1967). For a brief summary of grounded theory, see Helen Noble and Gary Mitchell, 'What is grounded theory?' (2016) 19(2) *Evidence-Based Nursing* 34.

⁷¹ Webley also adopts a grounded theory approach to her work on the professionalism of mediators and solicitors, stating that her research 'sought to develop or generate theory from the data sources using a constant comparative method.' See Lisa C Webley (n 7) 15.

⁷² Furthermore, anonymising the Codes of Practice would have made it difficult to properly track the development of family mediation and the role of the mediator over time. This approach is consistent with online guidance: Association of Internet Researchers, *Internet Research: Ethical Guidelines 3.0* (Association of Internet Researchers 2019).

⁷³ Maurice Punch, *The Politics and Ethics of Fieldwork* (SAGE Publications 1986) 34.

All data was stored electronically on Cardiff University's encrypted database and password protected. After the interview, audio recordings were immediately moved from the recording device to an encrypted laptop. The recording was transferred to Cardiff University's storage as soon as possible (usually the same day) and all other copies of the interview were destroyed. All audio recordings were then deleted after transcription.

Anonymisation was the final ethical issue in phase two of the research. All 17 interviewees were members of local services, regions, Member Organisations and the FMC. Throughout these communities, mediators formed relationships. There was thus a danger that a mediator's professional relationships could be affected if they were identified in research outputs. There was also the risk of identification by a potential, current or previous client. In essence, a mediator's professional reputation could be at risk unless steps were taken to anonymise the data. All interviewees were subsequently given a pseudonym upon transcription. Any information that could potentially identify a mediator was then removed from the interview transcripts. References to location were also anonymised and only discussed in relation to geographical region (South Wales, South West of England and London). The identity of all interviewees – and any other individuals mentioned in the interviews – were thus protected.

4.3 Subjectivity and the value of the dual-methods approach

The final section of this chapter considers the impact of subjectivity on this thesis' research findings. Codes of Practice, like any written document, are open to interpretation. Whilst these documents are created by regulatory bodies, a multitude of meanings can be drawn from them. The meaning drawn by an academic commentator may differ from what a mediator would take from the very same document. This is particularly important where participants had attended different training courses, practised mediation for different lengths of time and mediated different types of disputes. These factors, and numerous others, all contributed towards a mediator's professional identity. Similarities (and differences) were drawn amongst the interviewees, but data analysis remained subjective. For example, the interview data was collected and analysed one year on from the text analysis of Codes of Practice and identification of four mediator functions. Findings from phase two were subsequently analysed from a particular standpoint and in light of a particular hypothesis (that mediators adopt four functions), rather than a wholly objective, outsider perspective.⁷⁴ This was again influenced by

⁷⁴ Interestingly, this appears to reflect the issues surrounding mediator neutrality that were discussed in *chapter two*. It is incredibly difficult for a mediator to maintain absolute neutrality, particularly where they are required to intervene in light of a power imbalance. The mediator may also hold subconscious beliefs and assumptions about the two parties. Similarly, it is difficult for a researcher to remain completely

the researcher's own understanding of family mediation and what it could achieve in the post-LASPO context. Nonetheless, it is questioned how far any qualitative research can be conducted from a wholly neutral stance. This limitation does not negate findings, but rather acknowledges the effect of one's lived experiences on the interpretation of data and, furthermore, meaning.

As a research method, interviews are limited in terms of reliability to the extent that what an interviewee says may not reflect reality. Della Noce argues that research into mediator practice should include 'empirical evidence of what mediators actually *do*, not just what they *say* they do.'⁷⁵ The risk of relying too heavily on interview data was apparent in Mulcahy's observations into community mediation, where mediators claimed loyalty to a traditional model of family mediation and absolute neutrality despite their actions going against the framework in practice.⁷⁶ In response, this thesis does not provide new data on how mediators approach mediation in the post-LASPO landscape, but how they *conceptualise* the process and their role. A variety of readings are to be welcomed, rather than considered a limitation of this thesis. It is hoped that this project will be followed up by observations of mediator practice in the future, applying the theoretical tools developed in the remaining chapters.

As accepted by Eekelaar, Maclean and Beinart, interviewees can provide 'generalised responses'.⁷⁷ This is attributed to several factors: the respondent may refuse to openly acknowledge their true reality or feel that their lived experience is of little interest to the researcher. Some steps can be taken to combat these limitations. For this project, a rapport was built with mediators early on in the data collection. Mediators often expressed interest in the study and ordinary, everyday conversations flowed naturally. Work was always conducted transparently, and mediators remained informed throughout the project. Contact with participants continued after data collection, with a significant number of mediators interested in the results of the study. There is thus some evidence (albeit anecdotal) that participants felt comfortable participating in, and engaging with, the research.

objective as they get to know the interview participants. They may attend the interview with subconscious views about the participant, the purpose of the data or their responses.

⁷⁵ Dorothy J Della Noce, 'Evaluative mediation: In search of practice competencies' (2009) 27(2) *Conflict Resolution Quarterly* 193, 193. Hitchings and Miles similarly argue that it is 'important to acknowledge the limitations of data based on professionals' reports of what they do.': Emma Hitchings and Joanna Miles (n 57) 179.

⁷⁶ Linda Mulcahy, 'The Possibilities and Desirability of Mediator Neutrality – towards an ethic of partiality?' (2001) 10(4) *Social & Legal Studies* 505, 517.

⁷⁷ John Eekelaar, Mavis Maclean and Sarah Beinart (n 8) 31.

4.4 Conclusion

By adopting a dual methods approach, this study provides new data on the modern conceptualisation of family mediation. It adopts a pragmatic approach beyond critiquing the LASPO reforms and considers the future direction of family mediation and family justice. This thesis acts as a response to the disconnect between orthodox theory and the contemporary demands placed on mediation, and attempts to facilitate the shifts that may provide access to justice through mediation in the long-term. In order to challenge the dominant conceptualisation of family mediation, it must first be understood. This is a topical argument and will be of interest to regulatory bodies undertaking the current Standards Review, as well as those involved in future reform around family justice.

Chapter 5. Family mediation from the perspective of regulatory bodies: the four mediator functions

This chapter presents the findings from the text analysis of mediation Codes of Practice. The discussion begins with the overarching objectives of family mediation, finding that regulatory bodies prioritise improving communication and conflict resolution over settlement despite public policy promoting the latter. The majority of the chapter is then dedicated to the identification and discussion of four mediator functions within the Codes of Practice: mediators as helpers, referrers, assessors, and intervenors. It is argued that these functions span the facilitative to evaluative continuum, and confirm that mediator evaluation by facilitative proxy (as identified in *chapter three*) is increasingly evident within the Codes. Regulatory bodies have tacitly accepted mediator evaluation – and therefore the modern mediator – despite giving the impression that this is not the case. This is demonstrated through prominent, contradictory messages in the Codes of Practice. The result of these findings is discussed towards the end of the chapter: there exists a dissonance about the role of mediators and a consequent lack of transparency in current regulatory guidance. Nevertheless, it is submitted towards the end of the chapter that mediators' more evaluative functions – specifically assessor and intervenor – are essential to ensuring flexibility, and thus access to justice, in family law and mediation post-LASPO.

The following discussion makes reference to regulatory documents from the early days of family mediation, and documents that are currently enforced. Further information on the text analysis was set out in *chapter four*. All italics in quotes are added for emphasis.

5.1 The objectives of Family Mediation

The first set of findings relates to the definition and objectives of family mediation within the Codes of Practice. This returns to the two main objectives identified in *chapter two: improving communication and conflict resolution and settlement*. The following discussion reveals some variance in the conceptualisation of family mediation according to the state and regulatory bodies, creating a dilemma for mediators in their daily work.

5.1.1 Defining family mediation

The NFCC did not define family mediation in its 1985 Extended Code of Practice.¹ NFM and FMA gave the first definition in their 1994 Joint Code of Practice which was repeated by UKCFM in 1998:

'Family mediation is a process in which an impartial third person assists those involved in family breakdown, and in particular separating or divorcing couples, to communicate better with one another and reach their own agreed and informed decisions about some or all of the issues relating to or arising from the separation, divorce, children, finance or property.' **NFM and FMA,² UKCFM³**

The same definition is adopted in current Codes of Practice:

'Family mediation is a process in which those involved in family breakdown, whether or not they're a couple or other family members, appoint an impartial third person to assist them to communicate better with one another and reach their own agreed and informed decisions concerning some, or all, of the issues relating to separation, divorce, children, finance or property by negotiation.' **Resolution⁴**

'Mediation is a process in which an impartial third person assists those involved in conflict to communicate better with one another and reach their own agreed and informed decisions concerning some, or all, of the issues in dispute.' **College of Mediators⁵**

'Mediation is a process in which those involved in family relationship breakdown, change, transitions or disputes, whether or not they are a couple or other family members, appoint an impartial third person, a Mediator, to assist them to communicate better with one another and reach their own agreed and informed decisions typically relating to some, or all, of the issues relating to separation, divorce, children, finance or property by negotiation.' **FMC⁶**

Across these definitions, regulatory bodies describe the mediator as an 'impartial third person' whose role is to 'assist' parties, in other words as a facilitator. Before going on to consider the

¹ National Family Conciliation Council, 'Extended Code of Practice for Family Conciliation Services' (1985) 15 *Family Law* 274.

² UK College of Family Mediators, *UK College of Family Mediators: Directory & Handbook 1997/98* (Sweet & Maxwell 1997) A7, s 1.2.

³ UK College of Family Mediators, *UK College of Family Mediators: Directory & Handbook 1998/99* (Sweet & Maxwell 1998) A169, s 1.2.

⁴ Resolution, *Guide to Good Practice on mediation* (Resolution 2018) 13.

⁵ College of Mediators, *Code of Practice for Mediators* (College of Mediators 2019) s 1.2.

⁶ Family Mediation Council, *Code of Practice for Family Mediators* (FMC 2018) s 1.3.

facilitative image of the mediator in further detail, it is useful to first acknowledge the continuation of both objectives in the Codes of Practice. Mediation is promoted as a process that assists parties to ‘communicate better with one another’, promoting the therapeutic objective. Regulatory bodies then see mediation as aiming to help parties ‘reach their own agreed and informed decisions’, effectively the self-resolution of disputes, echoing legal settlement. These sections largely reflect the orthodox conceptualisation of family mediation, as recognised in *chapters two and three*.

The prominence of ideas from traditional mediation theory in the Codes of Practice analysed is unsurprising. The NFCC, established in 1983, was the first regulatory body for family mediation in England and Wales.⁷ While the organisation did not define family mediation (known as conciliation), its Code of Practice began with a main aim:

‘The primary aim of conciliation is to help couples involved in separation and divorce to reach agreements, or reduce the area of intensity of conflict between them, especially in disputes concerning their children.’ NFCC⁸

The two broad objectives of family mediation are evident in this excerpt. First, mediation aims to help parties ‘reach agreements’. This reflects the achieving settlement objective. A settlement-oriented approach in mediation can be traced back to the late 20th-century family law landscape where settlement was a noticeable concern in public policy, as highlighted in *chapter one*.⁹ Second, the statement that mediation intends to ‘reduce the area of intensity of conflict’ amongst parties, directly related to improving communication and conflict resolution. This objective reflected the introduction of family mediation in England and Wales in the 1970s and 1980s when most mediators had prior experience in counselling or therapy work.¹⁰ Altogether, the prominence of both objectives shows that the traditional aims of family mediation were also reflected in late 20th-century Codes of Practice.

The orthodox objectives of mediation remain visible in contemporary guidance. Under the FMC’s and College of Mediators’ Codes of Practice, mediation ‘aims to assist Participants to reach the decisions they consider appropriate to their own particular circumstances’, highlighting the importance of settlement.¹¹ The two organisations discuss the improving communication and conflict resolution objective, writing that mediation ‘also aims to assist

⁷ Simon Roberts, ‘Mediation in Family Disputes’ (1983) 46(5) *Modern Law Review* 537, 538.

⁸ National Family Conciliation Council (n 1) s 1.

⁹ *Chapter one* details the promotion of family mediation to successive governments as an inexpensive process that engendered settlement. Also see Gwynn Davis, Stephen Cretney and Jean Collins, *Simple Quarrels: Negotiating Money and Property Disputes on Divorce* (Clarendon Press 1994) 273.

¹⁰ Gwynn Davis, *Partisans and Mediators: The Resolution of Divorce Disputes* (Clarendon Press 1988) 59.

¹¹ Family Mediation Council (n 6) s 2.1; College of Mediators (n 5) s 2.1.

Participants to communicate with one another... and to reduce the scope or intensity of dispute and conflict'.¹² Both sections originate from the UKCFM's 1998 Code of Practice, demonstrating the longevity of the two mediation objectives.¹³ Improving communication and reducing conflict, as well as settlement, continue to be firmly entrenched in regulatory bodies' conceptualisation of family mediation post-LASPO.

These aims are not necessarily of equal value in Codes of Practice. When comparing the two objectives, it is apparent that regulatory bodies primarily view mediation as a process that improves communication and conflict resolution between participants. This is because settlement is written in autonomy-based language: the parties reach an agreement that 'they consider appropriate to their own particular circumstances'. If the parties are understood as holding the autonomy to determine their dispute, they are also responsible for ensuring settlement occurs. While settlement is *desirable*, the mediator cannot intervene to promote it. Thus, the regulatory bodies expect mediators to primarily focus on the party dynamic, potentially limiting the remit of their role.

5.1.2 Comparing regulatory documents to public policy: settlement over party dynamic

Since the late 20th century, settlement has dominated the family justice discourse. The contemporary family justice system was designed to encourage settlement and move most disputes into the private sphere.¹⁴ The rise of family mediation is often connected to this 'settlement mission' and reduced state involvement in family matters.¹⁵ By comparison, the findings above suggest that regulatory bodies place more emphasis on the therapeutic objective. A significant question, therefore, is how far the improving communication and conflict resolution objective is prioritised in mediator practice and the dominant conceptualisation of the process.

Whilst late 20th-century policy identified both objectives, it placed more emphasis on mediation as a means through which to obtain resolution. To return to the first policy definition of family mediation, the 1974 Committee on One-Parent Families described the process as:

¹² Family Mediation Council (n 6) s 2.2; College of Mediators (n 5) s 2.2.

¹³ UK College of Family Mediators (n 3) ss 2.1-2.2.

¹⁴ As previously acknowledged in *chapter one*, this is not inherently problematic. The settlement objective can support parties to foster agreements that are workable and viable in the long-term, though it has been misappropriated by successive governments to justify state withdrawal in private family matters.

¹⁵ Noel Semple, 'Mandatory Family Mediation and the Settlement Mission: A Feminist Critique' (2012) 24(1) *Canadian Journal of Women and the Law* 207.

‘...assisting the parties *to deal with the consequences* of the established breakdown of their marriage, whether resulting in a divorce or a separation, *by reaching agreements* or giving consents or reducing the area of conflict...’¹⁶

The central focus of the Committee was on parties resolving ‘the consequences of relationship breakdown’ by ‘reaching agreements’. This language anticipates settlement as the final outcome of mediation, rather than a desirable add-on. The Matrimonial Causes Procedure Committee repeated this pro-settlement discourse the following decade:

‘The object of [mediation] is to *marshal such reasonableness* and objectivity as exist and to *direct* the parties towards *solving* the essentially practical problems which arise.’¹⁷

The Committee promoted improving communication and conflict resolution through ‘reasonableness’, but simultaneously recognised that this therapeutic element only went so far. Instead, mediation sought to ‘direct’ parties towards resolution. Settlement was thus constructed as an absolute goal, with the improvement of communication and conflict resolution viewed as a tool through which to achieve it.

The settlement mission continues into modern policy. During the LASPO proposals, the Ministry of Justice promoted mediation as a process that ‘can help reduce levels of hostility between parents, and it offers real opportunities for resolving matters.’¹⁸ Whilst the Ministry of Justice upholds both objectives, the language used stresses the need for resolution. The institution adopted a similar vision in its recent post-implementation review of LASPO and defined mediation as a process where a mediator ‘helps individuals... work out agreements.’¹⁹ There was no mention of the improving communication and conflict resolution objective, suggesting that the Ministry of Justice solely valued mediation in light of its ability to engender settlement. This conceptualisation is supported by the requirement that all applicants to legal aid for family matters must have a *legal issue*.²⁰ More specifically, the Legal Aid Agency states in its guidance that if ‘the role of the mediation is simply to improve communication and the relationship

¹⁶ Committee on One-Parent Families, *Report of the Committee on One-Parent Families: Volume 1* (Cmd 5619, 1974) para 4.288.

¹⁷ Matrimonial Causes Procedure Committee, *Report of the Matrimonial Causes Procedure Committee* (Stationery Office 1985) para 3.11.

¹⁸ Ministry of Justice, *Government Response to Justice Committee’s Third Report of Session 2010/11: The Government’s proposed reform of legal aid* (Cm 8111, 2011) para 45.

¹⁹ Ministry of Justice, *Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)* (CP 37, 2019) para 603.

²⁰ Legal Aid Agency, ‘Family Mediation Guidance Manual’ (Legal Aid Agency 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/738258/Family_Mediation_GuidanceManual_V5_Sep2018.pdf> accessed 23 April 2020 s 3.3.

between the parties, then this will not fall within the scope of legal aid.²¹ In effect, a therapeutic matter is not enough by itself to receive public funding. This transforms settlement from an autonomy-driven concept, as identified in Codes of Practice, to the ultimate criterion for public funding.

It is unsurprising that regulatory bodies place more emphasis on communication and conflict in comparison to public policy. As mentioned above, family mediators traditionally came from a therapeutic or counselling background. They were limited to mediating child-related matters which encouraged a positive post-separation relationship between disputants. This focus on improving communication and conflict resolution has transcended into both older and more recent Codes of Practice, despite the rise in lawyer mediators and introduction of all-issues mediation. This context contributes to the differing preoccupations of regulatory bodies and the state. The former emphasises relationships, whereas the latter prioritises outcomes. This has important implications for mediator practice. The mediator finds herself in a dilemma: does she prioritise improving communication and conflict resolution because it is emphasised in Codes of Practice, or settlement because it is highly sought by the state? Furthermore, can she find a way to balance and give equal attention to the two objectives? This careful balancing act will be returned to in *chapter six*.

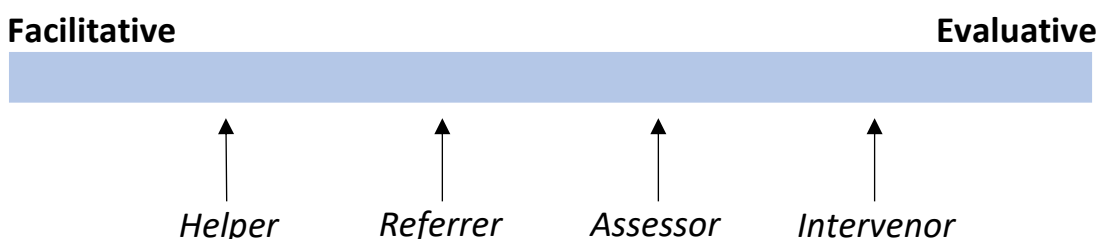
5.2 Four functions of family mediators: the facilitative to the evaluative framework

A crucial line of investigation is whether the promotion of the improving communication and conflict resolution objective in Codes of Practice advances the use of the facilitative framework that restricts mediator practice. The preceding discussion has hinted at the broad powers that a settlement-oriented approach may bestow on mediators. A strong focus on settlement could impair party autonomy over the outcome and, moreover, mediator neutrality. By contrast, a mediator using the facilitative framework believes the disputants are best placed to settle, stressing the need for party autonomy. It is argued that regulatory bodies subsequently promote the therapeutic improving communication and conflict resolution objective to preserve the orthodox conceptualisation of family mediation that binds mediators to a facilitative framework and promote the limited mediator role. Nonetheless, there must be a further investigation into how far this facilitative framework dominates the Codes of Practice studied, and whether the regulatory bodies recognise mediator evaluation at all.

²¹ *ibid* s 3.5.

The remainder of this chapter discusses four mediator functions that were identified in the Codes of Practice analysed: *helper*, *referrer*, *assessor* and *intervenor*. It is argued that the presence of each function in guidance demonstrates an accepted ability of mediators to move across the facilitative and evaluative frameworks, going beyond their limited role. As depicted in *figure six*, this new explanatory theoretical tool builds upon Riskin’s thesis and avoids the binary trap often seen in later interpretations of his work. It does this by revealing nuances and proximities in the facilitative to evaluative strategies used by mediators, restoring the fluidity of the continuum. Thus, this four-function framework unlocks the theoretical potential of Riskin’s thesis by obscuring binary interpretations of mediator practice. Mediation can subsequently be viewed as an ever-changing and context-dependent practice. By exploring how the four functions can be mapped within Codes of Practice, this chapter uncovers several forms of mediator evaluation that are permitted by regulatory bodies, albeit through a facilitative guise that leads to a lack of transparency in the process. Altogether, this new theoretical tool demonstrates that the modern mediator role is already (tacitly) permitted by regulatory bodies.

Figure six: The four mediator functions on Riskin’s continuum



5.2.1 Function one: mediators as helpers

The first function, mediators as *helpers*, is located towards the start of Riskin’s continuum. Regulatory bodies expect mediators to help parties both obtain settlement and improve the communication and conflict between them. The function originates from the NFCC’s Code of Practice:

‘...the conciliator *helps* the parties to explore possibilities of reaching agreement, without coercion. Where children are involved, the conciliator *helps* the parties to work out arrangements which balance their individual interests with those of their children.’

NFCC²²

²² National Family Conciliation Council (n 1) s 2.

Under this provision, the parties were expected to ‘work out’ their arrangements, although the mediator ‘help[ed]’ them consider their options (with particular regard to child welfare). The same rhetoric was visible in the definitions of family mediation. As previously mentioned, regulatory bodies defined the mediator as an ‘impartial third person’ that ‘assists’ parties, emphasising a facilitative framework.²³ If a mediator departed from the helper function, she did not help parties to explore the possible solutions to the dispute, but rather influenced settlement.

The helper function is reinforced by the sacrosanct principle of mediator neutrality. The NFCC implicitly referred to neutrality by emphasising a responsibility to help parties ‘without imposing the conciliator’s own values’.²⁴ The remaining guidance has dedicated sections on mediator neutrality, covering all three interpretations of the concept identified in *chapter three*. First, a mediator must be even-handed:

‘They [mediators] must conduct the *process in a fair and even-handed way.*’ **UKCFM**²⁵

Second, a mediator must be neutral as to the outcome:

‘Mediators must at all times *remain neutral* as to the outcome of mediation. They must not seek to move participants to an outcome which the mediator prefers.’ **NFM and FMA**²⁶

Third, she must remain neutral in terms of bias, also referred to as impartiality:

‘Take care not to *become (or be perceived to have become) partial* to the view of one client rather than the objectives and aspirations of both.’ **Resolution**²⁷

‘They should also be aware of *the impact of unconscious bias* towards participants in mediation.’ **College of Mediators**²⁸

The FMC summarises all three interpretations:

‘The Mediator must remain *neutral as to the outcome* of the Mediation at all times... [she] must at all times *remain impartial* as between the Participants and conduct the Mediation *process in a fair and even-handed way.*’ **FMC**²⁹

²³ Family Mediation Council (n 6) s 1.3.

²⁴ National Family Conciliation Council (n 1) s 2.

²⁵ UK College of Family Mediators (n 3) s 4.3.

²⁶ UK College of Family Mediators (n 2) ss 2.3-2.4.

²⁷ Resolution (n 4) 24.

²⁸ College of Mediators (n 5) s 4.9.1.

²⁹ Family Mediation Council (n 6) s 6.2-6.3.1.

The lack of precision around what it means to be 'neutral', 'impartial' or 'even-handed' is questionable. Neutrality is an ambiguous term that often lacks certainty, yet the regulatory bodies in this study widely assume that the readers of their Codes of Practice (specifically family mediators) will interpret the concept consistently.³⁰ None of the regulatory bodies explain when a mediator can depart from her neutrality, suggesting that a strict and rigid interpretation is preferred. Alternatively, the lack of precision may reflect the elusiveness of mediator neutrality itself, a concept that no-one can define. Yet if the above provisions are read in isolation from the remainder of regulatory guidance, neutrality is portrayed as an absolute gold standard for mediators. This reinforces the helper function as the regulatory documents give no indication that a family mediator can advance a particular solution (or be perceived to have done so). By themselves, these provisions restrict mediators to their limited role. But at a broader level, they raise serious questions about the enforceability of mediator neutrality, particularly in its orthodox format.

Building on this argument, the helper function prevents mediators from evaluating the validity of any statements made by either party. The FMC stipulates that a mediator 'must make it clear that he or she does not make further enquiries to verify the information provided by any Participant.'³¹ She can notify parties of the importance of 'full and frank disclosure' and 'assist them where necessary in identifying the relevant information and supporting documentation', but cannot ensure this transparency occurs.³² Similarly, Resolution writes that mediators have a 'responsibility to *assist* clients in making a full and frank disclosure of their finances. However, it is not [her] role to interrogate.'³³ The limited mediator is subsequently unable to evaluate the credibility of any information exchanged by the parties, confining her actions to the helper function and, therefore, a dominant facilitative framework.

5.2.1.1 Information and advice

Under the facilitative helper function, mediators can only provide information. The NFCC hinted at this limitation in their original Code of Practice by recognising that mediation did not replace advice:

³⁰ The lack of definition for mediator neutrality was also recognised by Cooks and Hale after examining five Codes of Practice in the USA. See Leda M Cooks and Claudia L Hale, 'The Construction of Ethics in Mediation' (1994) 12(1) *Mediation Quarterly* 55, 63.

³¹ Family Mediation Council (n 6) s 8.13.

³² *ibid* s 8.11; College of Mediators (n 5) s 6.5; Resolution (n 4) 33, 36; UK College of Family Mediators (n 2) s 5.2; UK College of Family Mediators (n 3) s 6.5.

³³ Resolution (n 4) 36.

‘...while offering a different approach from the legal process of negotiation by solicitors or adjudication by the court, *conciliation should not be seen as a substitute for legal advice.*’ **NFCC**³⁴

Codes in Practice from the 1990s by NFM and FMA, as well as UKCFM, made this obligation explicit by maintaining that the mediator ‘must not give legal or other advice.’³⁵ The College of Mediators adopts the same phrasing in their current guidance,³⁶ while the FMC and Resolution place some onus on the mediator to clarify that they can only give information:

‘The Mediator *may inform Participants* of possible courses of action, their legal or other implications, and assist them to explore these, but *must make it clear that he or she is not giving advice.*’ **FMC**³⁷

‘...*Mediators will provide information* about the legal process, general legal principles and associated matters...*but won’t provide any individualised advice.*’ **Resolution**³⁸

Throughout these provisions, the regulatory bodies make it clear that mediators must not be seen to give legal advice, particularly because it may advantage one party over the other or involve a departure from neutrality. By contrast, information is portrayed as a form of support that is equally available to both parties. This returns to the general preference for the facilitative framework and the limited mediator under the orthodox conceptualisation of family mediation, forbidding the profession from moving into the evaluative arena.

The distinction between information and advice adopted by regulatory bodies also reflects an expectation that parties will obtain legal support, and thus evaluation, through a solicitor. The mediator can only act as a facilitative helper, but evaluation-based support remains accessible to disputants via another third party. Resolution implies that collaboration amongst mediators and solicitors creates benefits for both professions, in addition to their clients:

‘It’s important for both solicitors and mediators to understand the critical nature of working together to assist clients in resolving matters... Where solicitors and mediators work closely together, the outcomes for clients are likely to be improved and both solicitor and mediator stand to gain from client recommendation as a result.’

Resolution³⁹

³⁴ National Family Conciliation Council (n 1) s 6.

³⁵ UK College of Family Mediators (n 2) s 5.9; UK College of Family Mediators (n 3) s 6.10.

³⁶ ‘Mediators must not give legal or other advice.’ See College of Mediators (n 5) s 6.11.

³⁷ Family Mediation Council (n 6) s 6.2.

³⁸ Resolution (n 4) 54-55.

³⁹ Resolution (n 4) 53.

In another section, Resolution notifies mediators to ‘remind clients of the onward path from their mediation’, which includes solicitor involvement to obtain ‘individual advice’ and potentially ‘a binding agreement/consent order’.⁴⁰ Legal advice and oversight are subsequently seen as the final stage in mediation. The separation of powers between mediators (who inform) and solicitors (who advise) is reinforced, confining the former to a facilitative strategy.

5.2.2 Function two: mediators as referrers

The reliance on legal advisors to provide evaluation is further demonstrated by mediators’ second function as *referrers*. If a mediator has exhausted all facilitative techniques at her disposal, she cannot stray into explicit or open evaluation. However, the referrer function enables mediators to signpost parties to a professional outside mediation. Examples include signposting to support services in light of alleged abuse⁴¹ or another mediation service if the mediator does not have a legal aid contract and the parties are eligible for public funding.⁴²

The central purpose of the referrer function, however, is to promote legal advice. The NFCC expected *all* parties to obtain legal support:

‘The parties should be warned against entering into any agreement without first obtaining legal advice on its terms. They should be encouraged to seek legal advice *in all cases...*’ **NFCC**⁴³

In the 1980s, the NFCC effectively introduced a blanket rule requiring mediators to refer all parties to legal advice, eliminating any element of mediator evaluation (to determine when legal advice is appropriate) from the referrer function. The mediator consequently continued to provide information, confined to a facilitative framework. This is underpinned by the idea of the limited mediator. At a broader level, this requirement further reinforced the binary approach to Riskin’s thesis as it adopted a sharp distinction between information and advice, and the roles of mediators and solicitors accordingly.

Interestingly, the remaining regulatory bodies in the study adopted more specific requirements for referral, introducing mediator evaluation. In 1994, NFM and FMA required mediators to tell parties to seek legal advice when it was ‘desirable’. The same phrasing was used by the UKCFM several years later and is now repeated by the FMC and College of Mediators:

⁴⁰ *ibid* 47.

⁴¹ Family Mediation Council (n 6) s 5.4.2, s 6.6.4.

⁴² *ibid* s 8.9.

⁴³ National Family Conciliation Council (n 1) s 3.

‘The Mediator must inform the Participants of the advantages of seeking independent legal or other appropriate advice whenever this appears *desirable* during the course of the Mediation.’ **UKCFM, FMC, College of Mediators**⁴⁴

Resolution similarly writes that mediators should notify parties of instances where it is ‘helpful’ to receive legal advice.⁴⁵ These provisions introduce a more nuanced interpretation of the referrer function, specifically that mediators can determine when legal advice is beneficial to the parties. Evaluation underpins this action; for a mediator to decide whether legal advice is desirable or helpful, they must first evaluate the proposed settlement or party dynamic. This approach begins to depart from the orthodox, absolute facilitative framework seen in the NFCC’s original Code of Practice, suggesting some recognition of the modern mediator who can use the full continuum of mediator strategies.

However, this evaluative element is concealed by regulatory bodies. Evaluating the party dynamic or settlement to determine if a referral is ‘desirable’ or ‘helpful’ contradicts absolute mediator neutrality, as well as the limited helper function. Yet when a mediator refers parties to advice or support, she is portrayed as acting within her capacity as a helper who provides information. Regulatory bodies subsequently maintain the image of the limited mediator who helps and refers, but does not assess, throughout its guidance. The facilitative proxy, a concept developed in *chapter three* whereby a mediator projects a facilitative stance to hide her use of evaluative techniques that often protect a weaker party, is thus evident. In the Codes of Practice analysed, mediators are portrayed as facilitative helpers and referrers, but often use evaluative techniques to progress the dispute or support parties. They are presented as limited mediators, but can work as modern mediators in reality. This is an original finding of this thesis and will aid later discussions around how mediators move between facilitation and evaluation, particularly with the permission of their regulatory bodies. It builds upon Webley’s view that the previous Codes of Practice adopted by the Law Society and UKCFM portrayed mediators as being ‘there to assist and to protect clients’.⁴⁶ While Webley did not expressly refer to Riskin’s continuum, implicit within her argument was the recognition that mediators move between facilitation (to assist) and evaluation (to protect). Recognition of evaluation by facilitative proxy adds depth to Webley’s argument and illustrates how regulatory bodies recognise the

⁴⁴ Family Mediation Council (n 6) s 8.14; UK College of Family Mediators (n 3) s 6.11; College of Mediators (n 5) s 6.12.

⁴⁵ Resolution (n 4) 17.

⁴⁶ Lisa C Webley, *Adversarialism and Consensus? The Professions’ Construction of Solicitor and Family Mediator Identity and Role* (Quid Pro 2010) 178.

importance of mediator evaluation in some instances, but continue to conceal it under a facilitative guise to uphold the original image of the limited mediator.

5.2.3 Function three: mediators as assessors

Mediators as *assessors* is the third function identified in Codes of Practice and is situated towards the evaluative end of the continuum. It envisages a more complex role for mediators that comprises a variety of different techniques, such as screening, predicting court outcomes and reality-testing.

5.2.3.1 Screening for suitability

An important element of dispute resolution is whether it is appropriate for the dispute at hand.⁴⁷ Previous research suggests that mediators do not adequately screen for power imbalances and often adopt a narrow interpretation of abuse.⁴⁸ However, mediators are increasingly taking on cases involving these characteristics because they feel that parties have few options beyond mediation and adjudication (particularly as a LiP) post-LASPO.⁴⁹ This thesis adds to the evidence base by considering screening from the perspective of regulatory bodies and mediators themselves (as detailed in *chapter six*).

Similar to the referrer function, there is some evidence in Codes of Practice that mediators' screening role has widened over time. Neither NFCC nor NFM and FMA discussed mediators' responsibility to screen parties for harm. They did, however, mandate the mediator to check for harm (or the risk of harm) to a child.⁵⁰ The UKCFM Code of Practice was the first document in the study to require mediators to screen for violence between the parties themselves:⁵¹

⁴⁷ As covered in *chapter two*, Barlow and others identify a number of characteristics required to mediate successfully, including emotional readiness, 'relatively equal footing' and engagement. See Anne Barlow and others, *Mapping Paths to Family Justice: Briefing Paper and Report on Key Findings* (University of Exeter 2014) 25.

⁴⁸ Paulette Morris, 'Mediation, the Legal Aid, Sentencing and Punishment of Offenders Act of 2012 and the Mediation Information Assessment Meeting' (2013) 35(4) *Journal of Social Welfare and Family Law* 445; Marianne Hester and others, *Domestic violence: A National Survey of Court Welfare and Voluntary Sector Mediation Practice* (The Policy Press 1997).

⁴⁹ Anna Bloch, Rosie McLeod and Ben Toombs, *Mediation Information and Assessment Meetings (MIAMs) and mediation in private family law disputes: Qualitative research findings* (Ministry of Justice 2014) 39.

⁵⁰ National Family Conciliation Council (n 1) s 5; UK College of Family Mediators (n 2) ss 8.3-8.4.

⁵¹ It is possible that the UKCFM included this specific clause following a working group on domestic violence set up by NFM in the early 1990s, leading to a training module and policy on violence in 1996. See Tony Whatling, 'Domestic Abuse and Family Mediation: What can an Experienced Mediator Tell Us?' in Marian Roberts and Maria Federica Moscati (eds), *Family Mediation: Contemporary Issues* (Bloomsbury Professional 2020).

‘In all cases, mediators *must* discover through a *screening procedure* whether or not there is fear of *violence or any other harm* and whether or not it is alleged that any participant has been or is likely to be violent towards another.’ **UKCFM**⁵²

The FMC has since broadened the criteria to abuse:

‘In all cases, the mediator *must* seek to discover through a *screening procedure* whether or not there is fear of *abuse or any other harm* and whether or not it is alleged that any Participant has been or is likely to be abusive towards another (or towards a child).’

FMC⁵³

Under current guidance, parties can attend the same MIAM but there must be some individual element so the mediator can ‘undertake domestic abuse screening’.⁵⁴ It could be said that these obligations uphold a facilitative framework. For instance, Parkinson argues that mediator screening for suitability is not a ‘gatekeeping function’ as the mediator does not impose a bar on court, instead helping parties to make a ‘well-informed... choice of route.’⁵⁵ By contrast, it is submitted that screening for suitability is underpinned by evaluation. If a mediator ‘must’ determine whether abuse (or violence) is feared, has occurred or is likely to occur, she has to consider the parties’ relative standing. Her actions, in effect, involve an assessment of whether mediation is appropriate. This gatekeeping role is particularly evident in MIAMs, where the mediator must ‘assess whether a mediation process may be suitable in the circumstances’.⁵⁶ Doughty and Murch consequently describe the gatekeeper role as ‘highly contentious’ as it raises questions around whether a mediator can adapt to act as ‘part of the access to justice apparatus.’⁵⁷ As will be discussed towards the end of this chapter, mediators’ more evaluative functions are essential in securing the modern mediator, and thus flexibility, in family mediation post-LASPO.

Mediators’ screening role is further emphasised within the current Codes of Practice. The FMC introduced section 3.7 in 2018:

⁵² UK College of Family Mediators (n 3) s 4.20.

⁵³ Family Mediation Council (n 6) s 5.4.2.

⁵⁴ *ibid* s 7. This provision was previously found in s 6.1 of the FMC’s first Code of Practice in 2010, but has since been moved to a separate section on the conduct of MIAMs.

⁵⁵ Lisa Parkinson, ‘The Place of Mediation in the Family Justice System’ (2013) 25(2) *Child and Family Quarterly* 200, 207.

⁵⁶ Family Mediation Council (n 6) s 2.4.

⁵⁷ Julie Doughty and Mervyn Murch, ‘Judicial Independence and the restructuring of family courts and their support services’ (2012) 24(3) *Child and Family Law Quarterly* 333, 342.

‘Mediators *must* have *appropriate safeguarding policies* and procedures in place.’

FMC⁵⁸

The FMC does not explain what is meant by ‘appropriate safeguarding policies’, although they published further guidance in September 2018 through their newsletter:⁵⁹

‘Paragraph 3.7 reinforces that family mediators are *responsible* for making sure that they take appropriate measures that protect clients from harm or damage throughout the family mediation process. It applies to all family mediators, though mediators who see children as part of the mediation process may have different policies and procedures in place to those who do not.’⁶⁰

This excerpt goes beyond section 3.7 (that there ‘must’ be safeguarding procedures in place) and presents screening as the ‘responsibility’ of mediators. Similarly, the College of Mediators introduced new excerpts on screening in their 2019 Code of Practice. Under appendix C, titled ‘Assessing Suitability to Mediate’, mediators are asked to consider several factors when screening participants.⁶¹ This includes whether the parties engaged in mediation voluntarily and made decisions free of undue pressure. Both section 3.7 and appendix C require mediators to assess imbalances of power, rather than remain a silent helper who cannot intervene. This is no longer an option, but an obligation, increasing the impact of mediator evaluation.

Screening for suitability is an ongoing responsibility, meaning mediators must evaluate the party dynamic and settlement throughout negotiations. NFM and FMA allowed mediators to respond if a party could not ‘participate fully and freely’ in mediation:

‘If a mediator believes that any participant is unable or unwilling to participate *fully and freely* in the process, the mediator may suspend or terminate the mediation...’ **NFM and FMA**⁶²

The FMC adopts the same terminology in its current Code of Practice.⁶³ Yet determining whether a party can engage ‘freely and fully’ in mediation is a clear form of assessment. It

⁵⁸ Family Mediation Council (n 6) s 3.7.

⁵⁹ Family Mediation Council, ‘FMC Newsletter: September 2018’ (FMC 2018) <www.familymediationcouncil.org.uk/wp-content/uploads/2018/09/FMC-Newsletter-September-2018.pdf> accessed 21 April 2020.

⁶⁰ Family Mediation Council, ‘Safeguarding Policies and Procedures for Family Mediators’ (FMC 2018) <www.familymediationcouncil.org.uk/safeguarding-policies-and-procedures-for-family-mediators/> accessed 21 April 2020.

⁶¹ College of Mediators (n 5) appendix C.

⁶² UK College of Family Mediators (n 2) s 2.1.

⁶³ ‘Where the Mediator considers that a Participant is unable or unwilling to take part in the process *freely and fully*, the Mediator must raise the issue and where necessary suspend or terminate the Mediation.’ Family Mediation Council (n 6) s 6.1; also see Resolution (n 4) 16, College of Mediators (n 5) s 4.1, UK College of Family Mediators (n 3) s 2.1.

requires the mediator to look at either the party dynamic or proposed settlement and decide if both parties can voluntarily engage in mediation. The mediator can go on to 'raise the issue' and, in extreme circumstances, terminate the mediation, although this moves into the final intervenor function (considered below).

A crucial finding is that mediator evaluation through screening is not hidden by a facilitative proxy. When a mediator screens parties for suitability, she does not attempt to hide the assessment and can explicitly refuse to mediate a case. This openness may reflect a procedural gatekeeping role as the mediator does not evaluate the substantive content of the proposal. Nonetheless, the evaluative undertones within mediator screening are only visible because the remainder of mediation is portrayed as a purely facilitative process. After the modern mediator determines that the parties are suitable for mediation (including before and during negotiations), she retreats to her limited helper function. A substantive evaluation can only be provided by another third party, reinforcing mediators' dominant facilitative framework. Evaluation in relation to screening is therefore evident in Codes of Practice, albeit an evaluation that is somewhat limited in nature.

5.2.3.2 Predicting court outcomes

There have been interesting developments relating to mediators' ability to predict the likely outcome in court. Originally, there was no basis for this role in the earlier Codes of Practice studied. The NFCC first wrote that a conciliator helps parties 'without imposing the [her] own values on them or directing them towards an outcome preferred by [herself].'⁶⁴ The 1990s Codes of Practice in the study built on this statement and explicitly prohibited mediators from predicting the likely court outcome:

'They must not predict the outcome of court proceedings in such a way as to indicate or influence the participants towards the outcome preferred by the mediators.' **NFM and FMA, UKCFM**⁶⁵

The earlier regulatory bodies did not allow mediators to predict court outcomes if doing so steered parties towards a preferred outcome (making it unclear whether information with the same effect was also prohibited). This stance is vastly different from current guidance. The FMC now allows mediators to notify participants if their proposed resolution 'might fall outside the parameters which a court might approve' under section 6.2 of its Code of Practice:

⁶⁴ National Family Conciliation Council (n 1) s 2.

⁶⁵ UK College of Family Mediators (n 2) s 5.9; UK College of Family Mediators (n 3) s 6.10.

'The Mediator must not seek to impose any preferred outcome on Participants, or to influence them to adopt it, whether by attempting to predict the outcome of court proceedings or otherwise. However, if the Participants consent, the Mediator may inform them (if it be the case) that he or she considers that the resolution they are considering might fall outside the parameters which a court might approve or order.'

FMC⁶⁶

The FMC takes inspiration from an earlier Code of Practice enforced by the Law Society which encouraged mediators to notify parties if the proposed solution was likely to fall outside the typical outcome approved by court.⁶⁷ Webley previously described the Law Society mediators as a 'legal informer and backstop', of which the latter role reflected a somewhat partisan (and evaluative) remit usually reserved for solicitors.⁶⁸ The FMC does, however, slightly diverge from the Law Society's guidance as it requires mediators to first seek the consent of both parties before explicitly predicting the likely court outcome. There is thus some evidence that the FMC has interwoven a facilitative prerequisite into the evaluative – and legal – assessment of the likely outcome to be reached in court.

Before considering the evaluative nature of mediators predicting court outcomes, attention must be paid to the major inconsistencies in current guidance. As mentioned in the previous paragraph, the FMC only allows mediators to predict court outcomes if the parties consent. Resolution takes a different approach:

'Resolution mediators do have a responsibility, however, to inform clients if they think that the outcomes they are considering might (or would) fall outside that which a court might approve or order.' **Resolution**⁶⁹

Resolution outlines mediators' 'responsibility' to notify parties that the proposed outcome might not be approved by court. Party consent is not required, similar to the previous Law Society guidance analysed by Webley. The College of Mediators begins section 4.2 with a similar stance to the FMC:

'[Mediators] must not attempt to move the participants towards the mediator's own preferred outcome or to predict the outcome of court or formal proceedings.' **College of Mediators**⁷⁰

⁶⁶ Family Mediation Council (n 6) s 6.2.

⁶⁷ Lisa C Webley (n 46) 168.

⁶⁸ *ibid* 157.

⁶⁹ Resolution (n 4) 17.

⁷⁰ College of Mediators (n 5) s 4.2.

The College of Mediators first states that mediators must not ‘predict the outcome of court or formal proceedings’. The organisation is, nevertheless, silent on whether mediators can inform parties if the agreement may fall outside what would be approved in court. Current regulatory bodies thus adopt significantly different approaches to predicting court outcomes. Maclean and Eekelaar recognised these inconsistencies in 2016, followed by Barlow, Hunter, Smithson and Ewing the following year.⁷¹ Another issue identified by Maclean and Eekelaar occurs when one party consents to being informed (under the FMC Code of Practice) while the other does not.⁷² Despite these critiques, the conflicting guidance set by the FMC and its Member Organisations remains unresolved. This could lead to significant inconsistencies in mediation practice, particularly where predicting court outcomes is an evaluative assessment of the proposed settlement.

It is also important to recognise that the ability of mediators to predict (what they believe to be) the likely outcome in court contradicts the concept of absolute mediator neutrality which underpins the helper function. After a mediator has predicted the probable outcome in court, the parties are met with three options: proceed with the proposed settlement, alter the proposed settlement with regard to the shadow of the law, or terminate mediation completely. The mediator is likely to have influenced the outcome in all three scenarios. To provide an example, if the parties seek an agreement that is in line with the law and the mediator expressly predicts that the proposed settlement would not be upheld in court, the terms of the agreement will probably be changed. This contradicts the mediators’ prior responsibility to not ‘impose any preferred outcome’ on the parties. The assessor function, therefore, creates a major neutrality dilemma as it becomes increasingly difficult for mediators to balance these two conflicting obligations, both located in section 6.2 of the FMC Code of Practice.

This neutrality dilemma highlights the long-standing inconsistencies in Codes of Practice. As a whole, the regulatory guidance on family mediation has seen little development to resolve mediators’ neutrality dilemma, concealing it with a facilitative cloak. Rather than provide guidance on how the helper and assessor functions could or should work alongside one another (and in what circumstances each should be prioritised), regulatory bodies portray mediators as facilitative helpers because they only provide information about the likely outcome in court. The illusion of absolute neutrality is maintained through the facilitative proxy, but at what cost to transparency?

⁷¹ Mavis Maclean and John Eekelaar, *Lawyers and Mediators: The Brave New World of Services for Separating Families* (Hart Publishing 2016) 80; Anne Barlow and others, *Mapping Paths to Family Justice: resolving family justice in neoliberal times* (Palgrave Macmillan 2017) 109.

⁷² Mavis Maclean and John Eekelaar (n 71) 80.

5.2.3.3 Reality-testing

Evaluation by facilitative proxy is also demonstrated through recognition of reality-testing. This technique was previously noted by Hitchings and Miles (covered in *chapter two*), who claimed that mediators' reality-testing went beyond the 'neutral delivery of general legal information' and focused on the particular issues at hand.⁷³ This study builds on their work and explores how reality-testing is approached in regulatory guidance.

Both Resolution and the College of Mediators reference reality-testing in relation to legal norms and the probable legal outcome:

'In contexts where mediators are operating within a legislative framework they should *reality test the workability of proposals* put forward by the participants to be clear whether they fall within legal parameters.' **College of Mediators**⁷⁴

'As clients work towards achieving an outcome, their preferred option should be *carefully reality-checked* and information given where an option being considered may fall outside that which a court would approve.' **Resolution**⁷⁵

Resolution additionally asks mediators to support parties in reality-testing agreements with regard to the child.⁷⁶ While the FMC does not explicitly discuss reality-testing in its Code of Practice, the organisation provides further information in its 'Manual of Professional Standards and Self-Regulatory Framework', last updated in June 2019. It explains that an outcome summary (provided to parties at the end of mediation) includes 'ensuring that all mediated outcomes follow a clear rationale, are *reality-tested*, and are approved by both participants'.⁷⁷ Reality-testing involves an assessment of the proposed settlement or party dynamic, similar to the ability to predict court outcomes. The mediator considers how far a proposal follows the probable legal norms, the welfare of the child, and a potential range of other factors (such as viability).

However, the reach of this technique is unclear, as neither the FMC, Resolution, nor the College of Mediators clarify how far reality-testing is the responsibility of the mediator or the parties

⁷³ Emma Hitchings and Joanna Miles, 'Mediation, financial remedies, information provision and legal advice: the post-LASPO conundrum' (2016) 38(2) *Journal of Social Welfare and Family Law* 175, 184.

⁷⁴ College of Mediators (n 5) s 4.2.

⁷⁵ Resolution (n 4) 40.

⁷⁶ 'Assist parents to consider:... *reality testing arrangements* they are considering in the context of their growing children's needs': *ibid* 37-38.

⁷⁷ Family Mediation Council, 'FMC Manual of Professional Standards and Self-Regulatory Framework' (FMC 2019) <www.familymediationcouncil.org.uk/wp-content/uploads/2019/06/FMC-Manual-of-Professional-Standards-Regulatory-Framework-v1.3-Updated-June-2019.docx.pdf> accessed 21 April 2020 19.

themselves. For instance, reality-testing could extend to the viability and longevity of the agreement because the College of Mediators asks mediators to consider ‘the workability of proposals’. This may allow a mediator to explicitly tell parties if the proposal is unworkable in the long-term, widening the remit of the function. Alternatively, reality-testing may only permit mediators to ask about the proposed settlement (e.g. ‘what may be the consequences of that?’). The nature of reality-testing that is anticipated is, overall, ambiguous.

Even so, it is clear that reality-testing is evaluative in nature. Reality-testing assesses whether a proposal is a workable and viable solution for both participants, bringing the helper function into disrepute. To avoid conflict between the helper and assessor functions, the regulatory bodies portray reality-testing as a form of information giving. The mediator does not directly intrude or advise, but rather encourages the parties to consider the workability of any proposals. This is another example of evaluation by facilitative proxy in order to support the dominant facilitative framework. In general, the provisions on reality-testing confirm that evaluative techniques (carried out by the modern mediator) are present within Codes of Practice, albeit via a facilitative proxy.

5.2.4 Function four: mediators as *intervenors*

The fourth and final function, mediators as *intervenors*, is the most evaluative function when situated across Riskin’s continuum. Intervention does not necessarily equate to advice, but requires the mediator to actively address any harm amongst participants or their wider family. For example, mediators are required to have regard to the welfare of the child throughout mediation. Under the FMC Code of Practice, the mediator must consider the welfare of any children ‘at all times’, and ‘should encourage the Participants to focus on the needs and interests of the children’.⁷⁸ This is in line with the paramountcy of the child welfare principle in family law, briefly considered in *chapter two*.

Building on mediators’ assessor function, intervention primarily covers power imbalances and abuse. The FMC writes:

‘The Mediator must seek to prevent manipulative, threatening or intimidating behaviour by any Participant, and must conduct the process in such a way as to redress, as far as possible, any imbalance of power between the Participants. If such behaviour or any other imbalance seems likely to render the Mediation unfair or ineffective, the

⁷⁸ Family Mediation Council (n 6) s 5.3.

Mediator must take appropriate steps to seek to prevent this, including *terminating* the Mediation if necessary.’ **FMC**⁷⁹

This provision originally derives from the 1990s⁸⁰ and is repeated by both Resolution and the College of Mediators.⁸¹ It begins with assessment as the mediator must recognise that the behaviour of one party is ‘manipulative, threatening or intimidating’. The FMC then sets out three obligations. First, the mediator must attempt to prevent abusive behaviour. Second, she must alter the mediation process in response to any power imbalances. Advocates of the facilitative framework would argue that these two requirements endorse mediator neutrality: the mediator is managing the *process*, not the outcome. Third, if mediation becomes ‘unfair or ineffective’, the mediator can take ‘appropriate steps’, including termination where necessary.

All three obligations involve an evaluation of, and interference with, the party dynamic. After a mediator has realised (through assessment) that the parties are of unequal standing, she must determine the best course of action and put this into fruition, moving into intervention. Mediation may be suspended or terminated, although this action is framed as a last resort. The focal point of these provisions is that a mediator must take certain steps to reshape the party dynamic. Rather than merely determine if mediation is appropriate via screening, the mediator must consider how to change the process in light of the parties’ needs. She may, in turn, go on to evaluate the substantive issues in the dispute. Overall, the three obligations set out by the FMC act as strong evidence that regulatory bodies permit mediators to evaluate.

The intervenor function provides the mediator with the flexibility to alter her practices, although it amplifies her neutrality dilemma. As demonstrated through the discussion on the helper function earlier in this chapter, mediator neutrality is written in absolute terms. The need for parties to remain neutral and protect party autonomy over the settlement is also repeated throughout Codes of Practice. The strict adherence to neutrality advocated in the helper function, as well as the original conceptualisation of family mediation, means that the modern mediator – and her use of evaluative practices – is regarded as a radical and thus unjustified approach.⁸² Yet regulatory bodies also permit, and at times mandate, the modern mediator role through the intervenor function. The conflict between the two messages is not resolved by regulatory bodies, let alone acknowledged. The FMC does not detail the ‘appropriate steps’ a mediator can take, nor what it means when mediation is ‘unfair or

⁷⁹ *ibid* s 6.3.2.

⁸⁰ UK College of Family Mediators (n 2) s 2.4; UK College of Family Mediators (n 3) s 4.4.

⁸¹ Resolution (n 4) 14; College of Mediators (n 5) s 4.3.2.

⁸² The preference to view mediator neutrality in absolute terms, subsequently prohibiting mediators from an evaluative framework, was a key focus of *chapter three*.

ineffective'. Regulatory bodies undoubtedly expect mediators to take on the role of the modern mediator and redress power imbalances, but the scope of this obligation is unknown. There exists a haziness, or perhaps a cognitive dissonance, around the scope of strategies available to family mediators. Overall, there is a vital need to understand what types of intervention can be exercised by mediators to avoid further uncertainty in – or criticism of – contemporary mediator practice.

5.3 Advancing a contemporary model of family mediation

Thus far, this chapter has hinted at the flexibility available to mediators through the four functions envisaged within Codes of Practice. The final section considers the value of the functions in the contemporary family justice landscape where solicitors have withdrawn from mediation and mediators see an increasingly diverse client base.

The helper function supports the orthodox conceptualisation of family mediation and the limited mediator from the late 20th century. In 1985, NFCC stated that mediators 'must never give an evaluation or subjective appraisal of either party to either solicitor.'⁸³ The terms 'facilitative' and 'evaluative' did not become widely accepted in the mediation literature until Riskin's work in the 1990s, but it was clear that the NFCC only permitted mediators to go beyond their helper function in very limited circumstances (typically when a child was at risk of harm). Mediators referred parties to legal advice in every dispute, removing any opportunity for evaluation. Additionally, assessment and intervention were only permitted following serious harm to a child. These findings are unsurprising, as the NFCC wrote its Code of Practice at a time when mediation's clientele was largely homogeneous and had regular access to solicitors. The demand for mediators to go beyond their traditional limited role was low throughout this period, allowing the facilitative framework to dominate. In general, the dominance of the helper function in the NFCC Code of Practice shows an adherence to party autonomy over the outcome, promoting the conventional conceptualisation of family mediation.

In terms of the referrer function, mediators could signpost parties to legal advice when 'desirable' from 1994, signalling some departure from the absolute facilitative framework. However, the referrer function symbolises the long-standing reliance on solicitors (and other third parties) to evaluate and advance negotiations. This dependency is impractical in the post-

⁸³ National Family Conciliation Council (n 1) s 3.

LASPO climate: solicitor involvement is an aspiration for many, but now a reality for few.⁸⁴ Regrettably, the current regulatory bodies have taken little action to redress this problem. Resolution acknowledges the difficulties faced by mediators in the current climate, but nonetheless upholds the traditional conceptualisation:

'An increasing percentage of people are not seeking legal advice on family legal issues. This may be because they don't have the means to afford it or that they have made a choice not to do so... Whilst you may have considerable concerns for those who cannot afford legal advice, you must ensure you work within the requirements of the FMC Code of Practice and must not provide partial advice, as to do so would breach your neutrality and the impartiality of any mediation process.' **Resolution**⁸⁵

Within one section, Resolution appears both sympathetic and antagonistic towards the needs of parties post-LASPO. It recognises that unmet legal need is a significant issue, but this problem is met with a reiteration of the traditional view that mediators help (and facilitate) whilst solicitors advise (and evaluate). Such statements do little to aid mediators in understanding and navigating their contradicting obligations within Codes of Practice. This is because Resolution upholds the traditional model of legal support where both parties have access to a solicitor for advice. The full representation model, discussed in *chapters one* and *two*, still commands the contemporary conceptualisation of family mediation, despite its recent decline. As recognised by Webley in relation to a Code of Practice published by UKCFM in the 2000s, regulatory bodies emphasise the importance of facilitation 'in which it is for the parties to seek value-laden views' from a solicitor.⁸⁶ Party self-determination over the outcome is thus upheld, and the mediator is prohibited from portraying an evaluative role that could damage her neutrality.

The assessor function reflects a growing quasi-legal and evaluative role for mediators in the modern climate. The current guidance continues an assumption that parties will obtain legal advice but also acknowledges that such support is inaccessible. New sections on screening have been inserted in Codes of Practice in recent years, a probable response to the fall in solicitor referrals to mediation. This is in line with previous research (considered in *chapter two*) which suggests that mediators are more likely to take on the gatekeeper screening role themselves. The current study builds on this work and shows that regulatory bodies have increasingly acknowledged mediator evaluation through screening. The assessor function is further

⁸⁴ To return to a quote from Hitchings and Miles, used in *chapter two*, any mediator technique dependent on accessible legal advice is now 'doomed to fail'. See Hitchings and Miles (n 73) 188.

⁸⁵ Resolution (n 4) 17-18.

⁸⁶ Lisa C Webley (n 46) 178.

evidenced through the more recent provisions on reality-testing and predicting court outcomes. In light of these developments, the data show that regulatory bodies have reinterpreted the purpose of family mediation, expecting mediators not only to be aware of family law but to apply it to the case in hand. It appears, therefore, that regulatory bodies have begun to respond to the demand for flexibility in mediator practice and implicitly accepted the role of the modern mediator.

However, mediator assessment is not synonymous with the shadow of the law. Hitchings argues that outsider notions of justice (outside the legal process) are often conflated with more social or moral arguments.⁸⁷ A mediator who attempts to predict the outcome in court may advance what she thinks the law should be, rather than what she believes, or knows, to be the likely legal outcome. This is of particular concern where a significant proportion of mediators have no legal training. Even if a mediator originates from a legal background (or continues to practise as a lawyer), the FMC stipulates that mediation 'must be distinguished from any other professional role'.⁸⁸ Another contradiction in Codes of Practice comes to light: mediators are expected to be aware of, and flag, the likely outcome of a legal dispute, similar to a legal advisor, but must maintain a clear separation between their work and that of a lawyer. The legal remit of mediators is thus ambiguous. This demonstrates the difficulties that can occur where evaluation is hidden, rather than openly accepted as a set of techniques subject to numerous checks and balances. Ultimately, further regulation is necessary if the modern mediator role is to be accepted and used effectively.

The idea of the modern mediator is most prominently endorsed through mediators' final intervenor function. Through intervention, mediators can direct outcomes and provide scrutiny over the more complex, diverse cases in mediation following LASPO. While the function is frequently associated with termination, this action alone does not provide the desired level of flexibility post-LASPO. The intervenor function is discussed further in *chapter six*. For the current discussion, it is important to acknowledge that the presence of the intervenor function in Codes of Practice suggests that flexibility not only occurs, but is already permitted by regulatory bodies. If flexibility and neutrality are to be understood in a way that reinstates the fluidity of Riskin's continuum, the modern mediator will be able to carry out their intervenor function with further checks and balances. Unfortunately, the binary interpretation of Riskin's continuum overlooks the variety of functions available to mediators. The Codes of Practice strongly endorse the need for absolute neutrality, though at the same time expect some

⁸⁷ Emma Hitchings, 'Official, operative and outsider justice: the ties that (may not) bind in family financial disputes' (2017) 29(4) *Child and Family Law Quarterly* 359, 374.

⁸⁸ Family Mediation Council (n 6) s 5.1.5.

evaluation. These contradictory messages conceal mediator practice and prevent any discussion of their use. Because the traditional conceptualisation of family mediation portrays mediator intervention as a cursed practice, evaluation is hidden in both earlier and current regulatory guidance. This also conceals the more adaptable, modern type of mediator that can begin to respond to the post-LASPO climate.

5.4 Conclusion

The findings from the text analysis study show that regulatory bodies mainly understand family mediation as a process that promotes improved communication and conflict resolution between parties. They recognise settlement as a desirable element in mediation, in line with the facilitative framework. The most visible conceptualisation of family mediation adopted by regulatory bodies is that family mediators are facilitative helpers who also refer parties to legal advice. These functions largely operate to uphold the role of the traditional limited mediator. Yet underneath this headline message is a plethora of evaluative techniques, including screening, predicting court outcomes, reality-testing and intervention. Regulatory bodies have tacitly endorsed more evaluative techniques since the early Codes of Practice in the 1980s and 1990s, showing some recognition that the modern mediator is necessary to ensuring flexibility in mediator practice. However, the evaluation underpinning this role is mainly conducted through a facilitative proxy, leading to a lack of transparency in the process. Mediators are regularly portrayed as information-giving facilitators, supporting the ideal of absolute neutrality, yet the techniques discussed in Codes of Practice are often evaluative. This secrecy is, in effect, an attempt to avoid contradictions with the traditional approach and sacrosanct principle of absolute mediator neutrality. Rather than resolve this problem and the potential neutrality dilemmas caused by it, regulatory bodies have continued to implicitly permit evaluative techniques and strategies, over 35 years since the NFCC's Extended Code of Practice. Whilst the modern mediator role is recognised by regulatory bodies, its secrecy means mediator practice cannot develop.

For the modern mediator to be openly acknowledged, these more evaluative techniques must be recognised, used transparently, and regulated effectively. This study indicates that mediator evaluation is only hinted at by regulatory bodies, meaning none of these strands are satisfied. If evaluation is to be conducted by mediators and permitted by their regulatory bodies, it cannot be overshadowed by the overriding message of absolute neutrality. As a whole, the facilitative proxy simply buries the issues faced by mediators post-LASPO. Yet if debate acknowledges the fluidity of Riskin's continuum, reinforced by the four functions developed in

this thesis, it can be recognised that the modern mediator already moves towards the evaluative end of the continuum. This has significant implications for the post-LASPO era as more deliberate and purposeful use of the assessor and intervenor functions could promote access to justice and, ultimately, a contemporary mediation model where evaluation is transparent and regulated.

Further work is required to understand how evaluation operates in the post-LASPO landscape, as well as how mediators make sense of their four functions. *Chapter six* presents findings from interviews with family mediators, using the four functions as a framework for analysis.

Chapter 6. Family mediation from the perspective of mediators: a quasi-legal role

In the previous chapter, it was revealed that mediators are expected to fulfil four functions across the facilitative to evaluative continuum. This theoretical tool for understanding current mediator practices demonstrated a particular neutrality dilemma for mediators as their Codes of Practice did not signal when to depart from the facilitative helper function into more evaluative strategies, such as intervention. Instead, the existence of these latter techniques, carried out by the modern mediator, was concealed under a cloak of allegiance to orthodox, absolute neutrality. This chapter considers how mediators attempt to navigate this dilemma by presenting findings from the qualitative interviews with family mediators. It proposes that family mediators align with a facilitative framework (i.e. their traditional limited role) but simultaneously take on an increasingly modern, evaluative role in the contemporary landscape.

This chapter first considers mediators' conceptualisation of family mediation through their accounts of the objectives of mediation and the four mediator functions that were identified in *chapter five*. The mediators in the sample widely saw improving communication and conflict resolution as a means through which to achieve the ultimate goal of settlement. The interview data then reveals a strong alignment with the facilitative helper function throughout the sample. However, section two demonstrates that the interviewees believed they could assess the terms of possible settlement against a standard of *quality*. This has resulted in a somewhat quasi-legal role for mediators. The same reality of modern practice is evident in section three, which focuses on mediator neutrality. While this concept was central to the sample's conceptualisation of family mediation, it was clear that all the mediators took evaluative steps to redress power imbalances. The chapter concludes by asking why the stagnant understanding of mediator neutrality continues to prevent the contemporary conceptualisation of family mediation, underpinned by the modern mediator, from being openly recognised.

To secure participant anonymity, interviewees are referred to throughout *chapters six* and *seven* by a pseudonym. Letters are used to denote interviewees' professional backgrounds: lawyer (**L**), therapeutic (**T**), or lawyer with therapeutic training (**L+T**). A summary of participating mediators' relevant characteristics is tabled in *appendix four*.

6.1 The conceptualisation of family mediation and the role of mediators

6.1.1 Objectives and motivations

In *chapter five*, it was argued that regulatory bodies prioritised the therapeutic *improving communication and conflict resolution* objective over the legal *settlement* objective. It was, however, unclear how mediators would interpret the two objectives because settlement remains a key focus in contemporary family justice and policy. At the start of the interviews, participants were invited to talk about their background and motivations for becoming a mediator. Specifically, they were asked why family mediation appealed to them and what they thought mediation aimed to achieve.

All 17 mediators recognised both objectives of family mediation. Lauren was the most experienced mediator in the sample, establishing herself as one of the founding members of family mediation in the 1970s. When asked about the purpose of family mediation during the early pilots, she identified both objectives:

‘I think our concept at the start was about helping separating parents to communicate and work out agreements concerning their children... So I think it could go back to definitions but I would say it was about communicating and reaching their own decisions and agreements if possible. Rather than having a decision imposed on them.’

Lauren (T)

Although the scope of mediation has since widened to include financial and property matters, Lauren’s quote was indicative of the two objectives identified in Codes of Practice: mediation supported parties to ‘communicate’ and additionally ‘work out agreements’. However, it was apparent during the remainder of the interviews that mediators tended to interpret the improving communication and conflict resolution objective as a route towards settlement. This was explained by Rebecca:

‘...if they’ve learnt to talk better but they haven’t through talking been able to sort out the REALLY big issues, such as financial matters and children matters, they’re going to go somewhere else. Whether that be court OR be that to a sort of slightly dysfunctional situation. Sorting out matters may be the gateway for them to get on better... I don’t think those two things are in conflict.’ **Rebecca (L)**

Rebecca acknowledged the therapeutic objective but focused most of her attention on resolving ‘the REALLY big issues’, specifically the legal dispute. She expressed a concern that if a dispute was left unresolved, the parties might attend a different process, such as court, that

created a 'dysfunctional situation' for families. Rebecca consequently interpreted improving communication and conflict resolution as a 'gateway' to settlement. **Victoria (L+T)** held a similar position that mediation involved 'facilitating conversations to problem-solve', presenting improving the party dynamic as a means through which to achieve agreement. In general, the sample regarded settlement as mediation's main measurement of success.

The emphasis on settlement was also apparent when interviewees discussed their motivations for becoming a mediator. Mediators praised mediation as a process that fostered effective *solutions*, as illustrated by Charlotte:

'It [family mediation] just looked interesting, really. I liked the sort of- the kind of win/win aspect of mediation. That really chimed with me. It was something I'd not- before I worked at Citizens Advice, I hadn't even known it existed. It seems such a sensible and productive route. That's really what brought me in.' **Charlotte (T)**

Charlotte perceived family mediation as a 'sensible and productive route' to settlement. She represents the therapeutic mediators in the sample that were all drawn to mediation because they felt the process made a difference and gave the parties the power to make their own decisions. **Harley (T)** summarised this point aptly: 'I'm helping people help themselves to make changes.' Lawyer mediators placed a similar level of emphasis on settlement, although they directly contrasted this objective with court. As explained by Rosie:

'I've always wanted to be solution-focused. I don't want to make things worse. There's a- I suppose as I've become more experienced as a family lawyer, I've realised that we cause a LOT of harm... I thought that is a shockingly bad way to do it. So that's why I've always been looking at dispute resolution.' **Rosie (L)**

Rosie, a lawyer mediator, turned to 'solution-focused' mediation because the adversarial process caused 'a LOT of harm'. In actuality, all five lawyer mediators and five lawyer mediators with therapeutic training in the sample began to mediate because of the problems they witnessed in court or solicitor-based negotiations. **Michael (L)** described court being 'pretty rubbish' and **David (L+T)** saw mediation as 'a better way of dealing with family disputes'. Other lawyer mediators, such as **Emma (L)**, felt it was 'very hard to get a good outcome for the family if you only [saw] one side of the picture' as a partisan advisor. **Kate (L+T)**, a lawyer mediator with therapeutic training, asserted that 'solicitors up[ped] the ante' and caused negotiations to become 'litigious, aggressive' and 'heart-breaking'. This combination of findings provides some support for the claim that the adversarial court system was ineffective in resolving many family matters, as identified in *chapters one and two*.

To the sample, mediation attained settlement in a way that could also improve relations between the parties. This perspective emerged throughout all 17 interviews. To this extent, settlement may be the primary aim of mediation, but improving communication and conflict resolution remains essential to mediators' conceptualisation of family mediation. Mediators do not interpret the two objectives as being in conflict, although they stress the importance of attaining settlement through a thought-out and sustainable process.

6.1.2 Mediators' strong alignment with the facilitative framework and helper function

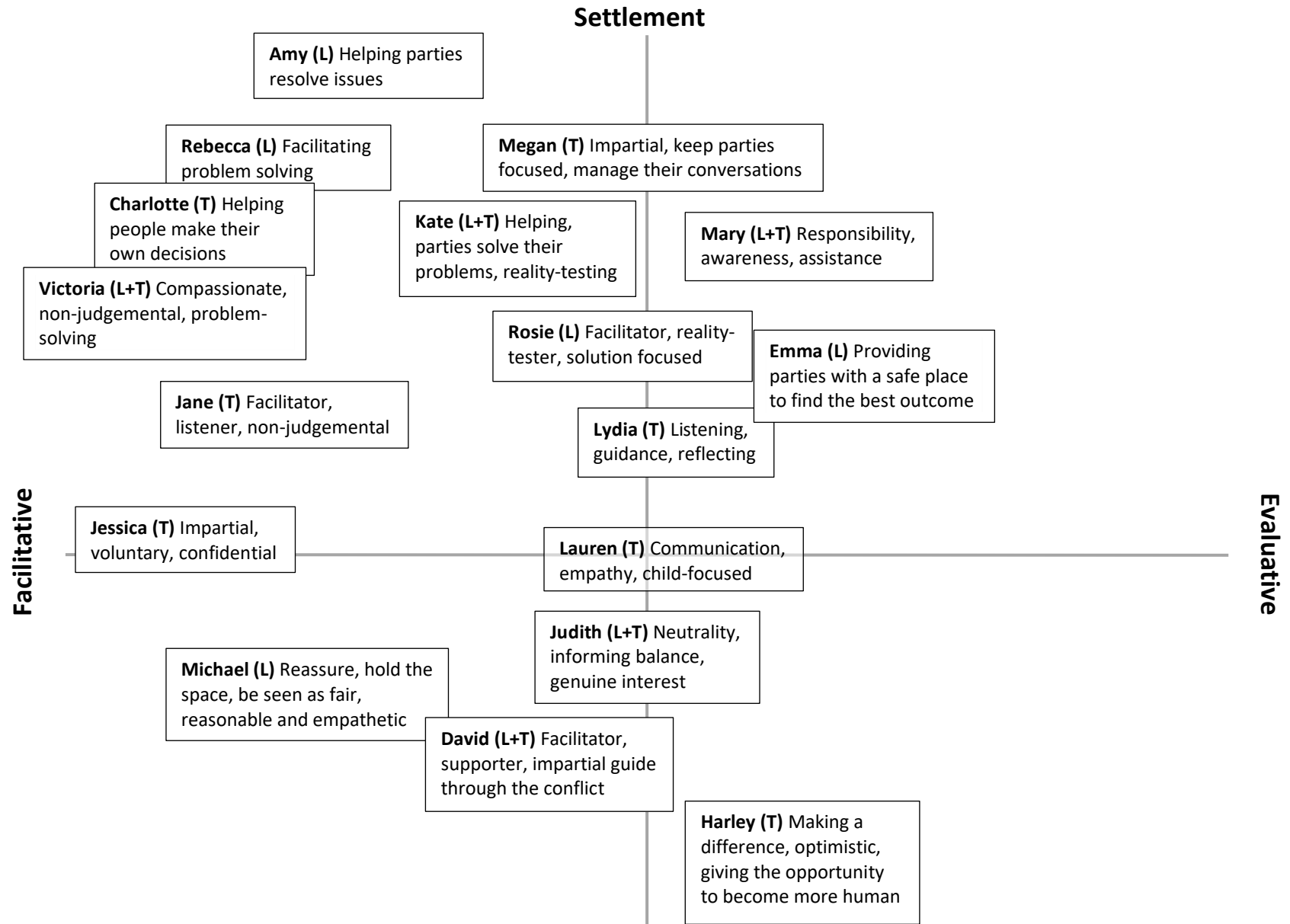
This chapter makes frequent reference to the four mediator functions identified in *chapter five* – mediators as helpers, referrers, assessors and intervenors – which reaffirm the fluidity of Riskin's facilitative to evaluative continuum. Its discussion shows that the four functions are not only a useful research tool for analysing Codes of Practice but other data on mediation, such as interviews.

Mediators were asked to describe their role in three words (or phrases). Some participants provided three separate words to describe the role of the mediator, whereas others gave three words that made a statement. Their responses are visualised in *figures seven* and *eight*. *Figure seven* is an objective word cloud of the most common answers (grouped into stemmed words via NVivo). *Figure eight* places the responses on two axes (following the researcher's subjective analysis), reflecting the facilitative to evaluative continuum and the objectives in family mediation respectively.

Figure seven: Words that mediators associated with their role, presented via word cloud



Figure eight: Words that mediators associated with their role, presented via axes of action and objective



Both figures reveal a strong alignment with the facilitative framework and helper function across the sample. In *figure seven*, attention is drawn to the phrases ‘facilitator’, ‘helper’ and ‘impartial’. In *figure eight*, mediators are primarily clustered towards the facilitative end of the continuum axis, with the majority also aligning with settlement rather than improving communication and conflict resolution.¹ All mediators selected at least one word that indicated a preference for facilitation, including ‘neutrality’ (**Judith**), ‘assistance’ (**Mary**), ‘guidance’ (**Lydia**) and ‘impartial’ (**Jessica, Megan, David**). **Victoria** selected ‘non-judgemental’, and **Lauren** took a similar stance by responding with ‘empathy’.² A small group of participants selected phrases that presented the mediator as the provider of a facilitative environment: **Emma** discussed ‘providing parties with a safe place’, **Michael** ‘holding the space’, and **Harley** ‘giving people an opportunity’. Three mediators (**Amy, Charlotte, Kate**) responded with ‘helping’, and another four (**Rebecca, Jane, David, Rosie**) described their role as a ‘facilitator’. Mediators were asked to explain these terms, providing further insight into the dominant facilitative framework:

‘As a mediator, you are HELPING them solve their problems together... You’re helping them hear each other and listen to each other.’ **Kate (L+T)**

‘I think I’m a facilitator. Okay? I facilitate discussion and conversation. I think I try to be a supporter, in that I try to support EQUALLY each of them...There’s something about supporting and working with people. And there’s also something about being an impartial guide.’ **David (L+T)**

Kate and Dave represented the entirety of the mediator sample that recognised the value of mediator facilitation: as the mediator facilitates, party autonomy is promoted and the family reaches a solution together. **Rosie (L)** similarly described being a ‘facilitator’ as ‘helping them to make the decisions for the family, otherwise who else is going to do it for them?’ This phrasing directly links to mediators’ helper function situated towards the facilitative end of Riskin’s continuum.

As hinted above, mediators connected the helper function with a demand for party autonomy. For example, **Jessica (T)** said she aimed to ‘empower [parties] with guidance to make their own decisions’. **Charlotte** expressed the same view:

¹ Phrases that reflect an alignment with the settlement objective included ‘keep parties focused’ (**Megan (T)**), helping parties to ‘resolve issues’ (**Amy (L)**) and ‘solve their problems’ (**Kate (L+T)**).

² **Lauren (T)** described empathy as: ‘Being able to receive and take on board without being seen as judgemental etcetera and communicating back in a way that makes the person feel understood and able to continue communicating and look for a solution.’

'I think people feel as soon as they start the process of separation and divorce, they feel somehow there is kind of a legal system that is going to tell them what to do. They forget actually that it's- it's ENTIRELY, really, a lot of it is up to them. If they want it to be. It's maybe helping them see the FREEDOM that they have to make decisions.'

Charlotte (T)

Charlotte wanted parties to realise that they had the 'freedom' to make their own settlement. Party autonomy underpinned this facilitative ethos, with all interviewees preferring to take on the role of helper. The sample's reasoning reflects the original definitions of family mediation stemming from the late 20th century, showing that the traditional conceptualisation of the process continues to influence mediators' understanding of their limited image today.

However, this strong alignment with a facilitative framework is not the complete picture. By mapping the interviewees' accounts onto the four mediator functions, a hidden evaluative framework is uncovered throughout the sample. When participants were asked to explain the three words they affiliated with their role, some of the mediators who responded with 'facilitator' also said things that showed they understood their role to have an evaluative remit. This is demonstrated by Jane:

'Could you expand on being a facilitator? What do you mean by that?' **Interviewer**

'So just helping the clients, facilitating the conversation that they're having. I guess you're managing the meeting but facilitating is a better word. You're helping them have communication and sort of trying to eliminate the bad conversations and trying to get them to focus on the future. You're facilitating- you're picking and choosing what's being said and sort of ignoring what shouldn't be said. I guess that's what I mean by being a facilitator. Kind of taking control of what is being said, really.' **Jane (T)**

Jane is placed towards the facilitative end of the continuum axis in *figure eight*. However, this excerpt suggests that she departs from her limited role and becomes an assessor to eliminate the 'bad conversations', as well as focus the parties on the 'future' (essentially agreement). By 'taking control of what is being said', there may be instances where Jane even intervenes to stop parties and change the topic of conversation. Based on this analysis, Jane adopted a weaker interpretation of facilitation than her three words originally suggested. In a similar vein, **Rebecca (L)** described mediators as facilitators but said they were also 'taught to be leaders'. This role provides mediators with an evaluative remit that enables them to control the mediation process and perhaps settlement. While many mediators associated themselves with

the image of a facilitative third party – the limited mediator – evaluation underpinned their approach.

Several mediators in the sample explicitly discussed their ability to evaluate. In *figure eight*, a handful of participants are clustered in the centre of the facilitation to evaluation axis. Mary selected ‘awareness’ as one of the three words that described her role as a mediator. When asked what this word meant, she explained that any agreement must be viable in the long-term and also approvable by the court:

‘Awareness of what is really going on. Awareness of what the law is and what is going to get through the courts. There is no point in getting them to agree something which the court won’t sanction. Also, awareness of any children who are with us in the room, as it were. Awareness of what the unit can stand. Again, getting them to agreements that are going to last.’ **Mary (L+T)**

Mary’s approach to awareness covered a wide range of techniques, from promoting the best interests of the child to following legal norms. These examples effectively acted as benchmarks to assess the proposed agreement, moving into evaluation. Similarly, **Kate (L+T)** explained that ‘the mediator has to make sure that whatever they decide is workable in practice’. This reality-testing (considered later in this chapter) provides mediators with the opportunity to assess the settlement and demonstrates a form of evaluation underpinning the conceptualisation of the mediator. Moreover, some mediators in the sample displayed an awareness that they could move across the continuum by picking words that reflected both facilitation and evaluation. **Rosie (L)**, for instance, selected ‘facilitator’, ‘reality-tester’, and ‘solution-focused’. **Megan (T)** then described her role as ‘impartial’ but also set out her responsibility to ‘keep parties focused’ and ‘manage their discussions’. The second and third phrases for both Rosie and Megan depicted a more active, settlement-oriented and evaluative role. Overall, there was evidence early on in the interviews that participants recognised both facilitative and evaluative frameworks.

These findings reinforce the fluidity of Riskin’s continuum, building on the demand for transparency advocated in this thesis. Further evidence is, however, required to reinforce this argument, and more specifically understand how mediators move across the continuum to take on the role of the modern mediator.

6.1.2.1 Screening into mediation and the LASPO safety net

Screening is an essential component of the conceptualisation of family mediation.³ It is a form of assessment that requires mediators to examine the party dynamic to understand the relative standing of both parties and determine if mediation is appropriate. This role is incredibly significant in the post-LASPO landscape as mediators are increasingly expected to adapt to a diversifying client base with little to no legal support. For these reasons, it is important to consider mediators' understanding of screening and whether more extreme disputes are screened out of the process, as originally intended by the LASPO framework.

A small number of participants regarded screening as a minor part of their role. These mediators tended to rely on solicitors to screen parties into mediation:

'I don't do a huge amount about safeguarding because most of my referrals are through solicitors. I'm aware of it. But having worked in a different sort of more legally aided area then it was highly, highly relevant. Usually if there's something coming through with those sorts of issues, I've already had a heads-up from the person who referred it.' **Emma (L)**

'I think they've [the parties] probably screened themselves out previously, to be honest. I think most who come are nowadays recommended. They want to resolve it, one way or the other.' **Michael (L)**

Emma and Michael's line of argument returns to the original conceptualisation of the family mediator, whereby legal advice – and subsequently evaluation – are widely available outside the mediation process, so the demand for mediators to assess is reduced. Emma and Michael's reliance on solicitors to screen parties out of mediation may reflect a change in their working environment or client base. Interestingly, both mediators had conducted publicly funded family mediation but stopped doing so after LASPO. Emma herself acknowledged that screening was 'highly relevant' when she worked in legal aid but would now receive 'a heads-up' from solicitors. The concerns around screening remain low for some mediators, even after LASPO, though it is expected that these mediators tend to see clients that can still access legal advice.

However, the standard response from mediators was that screening was now central to their role. The sample generally screened for domestic abuse and other power imbalances, as explained by Rebecca:

³ Screening was previously discussed in *chapters two and five*.

‘So, obviously there can be communication imbalances. There can be INTELLIGENCE imbalances and emotional imbalances. Emotional intelligence imbalances. Often the woman, sorry to say, is typically much more emotionally intelligent, and, the man comes across maybe as being kind of quite harsh but is in actual fact UNABLE to get out what they want to say. The emotions might come out as anger or, ‘I’m fed up with this’. But it’s because they’re not able to articulate or be fully- feel comfortable in the process. Then obviously we look at whether there has been any domestic abuse and that’s the screening you do at the beginning. That doesn’t necessarily mean screening out. You have to ask people what has happened and whether or not that prevents them coming to mediation.’ **Rebecca (L)**

The interview data cannot be used to critique the quality of screening but uncovers a general view amongst mediators that they must screen for various factors. Rebecca, for instance, recognised the gendered dimension in disputes and how these disparities provided parties with different forms of power. She cited a number of imbalances, including communication imbalance, intelligence imbalance and emotional imbalance.

Another key message conveyed by Rebecca was that domestic abuse did not automatically render mediation unsuitable. Other mediators adopted the same stance, including Charlotte:

‘Obviously I screen for domestic violence. Not that if there is, that means that it’s not suitable, but it’s about the current mindset and how able either party is to sit in a room or feel free to express an opinion or negotiation... in most cases I would encourage at least to try one session. You never really know what’s going to happen.’ **Charlotte (T)**

While neither Rebecca nor Charlotte claimed that mediation was a one-size-fits-all solution for family matters, they were keen to mediate. Rather than adopt a strict approach to screening, they considered how the party dynamic and previous history would impact the mediation. The standard view was that mediation should at the very least be attempted:

‘I remember from our training they said it as in, ‘You can screen IN or you can screen OUT.’ So, it depends on how you’re looking at it. You can think, you know you actually WANT to get everyone involved in mediation, as many as you possibly can. You’d always think, ‘Well, how can I make this work?’ or you could be like, ‘Hm, actually that’s a bit difficult.’ Be more about screening out. I suppose for me as a mediator I’m more of a screen IN person. I always want to try. I think mediation can help in the MAJORITY of cases.’ **Megan (T)**

Megan provided an interesting argument. Rather than describe mediators as screening parties *out* of mediation, it may be more appropriate to describe them as screening *in*. Most interviewees agreed with Megan, in addition to Charlotte and Rebecca, and felt that mediation should be attempted in most cases.⁴ These excerpts support the assertion that mediators are increasingly screening parties into mediation and, moreover, that they are increasingly understanding their role as legitimately encompassing more complex disputes.

There were, nevertheless, some limitations placed on this modern role where particular issues or party characteristics were present. For example, screening for mental health was a frequent theme in the data,⁵ and there was some divergence in opinion amongst participants. Harley was likely to screen these cases into mediation:

‘I think there is a danger if somebody has a mental health issue in mediation, people will think, ‘*panicked* What do you do?’ You just work with what’s there. You can ask them, ‘Hang on what do I need to know? What do I need to know in order to be helpful here? Do I need to be concerned about anything? Are there any signs I need to be aware of?’ Just to destigmatise it. To demystify it and make it something- how many people have mental health issues? It’s a lot of us. The social work course training, again, gave me a lot of grounding.’ **Harley (T)**

Harley warned that screening parties with poor mental health out of mediation further stigmatised the issue. He spoke highly of his previous background in mental health work and homelessness, suggesting that it improved his practice as a mediator. Harley also appeared somewhat critical of other mediators who were more apprehensive about mediating these cases, like Lydia:

‘...Mental health issues are quite hard because people who do actually have mental health issues that will AFFECT mediation, don’t often say. You know you try and question, but if they’re really withholding it, it’s very hard. Very difficult.’ **Lydia (T)**

Lydia acknowledged the difficulties that certain party characteristics brought into mediation, alluding to some constraints on her role as a mediator. These different perspectives reflect the types of mediators identified by Bloch, McLeod and Toombs in their work on MIAMs, previously

⁴ This is echoed by **Rosie (L)**: ‘...often I look at what their options are going to be. Sometimes perhaps we’re too cautious. Because, my view of mediation, even if it only sorts out one thing, it’s still done something. It may not resolve everything, but if you can narrow it down, then great.’

⁵ Recent literature has questioned the effectiveness of mediation when this characteristic is present: Anne Barlow and others, *Mapping Paths to Family Justice: resolving family justice in neoliberal times* (Palgrave Macmillan 2017) 97.

discussed in *chapter two*.⁶ Optimist mediators, such as Harley, thought mediation was appropriate in nearly every type of dispute. By contrast, Lydia leaned towards the purist mediator type, admitting the difficulties that certain power imbalances brought to mediation. Other mediators in the sample could be described as realist mediators who mediated complex disputes because they believed mediation was the only viable option for many parties after LASPO. Jessica recognised a tension between screening parties out of mediation and the lack of alternatives:

‘It’s a very difficult one because there’s some people that you know shouldn’t really be doing it [mediation] but a lot of them can’t afford to resolve it any other way, so they’re STUCK. *laughs* You don’t want to say, ‘No you can’t do it’ unless there’s something glaringly- you know, mental health issues but, again, where is that line? There’s a lot of people going through divorce that have some mental health issues because of where they’re at.’ **Jessica (L+T)**

It was apparent from the interviews that mediators took a range of approaches to screening. On the other hand, none of the mediators in the sample explicitly stated that specific issues, such as mental health or domestic abuse, meant that they ruled out the possibility of mediation completely. While some mediators could still be labelled as purists, they did not impose a blanket ban against mediating certain matters. Altogether, the data indicate that mediators will screen for a variety of issues that could impact negotiations. Some mediators are reluctant to mediate certain disputes, but still tend to screen in rather than screen out.

These findings are particularly interesting when it is recognised that domestic abuse support was the main area left untouched by the LASPO reforms. Domestic abuse is not a specific focus of this thesis but remains a crucial backdrop to many family disputes, as well as the arguments made in this chapter in terms of redressing power imbalances. Under LASPO, legal aid for a private family law matter in court remains available where there has been, or is risk of, domestic abuse.⁷ Implicit within this legal framework is the understanding that cases involving domestic abuse should be screened out of mediation. The findings from this study are out of sync with this framework and suggest that LASPO does not guarantee an adjudication safety net. This continues the revelation made by Barlow, Hunter, Smithson and Ewing that the ‘excessive faith in the value of the mediation process’ could damage screening as mediators

⁶ Anna Bloch, Rosie McLeod and Ben Toombs, *Mediation Information and Assessment Meetings (MIAMs) and mediation in private family law disputes: Qualitative research findings* (Ministry of Justice 2014) 16.

⁷ Legal Aid, Sentencing and Punishment of Offenders Act 2012, sch 1, para 12(1); The Civil Legal Aid (Procedure) Regulations 2012, 2012/3098 reg 33. See *chapter one* for further discussion.

see parties that would find the process 'traumatic' or a 'continuation of the abuse'.⁸ In light of this argument, it is submitted that mediators' general acceptance of their screening role vastly underscores the need for a strong and unified consensus on what is appropriate in mediation or, at a deeper level, explicit recognition of the contemporary conceptualisation of family mediation to ensure appropriate checks and balances are put in place.

Crucially, the ineffectiveness of the LASPO safety net raises further questions as to how these complex and difficult disputes are being resolved in family mediation. The quotes above implied that most mediators now see family mediation as a viable option for the majority of family disputes. This has large implications for their conceptualisation of family mediation, as it suggests that the interviewees felt there was sufficient flexibility in their role to adapt to more complicated disputes. More specifically, they departed from the traditional image of the limited mediator, into a more adaptable and modern role. An important question resurfaces: do mediators understand their role as one that promotes access to justice?

6.2 'It's the quality of agreement': mediators' perception of access to justice

As set out in *chapter one*, a crucial task for this thesis is to understand how far the perception of family mediation as a key player in access to justice has transcended into the conceptualisation of family mediation itself. The following discussion provides a new and interesting insight into family mediators' perceptions of access to justice, specifically post-LASPO.

Interviewees were asked what they understood by 'access to justice'. The most common response was to draw attention to the overburdened court process rather than mediation itself. Lauren and David spoke about a 'right' to court:

'I think it means the right- the human right to go to court. You don't have to have a lawyer to represent you in court... I think access to justice is the human right to go to court ON a justiciable issue. If there is one, you can't say ONLY lawyers can appear in court. You have to then accept Litigants in Person. Then it's access to what kind of quality of justice... There can be false expectations of what justice is and what is fair. But access to justice is access to a judiciary system.' **Lauren (T)**

⁸ Anne Barlow and others (n 5) 108.

‘I think it means the right of individuals to go to court if they feel they want to.’ **David (L+T)**

Lauren and David’s responses mirror the perceptions of court and mediation in general debate, returning to the discussion in *chapter one*. Lord Neuberger previously observed ‘a citizen’s right – and therefore her ability – to go to court’ (not mediation) that was fundamental to the rule of law.⁹ Similarly, none of the mediators in the sample referred to a right to mediate. Rather than evaluate a proposal to ensure access to justice, the mediators within the sample believed this task was reserved to the ‘judiciary system’, as mentioned by Lauren. By viewing access to justice as something that is achieved in court, the participants (perhaps subconsciously) placed certain parameters on what they could achieve as a mediator. This confines the profession to the facilitative framework, promoting the strict interpretation of Riskin’s continuum that was identified in *chapter three*. There are serious concerns around whether these constraints are part of an effective access to justice apparatus, particularly as the traditional adversarial court model is largely inaccessible post-LASPO.

However, there was evidence that the sample did not fully grasp the implications of reading access to justice as only access to court, not access to mediation. Mediators often gave confusing or contradictory statements throughout their interviews. For instance, **Amy (L)** stated that access to justice was ‘the ability to be able to go to court (pause) and a lot of people don’t.’ When asked how mediation fitted into this discourse, she mentioned that ‘mediation is in a way about not going to court’, expressing regret that ‘people don’t know about it’ and that MIAMs were not ‘doing the job’. Amy clearly associated access to justice with access to court and admitted that it was out of reach for many individuals in private family disputes. At the same time, she was disappointed that many people were oblivious to mediation, a process that from her perspective was about moving disputes away from court. Yet if mediation did not ensure access to justice, why was Amy critical of a supposed lack of awareness around the process? This is a significant shortcoming in her response and suggests some confusion around how access to justice operates in contemporary family justice.

The same contradictions were evident in the rest of the sample. Lauren was quoted above as emphasising ‘the human right to go to court ON a justiciable issue’. This statement stood in stark contrast to an earlier section in her interview where she implied that mediation obtained more than simply settlement. She spoke of a trainee mediator whom she felt was not suited

⁹ David Neuberger, ‘Keynote Address: A View From On High’ (Civil Mediation Conference, London, 12 May 2015) para 9.

for the role, using the anecdote to emphasise the importance of securing a high-quality agreement in mediation:

‘She [the trainee mediator] did the initial separate meetings and would tend to say the case was quite straightforward. There was a high conflict couple who were agreeing to sell the house, and she just said, ‘Good! You’ve agreed that.’ And I’d just think ‘Ah!’ *laughs* I would recognise- here is a man who is very keen to get his share NOW. She really didn’t seem to quite get it. I kept having to raise it and she decided not to carry on with mediation, which I think was a good thing. She just had a blind spot. She just thought an agreement was what we were looking for. It’s the QUALITY of the agreement. Yet we’re not making judgments, but you can see what I mean.’ **Lauren (T)**

Within this quote, Lauren implicitly or subconsciously associated family mediation with access to justice. She criticised the trainee mediator for glossing over serious issues, alluding to a more active role for mediators than their facilitative image suggests. In particular, she believed the trainee mediator was merely seeking ‘an agreement’. Hunter, Barlow, Smithson and Ewing previously acknowledged that it was unclear whether ‘access to mediation constituted access to justice’.¹⁰ Access to justice could equate to access to a particular procedure, but the researchers deemed this approach as inadequate. Rather, they argued that an agreement must be scrutinised in line with different guidelines or norms. In applying this argument to family mediation, it is submitted that access to justice does not mean a mediator (or another third party) only aims to engender settlement. Instead, she uses various norms to check the *quality* of the agreement, providing a form of oversight. Lauren adopts the same stance as Hunter and others by arguing that a mediated agreement should be of a certain ‘quality’. If a mediator helps parties to obtain not only settlement, but a settlement that satisfies a particular threshold of acceptability, how far does this differ from saying that a mediator works to ensure access to justice?

The following discussion sheds some light on the rule of thumb used by the mediators in the sample to determine the ‘quality of agreement’. In particular, it traces mediators’ commitment to legal norms. As set out in *chapter one*, one element of divorce negotiations is that parties ‘bargain in the shadow of the law’ and use precedent (or more specifically the predicted effect of such precedent on their settlement) to guide negotiations.¹¹ Barlow and others, speaking to

¹⁰ Rosemary Hunter and others, ‘Access to What? LASPO and Mediation’ in Asher Flynn and Jacqueline Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Hart Publishing 2017) 240.

¹¹ Robert Mnookin and Lewis Kornhauser, ‘Bargaining in the Shadow of the Law: the Case of Divorce’ (1979) 88(5) *The Yale Law Journal* 950.

mediators from 2011 to 2013, found that family dispute resolution practitioners used child welfare norms and legal standards to promote a 'just' settlement.¹² However, they warned that the law may have become 'less normative' within mediation following the withdrawal of solicitors from family justice after LASPO.¹³ Where Barlow and others primarily interviewed and observed family mediators from a legal background, this research builds on their findings in the post-LASPO climate and, furthermore, considers the similarities in the approaches adopted by both lawyer mediators and therapeutic mediators (as well as those with training in both disciplines).

It is useful to briefly mention the quality of assessment in relation to child welfare.¹⁴ **Lauren (T)** promoted child-related norms throughout her interview. She described the role of the mediator as 'child-focused' and mentioned that 'children's feelings matter' within negotiations. She later referenced Trinder and others' study on court orders in child contact cases and voiced concern about the rising levels of poor mental health in young people.¹⁵ For Lauren, child welfare was the leading motivator in her professional work. This norm was weaker in the remaining interviews, although most mediators acknowledged the need for parties to consider their children's best interests. For instance, **Rosie (L)** believed that 'it's all about the children... it's what the children want.' **Jessica (T)** likewise described the welfare of the child as 'the fundamentals of family law'. In line with Barlow and others, these findings demonstrate that most, if not all, mediators accept the child welfare norm as integral to the quality of agreement. However, the more prominent theme in the interview data was the use of legal norms by family mediators, indicating a more quasi-legal role for the modern mediator in the contemporary landscape.

¹² Anne Barlow and others (n 5) 180-194.

¹³ *ibid* 194.

¹⁴ The welfare of the child norm in family mediation has been heavily studied in previous work. See Gwynn Davis, *Partisans and Mediators: The Resolution of Divorce Disputes* (Clarendon Press 1988) 54; Janet Smithson and others, 'The 'Child's Best Interests' as an Argumentative Resource in Family Mediation Sessions' (2015) 17(5) *Discourse Studies* 609; Liz Trinder and others, *Making contact happen or making contact work? The process and outcomes of in-court conciliation* (Department for Constitutional Affairs Research Series 3/06, 2006).

¹⁵ Liz Trinder and others, *Enforcing contact orders: problem-solving or punishment?* (University of Exeter 2013).

6.2.1 Referring parties to legal advice: legal norms outside the mediators' remit

Mediators' commitment to the shadow of the law was first demonstrated through their referrer function. The entire sample stressed the need for parties to receive advice, particularly for financial matters. This was illustrated by Harley and Emma:

'I think one of our roles is to make sure people have access to advice. We encourage people to seek advice. Certainly in property and finance matters, it's about saying, 'Go and get advice.' What you don't want to happen is four, ten, whatever years down the line you think, 'Why did I do that?' Go and take advice. It's worth it.' **Harley (T)**

'Finance and property, I'd probably push it [legal advice] a bit more. It's always important to have legal advice, especially when we've done a financial disclosure in mediation and then they've had a meeting where they've considered the different options.' **Emma (L)**

Throughout this thesis, it has been recognised that advice is a form of evaluation that can help parties reach an agreement in line with the law. The sample widely accepted that a mediator could not complete this task and would instead refer parties to legal advice. However, the interviewees felt well-equipped to give information. This was a standard response, regardless of professional background:

'...I can't tell them what's right and wrong. I can't say, 'Oh you can't do that- that's not fair'. That's not my job. I'm not allowed to. So, what I say is, 'Right, there's your proposals. Here's the information. This is what you need to sort out. Now go get your solicitor to look at it and check that they're okay and you feel you're fully protected, and everything's been thought through.' **Jessica (T)**

'...it's very difficult to explain to people what their legal rights ARE, because they're different, without sounding partial. And I'm absolutely not going to do that. So, for example, if you have got an unmarried couple with a child. The unmarried couple won't be claiming any spousal maintenance because they're not spouses. The child will only be supported by the child support system which is quite rigid. How else will you deal with X? Sometimes you need to say to them, 'Go off and talk to your lawyer about this.'"

Judith (L+T)

By confining their role to one of information-provision, mediators' helper function is protected. This is because any subsequent use of the referrer function moves legal advice – and

consequently evaluation – outside the mediation process.¹⁶ The sample's preference for a facilitative framework and their traditional limited image is reinforced as a result.

Nonetheless, the referrer function is still connected to mediators' conceptualisation of their role as one which can secure a certain quality of agreement (rather than mere settlement). Mediators evaluate in order to determine when legal advice is necessary. This is demonstrated by Judith above, who acknowledged that 'sometimes you need to say' that the parties should talk to a solicitor. **Charlotte (T)** additionally said she always recommended that parties seek legal advice, but would 'push it MORE when somebody has a really unrealistic idea of what they want'. This evaluation is analogous to a mediator realising that the proposed agreement does not reach the certain quality necessary to ensure a just outcome. At the same time, the referrer function limits the ability of mediators to ensure the agreement reaches a certain threshold. This is because it continues the practice of reliance on other legal professionals to provide an explicit evaluation. In many ways, recommending parties to seek legal advice is a warning signal that the proposed agreement is not of a certain quality, with particular reference to legal norms or expectations. Whether this quality is obtained is the responsibility of parties themselves, as well as the legal advisor outside the mediation process. The mediator points towards the relevance and value of the shadow of the law, but swiftly returns to her limited helper function upon referral. Unfortunately, this dependency on accessible legal support is unrealistic in the post-LASPO climate and could lead to low quality agreements.

6.2.2 Mediating in the shadow of the law

Beyond the referrer function, the study produced evidence that the interviewees *mediated* in the shadow of the law. Legal oversight is not always deferred to another third party, but often conducted by the mediator herself. The difference between referring and mediating in the shadow of the law is demonstrated through the contrasting responses of Rosie and Judith. They both recalled a previous case where the proposed settlement would leave one party at a significant disadvantage:

'I had one [case] where he had a really valuable pension and she was saying, 'That's alright, I don't really want to bother with the pensions.' Then I said, 'I think you should

¹⁶ Mediators discussed other tasks that were outside their role, limiting their conceptualisation. **Jessica (L)**, for instance, said 'I don't sort out paperwork. I will ask them to give it to me in that format'. **Michael (L)** also mentioned that creating a binding agreement was 'obviously a different function that I can't perform'.

get legal advice at this point.’ So, she then went to see a solicitor, because obviously I can’t give legal advice.’ **Rosie (L)**

‘It [the case] was about resigning from a company. Actually, it was not a tax problem. This was simply if you have a certain percentage of a company and you remain a director of that company when you transfer the shares, you get an entrepreneur’s rate of tax which is five, ten percent. As opposed to FORTY percent. It’s really important that you don’t resign from being a director before you transfer the shares. But they wanted to do it that way. They wanted the person to resign as director, ‘You’re not having control of my company! We will transfer the shares sometime.’ And I was working very hard to say don’t do it that way. One person- she wanted out. ‘I’ll sign the form now.’ ‘Actually, it’s PROBABLY not a good idea.’ I thought tax advice was quite neutral, but they got really hent about it.’ **Judith (L+T)**¹⁷

The functions adopted by the two mediators differed. Rosie referred parties to legal advice through a solicitor. By comparison, Judith intervened. While both parties went beyond their helper function to encourage a high-quality agreement, the shadow of the law in Judith’s mediation was more prominent. In effect, she went from referring to legal advice, to mediating in the shadow of the law. Judith’s use of ‘advice’ is a more extreme example of mediator evaluation in the study, but nonetheless reflects the range of assessments and interventions used by mediators to directly influence the quality of agreement.¹⁸

In general, the interviewees felt the role of the mediator was to promote an agreement that followed certain guidelines. As discussed by Judith and David:

‘I’m sure we all know couples- you take a job in, let’s say, Berlin, and your other half will say they can get a job there but not the job they’re doing now. So, they get a lesser job...You then separate. This person has given up quite a lot of their own potential. It’s nothing if you’re not married. So that sort of thing is MUCH better mediated because it’s important to actually get something that’s fair. Because I KNOW the legal

¹⁷ This quote also raises an interesting question around the potential impact of a mediator’s professional background on settlement. Would a therapeutic mediator be aware of the same legal issue in this case? Whilst the abilities of lawyer and therapeutic mediators, as well as the legal training offered to trainee mediators, is outside the scope of this thesis, it is certainly a crucial line of investigation for future research.

¹⁸ **Michael (L)** was the only other mediator who said he gave advice: ‘I do, wherever possible, give as much general advice as I can, advice that will help move them to a position- I’m probably one of those mediators who will give more advice. There are some, I think, who will just let the clients say what they like and not really control it enough.’ This approach may reflect Judith and Michael’s background as a solicitor, a profession which they both continued to practise at the time of interview.

background, I can also explain to them in the mediation WHY we're doing what we're doing.' **Judith (L+T)**

'...if I'm dealing with finance, I believe I have a professional responsibility to help the couple to find a solution which falls within section 25. So within the criteria of fairness. Both because I think that's RIGHT but also because they will want to get their financial settlement approved by the court and that will therefore need to be within the criteria.'

David (L+T)

Both mediators assumed some responsibility for engendering outcomes in line with concepts such as fairness ('it's important to actually get something that's fair') and legal precedent ('find[ing] a solution which falls within section 25... because I think that's RIGHT'). Moreover, David expected parties with a financial dispute to seek a binding court order, strengthening the shadow of the law. While the quality of agreement would still be assessed by a judge – and a solicitor under the conventional route from consent to court order – David would be the first professional in the dispute to evaluate the legality of its proposals. He would subsequently mediate in the shadow of the law, encouraging a legally correct settlement.

Before considering the ability of mediators to predict court outcomes, it is important to briefly critique the use of legal precedent and legislation through a gendered lens in order to fully appreciate mediators' responses to power imbalances. On the one hand, the use of legal norms in mediator practice may provide some form of scrutiny on settlements reached outside of court. Diduck voices concern that the settlements reached in family mediation 'are not scrutinised, regulated or governed by the rules of that [justice] system.'¹⁹ The findings from the mediator interviews reveal a continuum of mediator functions available to the modern mediator that could counteract the possibility that mediated settlements are free from any regulation. However, the influence of legal norms is not without its problems. Webley maintains that legal norms are the 'preserve of white middle-class men' (having been written to protect men's interests over women's) which, alongside a facilitative framework, prioritises masculine values such as 'autonomy of decision-making, detachment and rationality' over 'emotion, dependence and subordination.'²⁰ This thesis does not provide data on the quality or effect of legal norms adopted by mediators. But it is important to acknowledge that mediators' evaluative functions, including assessment, could hamper substantive justice

¹⁹ Alison Diduck, 'Justice by ADR in private family matters: is it fair and is it possible?' (2014) 44(5) *Family Law* 616, 617.

²⁰ Lisa C Webley, *Adversarialism and Consensus? The Professions' Construction of Solicitor and Family Mediator Identity and Role* (Quid Pro 2010) 35-36.

because these functions rely on legal norms that prioritise formal equality, and risk overlooking the structural inequalities typically experienced by women.²¹ This supports the call for further transparency and recognition of the mediator functions across the facilitative to evaluative continuum which would, in turn, enable further regulation of family mediation. If mediator practice is seen as fluid, as is permitted through the modern mediator role, the profession would be better equipped to respond to the structural inequalities often seen in disputes. Thus, mediated settlements could be better regulated and scrutinised, promoting access to justice.

6.2.3 Predicting court outcomes through information: evaluative intentions

Predicting court outcomes is a standard procedure for legal professionals within the wider family justice system.²² It is a form of assessment permitted under the FMC's Code of Practice, as outlined in *chapter five*. The entire sample agreed that mediators would speak to the parties about court. However, the level of detail given to parties varied. Interviewees appeared to separate predicting court outcomes into two tasks: providing information about the law, and explicitly discussing the likely decision to be reached in court. Rebecca summarised this position:

'I suppose when somebody is really trying to almost sabotage the process by saying, 'I've come to mediation but actually I haven't come in good faith. It's my way or the highway. My way is over there away from all reasonable proposals.' You have to sort of think- well, is this RIGHT for mediation? You might then start talking about the parameters- the way that family law WORKS and start VAGUELY. Depending on how difficult it is you then could start to have to be REALLY explicit and say, 'Well, a judge is probably not going to accept that.' **Rebecca (L)**

First, a mediator 'vaguely' outlines the parameters of family law. As this thesis is concerned with mediators' conceptualisation of family mediation, information-provision (on either the law or what would happen if the case should go to court) must be discussed as a part of predicting court outcomes, rather than as something separate to it. Second, the mediator can talk to parties about the likely outcome in court. These tasks will now be considered separately.

²¹ This echoes the criticisms of mediator neutrality in favouring formal equality as set out in *chapter three*.

²² In Sarat and Felstiner's study on US divorce lawyers, parties frequently asked their solicitor about the likely outcome in court or what a judge would probably decide: Austin Sarat and William L F Felstiner, *Divorce Lawyers and Their Clients: Power & Meaning in the Legal Process* (Oxford University Press 1995) 122.

In terms of information-provision, previous research by Hitchings, Miles and Woodward showed that both mediators and solicitors emphasised the need for parties to understand their legal rights and obligations.²³ A similar finding emerged from the current interviews. Most mediators, including those from a therapeutic background, thought they could give an outline of the typical court outcome in certain cases.²⁴ The participants would inform parties about the list of factors considered by a court upon the division of family assets, particularly section 25 of the Matrimonial Causes Act 1973:

‘I mean I always talk about the section 25 factors *points to a poster on the wall*. They can see HOW a court would look at any decision... But I wouldn’t say, ‘The court would do this or that.’ I wouldn’t do that at all.’ **Charlotte (T)**

Mediators’ typical response promoted the strict divide between information and advice, with all interviewees aligning their work with the former. Some respondents, such as Charlotte, felt they should not give explicit guidance on the likely outcome in court. While this may reflect Charlotte’s therapeutic background – and any potential feelings that she was unqualified to give legal information – the same stance was echoed by a lawyer mediator with therapeutic training:

‘What I would say is there are five orders the court have the power to make. When they make a decision, they apply the section 25 factors... I’ll give them legal information. For example, would an inheritance be taken into account? The legal information on that is if it’s sufficient, certain and proximate. But I would avoid applying the legal information to their set of circumstances. What I would do is put ‘two plus two equals’, and then it’s up to them to make four, OR to go to their solicitors to make four.’ **Victoria (L+T)**

As explained by Victoria, she could provide parties with a hint (‘two plus two’). However, they would have to find the answer (‘four’) alone or with the support of a solicitor, moving evaluation outside the mediation process. This presents the mediator as a facilitative helper that only provides information, regardless of whether the parties can access additional support.

Nevertheless, many interviewees claimed they would use legal information to move parties towards a particular outcome. *Chapter two* referred to Hitchings and Miles’ ‘viable options’ approach, a technique whereby mediators directed parties towards a certain settlement or

²³ Emma Hitchings, Joanna Miles and Hilary Woodward, *Assembling the Jigsaw Puzzle: Understanding Financial Settlement on Divorce* (University of Bristol 2013) 97.

²⁴ Barlow and others previously mentioned giving information about the substantive law as a method used by mediators to strengthen the shadow of the law. See Anne Barlow and others (n 5) 184.

encouraged them to understand the reality of their proposed agreement.²⁵ Similarly, Maclean and Eekelaar found that mediators used information to move parties towards a particular outcome.²⁶ The present study confirms these findings. Both Lydia and Jessica reiterated that the role of the mediator was to give information, though they could notify parties of their 'options':

'...they phone up and ask for advice, or during the mediation. Just asking, 'What would you do?' They're always asking for advice. You have to say clearly to them, 'I can't give you advice, but I can give you some information. This is what would happen, these are the choices, these are your options.' **Lydia (T)**

'Finances are a bit easier in that sense because they're a bit more systematic. You can actually say, 'These are your options with pensions. These are your options with the property. These are your options with your savings. This is what the law says about debts.' You can actually give a lot more practical information on finances.' **Jessica (T)**

Lydia and Jessica refused to give advice. But by setting out the 'options' available to parties, they gave information that could significantly alter the outcome of negotiations. In effect, the mediator is attempting to improve the quality of agreement. She can evaluate the proposed settlement and influence the outcome, though it remains hidden behind the facilitative guise of information-giving. David explained:

'...my position is you can give as MUCH detailed information about the law as you know. You can go as far as you know. But you give it in a way which is objective and impartial, as you might read it in a book or article.' **David (L+T)**

David framed his responses as 'objective and impartial' information but did not consider how it potentially moved the parties towards, or away from, a particular agreement. **Victoria (L+T)** was more conscious of this concealed evaluation by stating that she gave parties 'two plus two equals', with the intention being that parties reached four (i.e. the preferred outcome) themselves. She later commented that mediators should 'get parties so far to the gate', as 'somebody who has been listening carefully can make a reasonable judgment.' In this excerpt, Victoria showed an awareness that she influenced the outcome if a party paid attention to her prompts. However, the majority of participants did not demonstrate this level of reflexivity and continued to refer to the strict confines of information-provision over advice. Despite

²⁵ Emma Hitchings and Joanna Miles, 'Mediation, financial remedies, information provision and legal advice: the post-LASPO conundrum' (2016) 38(2) *Journal of Social Welfare and Family Law* 175, 185.

²⁶ Mavis Maclean and John Eekelaar, *Lawyers and Mediators: The Brave New World of Services for Separating Families* (Hart Publishing 2016) 126.

mediators' dominant depiction of themselves as limited information-givers, there were clear evaluative intentions behind their work.

6.2.3.1 The decision of the court: open evaluation

Mediators would also talk to parties about the likely outcome in court. This is the general explanation of predicting court outcomes adopted in the literature, described by **Rebecca (L)** above as an 'explicit' approach. As a more openly evaluative technique, it was less common in the data:²⁷

'I don't think I've ever had one [mediation case] that is SO kind of extreme in their differences that I feel, 'Oh this is not going to work.' If I DID think that then I would probably say, 'Look, this MIGHT be outside what a judge would see as fair and acceptable.' **Megan (T)**

'It [the agreement] also has to be approvable by the court, if it's then going to become a consent order in divorce proceedings. So, an important role of the mediator is to make sure that people don't leave with completely unworkable or- or an agreement that is not going to be approved by the court. You have to flag it up, and that's one of my roles: 'I'm not a hundred percent sure that would be approved, so I strongly recommend that you speak to your solicitors to get THEIR view on it'.' **Kate (L+T)**

This small group of participants, comprising both therapeutic mediators and lawyer mediators, felt mediators could assess the proposed agreement and determine whether a similar outcome would be reached in court. Such a mediator may follow particular legal norms: for instance, **Amy (L)** would say to parties, 'if the court were looking at this, they might think it is a bit unfair'. This explicit form of predicting court outcomes enables mediators to take on a more active (and evaluative) role in mediation, providing them with a legal advice remit that could prove useful in the post-LASPO climate. In particular, predicting court outcomes strengthens the power of legal norms in the negotiation setting.

When viewing both approaches to predicting court outcomes together, it is clear that many mediators in the sample – comprising all three sub-groups – believed that they knew enough

²⁷ Many mediators said they reassured parties that they were not giving advice when predicting court outcomes, continuing to conceptualise their work as information-based. **Emma (L)** mentioned: 'I am able to say, 'Look. I'm not giving you legal advice but I'm telling you as a matter of fact that there is ABSOLUTELY no way that you're going to have a 20/80 split.'

about the possible legal outcomes to at the very least give legal information.²⁸ They did not perceive this information-provision as a task reserved for lawyers, or even lawyer mediators. While the quality of information or advice cannot be deduced from these interviews, it is apparent that some mediators, including those from a therapeutic background, carried out a quasi-legal role. This is further evidence that mediators felt qualified to mediate in the shadow of the law, extending the reach of mediator evaluation and going beyond the strict confines of the original, limited mediator.

Even so, the interviewees treated predicting court outcomes with some caution. **Kate (L+T)** in particular felt it was 'dangerous' and 'not the mediator's role' to be 'directive' in predicting court outcomes because of the uncertainty in family law decisions.²⁹ Returning to the quotes above, **Megan (T)** viewed predicting court outcomes as a last resort. **Kate (L+T)** would similarly tell parties that she was 'not a hundred percent sure' what would be reached in court, deferring responsibility to a lawyer via referral. These mediators mediated in the shadow of the law, but were still reliant on other legal professionals to verify their evaluation. Thus, notifying parties that their agreement falls outside what (the mediator believes) may be reached in court involves a more explicitly evaluative approach to mediation, though it is not understood by mediators as an unrestricted form of quality control.

6.3 Balancing neutrality and flexibility

Thus far, this chapter has concentrated on mediators' conceptualisation of family mediation and their role. It has had particular regard to interviewees' widespread responsibility to seek a quality agreement, or, in other words, access to justice. A crucial element to this discussion is how mediators balance the sacrosanct principle of mediator neutrality alongside the demand to combat power imbalances and provide flexibility.

²⁸ In a 2020 book chapter, Barlow and Hunter briefly acknowledge that mediators from both 'legal and non-legal backgrounds' in the 'Mapping Paths' study gave parties information about court. It corroborates findings from this thesis where the conceptualisation of family mediation was widely the same across its three mediator subgroups. See Anne Barlow and Rosemary Hunter, 'Reconstruction of Family Mediation in a Post-Justice world' in Marian Roberts and Maria Federica Moscati (eds), *Family Mediation: Contemporary Issues* (Bloomsbury Professional 2020) 18.

²⁹ She expanded on this point: 'We all know that if there are six different district judges, what they would do on any given situation, you'd get six different answers. If that's the case, how can ANY mediator tell clients, 'If you went to court this is what would happen.' Or, 'If you went to court the judge would say no.' I mean there may be one or two occasions where it's so clear-cut that you might feel able to say it, because it's almost a fact. But in most situations, family law is INCREDIBLY grey and discretionary.'

6.3.1 Approaches to neutrality

It is useful to start with mediators' conceptualisation of their neutrality, a concept widely associated with the facilitative framework and helper function. Two broad conceptualisations of mediator neutrality, representing roughly half of the sample respectively, were identified in the data.³⁰ The first approach was the traditional, absolute interpretation of neutrality identified in *chapters three and five*. Judith commented:

'It's [mediator neutrality] really important. It's almost like being an actor. It's REALLY important. If you feel the other person is turning towards the other person too much. Being neutral, you have to be REALLY careful. It's not quite like somebody holding a talking stick, you know you can only talk when you hold the stick. But it's really important for them not to feel that you're spending too much time with the other person or that you're ignoring them.' **Judith (L+T)**

The traditional approach presents neutrality as a concept that compels mediators to be even-handed, free from bias and not interfere with the outcome. **Amy (L)** adopted the same interpretation by stating that mediator neutrality meant 'you don't take sides'. Kate agreed with this idea of even-handedness, though admitted it could be difficult to maintain in practice:

'There are words that we use, so 'you both', 'each of you', etcetera. If you are listening to one for any length of time, you have to make sure the other one has got the chance to respond. To me, it means being VERY balanced and being absolutely non-judgmental. That's really testing. The story I heard this morning... It was outrageous what I heard. But I know that she wouldn't have known I was thinking that, because, although I'm a terrible poker player, I'd like to think I'm experienced enough to ensure that she had no idea what I was thinking in my head. They will have NO idea that I think his behaviour is really quite despicable. Anyone would agree that his behaviour was not appropriate, but he won't know that.' **Kate (L+T)**

Kate had conducted an intake meeting the morning of the interview with a woman who was separating from her partner of forty years. She was shocked by the ex-partner's behaviour but remained confident that she could mask these feelings and appear completely neutral to both parties. Then again, Kate admitted that this task was 'testing'. Many other mediators

³⁰ All mediators were asked what they understood by 'mediator neutrality', with the exception of **Jane (T)**. Her interview was cut short due to an issue with a client before their mediation session.

acknowledged the difficulties in upholding an absolute vision of neutrality, particularly when negotiations reached a standstill. As explained by Jessica:

‘It [negotiations] can get very heated. I might take one [party] out for five minutes which I have to be VERY careful with because of my neutrality. You can’t really once you’ve started mediation carry on separate conversations. But they need a coffee, or they may just need five minutes.’ **Jessica (T)**

The orthodox understanding of mediator neutrality reads almost like a textbook answer: a mediator must be neutral and treat both parties equally at all times. Yet the interviewees who adopted this conceptualisation widely acknowledged that this approach did not account for the subtleties of mediator practice. In light of this evidence, it is argued that many mediators follow the role of the limited mediator, though this does not mean they are blind to the neutrality dilemma.

The second half of the sample adopted a more active response to this discrepancy in neutrality theory and rejected the traditional approach. They distinguished the concept from impartiality:

‘Neutrality seems to signify something more passive to me. There is a kind of, just letting it happen. Whereas I think impartiality is about ALLOWING something to happen, without having an investment in the outcome, other than that outcome is something that will be helpful to the clients... I mean it’s just a word-banding exercise in some senses. Neutrality can mean that you don’t have a particular investment as well. Thinking about the Swiss. *laughs* It’s a very big term and I think it’s one- the reality is that we’re never REALLY neutral.’ **Mary (L+T)**

‘I’d distinguish between neutrality and impartiality. Neutrality would mean having no values. That wouldn’t accord with the principles of mediation where Codes of Practice say mediators have a special responsibility with children. That again needs a WHOLE load of unpacking as to what that means, but it’s not value-free... That’s not neutral, but that’s different trying to retain impartiality so that both parents feel that you’re trying to help the WHOLE family and not one more than the other.’ **Lauren (T)**

The perception that a mediator supports *both* parties, rather than acts as a passive third party who acts for *no-one*, underpinned this alternative conceptualisation.³¹ This meant that

³¹ From a similar perspective, **Megan (T)** discussed the term multi-partiality, requiring a mediator to be ‘on both of their sides rather than on anyone’s side... you’re helping BOTH of them to get what they want... Impartiality I feel like it’s a bit more like you’re REMOVED from it. Whereas multi-partial I feel like you’re a bit more drawn into it.’

mediators could combat power imbalances without instantly departing from their helper function. Some mediators also adopted this different interpretation because they recognised that they promoted certain norms in mediation. For instance, **David (L+T)** explicitly rejected the neutrality label because he had ‘two focuses’: ‘the welfare of the child and... keeping the family out of court’. His stance begins to recognise a mediator’s evaluative remit, whether that be via referral, assessment or even intervention.

Interestingly, the preference for the term ‘impartiality’ in roughly half of the sample suggests that some mediators distinguish the concept from neutrality. To return to *chapter three*, advocates of impartiality claim that neutrality requires mediators to be disinterested in the outcome, whereas the former principle is based on even-handedness as to the process. However, it was argued that the terms are largely synonymous in practice. If the intended effect of adopting the term ‘impartiality’ is to avoid contradictions in mediation theory, this can also be achieved by redefining and sharpening the understanding of ‘neutrality’ itself. The problem is not necessarily with the terminology used, but rather the mass ambiguity as to when and how this facilitative framework is balanced with more evaluative actions. Nevertheless, the current discussion must recognise that some participants in the study were more aware of – and open to – the evaluative framework, and thus preferred an alternative interpretation of neutrality. The preference for impartiality amongst some mediators must, therefore, be taken into account when redesigning mediation theory to capture the intricacies of modern mediator practice.

6.3.1.1 Neutrality according to mediator background

Some divergence in understanding mediator neutrality within the sample was to be expected. However, one unanticipated trend in the data was a strong correlation between the interpretation adopted and mediators’ professional background. *Table twelve* summarises the responses of mediators when asked about their interpretation of neutrality. A striking result was that lawyer mediators predominantly followed the traditional conceptualisation of neutrality, whilst an alternative conceptualisation tended to be adopted by therapeutic mediators. The only lawyer mediators that adopted an alternative interpretation of neutrality were those that also had therapeutic training. This introduces the mediation literature to a new hypothesis regarding mediator neutrality. Previously, Hitchings and Miles said that it would be ‘unsurprising’ if lawyer mediators ‘express frustration with the neutrality of facilitative

mediation'.³² By contrast, this study produces strong evidence that mediators from a therapeutic background (or those with therapeutic training) are more frustrated with the traditional, facilitative approach to neutrality, and subsequently more likely to adopt an alternative interpretation.

Table twelve: Mediators' conceptualisation of mediator neutrality by professional background

Approach to mediator neutrality	Number			
	Lawyer mediators	Therapeutic mediators	Lawyer mediators with therapeutic training	Total
Follows the traditional conceptualisation	5	2	2	9
Alternative conceptualisation	0	4	3	7

There was no definitive explanation in the sample as to why this difference exists, although it is hypothesised that it relates to the overarching principles in family mediation.³³ Reflexivity was a recurring theme in the interviews with therapeutic mediators (or those with therapeutic training). It is proposed that where a participant believed reflexivity was essential to their work as a mediator, they were more likely to reflect on the fundamental principles of mediation, including neutrality. David ran a training course for family mediators and explained that lawyers often struggled to reflect on their work:

‘...I think one of the things that is really difficult about mediation is when mediation begins and two people walk into the room, you have no idea where it is going to go. You may have had a couple who seemed to be fairly calm and together in session one. But in session two, they’ve completely changed. Lawyers find that quite difficult to handle, and to work reflectively.’ **David (L+T)**

The suggestion that lawyer mediators do not align with the concept of reflexivity is based on purely anecdotal evidence, although David’s argument was further supported by Mary and Emma’s contrasting statements:

³² Emma Hitchings and Joanna Miles (n 25) 191.

³³ Another reason may be the training undertaken by the different mediator sub-groups. Because there is no clear distinction between ‘neutrality’ and ‘impartiality’, it is unlikely that every mediator in the sample who preferred the latter term made this decision in isolation. Instead, the therapeutic mediators, and lawyer mediators with therapeutic training, may have been exposed to the terminology debate in their training (whether to become a mediator or another profession). This raises questions around the training undertaken by different mediator sub-groups, and whether there is consistency across the various courses provided. Mediator training is briefly discussed towards the end of *chapter seven*.

'I think it [therapeutic training] helps you to reflect. But, also, perhaps to manage your work. If you feel- if you feel ANXIOUS in the room or ANGRY with one of your clients... Those will impede the work. I sometimes think that some of the resistance in the mediation room is the mediators themselves.' **Mary (L+T)**

'I suppose it's [mediator accreditation] really about trying to get people to have EXPERIENCE... It's a much better thing than doing these RIDICULOUS reflective- I can't begin to tell you what a load of rubbish I thought that reflective bit of work was.' **Emma (L)**

Throughout her interview, Mary emphasised the need for mediators to consider the therapeutic elements of family mediation. She promoted reflexivity, claiming that it furthered mediation and separated the mediator from any ill feelings they held towards the parties. By contrast, Emma was frustrated with the reflective tasks that were required for FMC accreditation, describing it as a 'load of rubbish'.³⁴ Mary and Emma thus viewed reflexivity differently. This may reflect their approach to mediator neutrality, as Emma followed the traditional understanding of the concept, whereas Mary opted for impartiality. A note of caution is again due in this respect because of the small sample size in this study. Nevertheless, this preliminary finding suggests that lawyer mediators and therapeutic mediators (or lawyer mediators with therapeutic training) may differ in how they approach and interpret different concepts, including mediator neutrality and reflexivity.

6.3.2 Redressing power imbalances

Regardless of the interpretation adopted, the interviewees did not see mediator neutrality as a concept that stopped them from redressing power imbalances. Mediators were explicitly asked how their neutrality worked when there was a power imbalance between the parties. None of the interviewees said they could not react. Instead, they would prefer to assess the situation and intervene.³⁵ Several mediators, for example, said they spent more time in

³⁴ Under the FMC's Manual of Professional Standards, last updated in June 2019, a trainee mediator must reflect on cases that did not settle, the types of cases she mediated, and the skills she gained through training. Family Mediation Council, 'FMC Manual of Professional Standards and Self-Regulatory Framework' (FMC 2019) <www.familymediationcouncil.org.uk/wp-content/uploads/2019/06/FMC-Manual-of-Professional-Standards-Regulatory-Framework-v1.3-Updated-June-2019.docx.pdf> accessed 21 April 2020 15.

³⁵ 'Obviously when there is a power imbalance the role of the mediator is to try and lessen that in the meeting. If one person has less of an understanding about financial stuff, to give them more time to understand something or to speak up when the other person has a tendency to speak more or dominate in that area.' **Charlotte (T)**.

sessions asking about one party's perspective but would openly acknowledge this in the room beforehand.³⁶ Some of these interventionist techniques will now be discussed, before coming back to consider any repercussions for the neutrality or impartiality debate.

Termination is a clear form of intervention, although the interviewees rarely felt this was necessary. **Harley (T)** mentioned that he had only stopped mediation 'once or twice' in the twenty years that he had been a mediator, and this only occurred because the weaker party was unable to 'say whatever [they] wanted'. His stance suggests that mediators do not think they can mediate every dispute, echoing the discussion on screening towards the start of this chapter. Then again, termination was only mentioned by around a third of the sample, many of whom acknowledged the tension if parties had to attend another dispute resolution process.³⁷ In general, termination was understood as a last resort when all other options had been exhausted. This suggests that mediators have a wide variety of interventions, beyond termination, at their disposal.

Mediators would regularly reality-test when the proposed agreement had not taken into account the reality of the parties' situation. **Mary (L+T)**, for example, defined reality-testing as 'getting them [the parties] to imagine what it's going to be like'. **Jessica (T)** emphasised that it was essential that a mediator 'questioned [parties] on things that might happen in the future that they haven't thought about'. Reality-testing could be regarded as a form of intervention at some points in the data, revealing the fluidity of Riskin's continuum and the four mediator functions. This intervention was particularly relevant where the proposals benefited one party over the other. As discussed by Kate and Rosie:

'The clients have to believe you are there for them both. So, your behaviour and everything you say, the language that's used, has to be constantly worded in a way that's mutual. That doesn't mean you can't reality-test and say, 'I know you're saying that, but what would happen if you did that and where would she then live?'... you should make sure that you are COMPLETELY balanced in your language.' **Kate (L+T)**

'You can have one that turns up with their Mac laptop and the Excel spreadsheet, and the other who has been looking after the kids for 25 years. The first one will say, 'Well she can get a job now.' Right, okay, you were happy for 25 years for her not to work,

³⁶ As illustrated by **Rebecca (L)**: 'I don't want them to think I have some sort of magic. So, I keep telling MY thought process and saying, 'Sorry I'm spending a lot of time dwelling on YOUR situation but that's making sure we have the same amount of information.'

³⁷ **Lydia (T)** mentioned that 'very occasionally I will feel that I don't want to do it [mediate]. More often than not but they [the parties] are insistent that they want to do it. That's a hard one, extricating yourself from something like that.'

but SUDDENLY- and realistically, what is she going to get? She's a bit old to start her training. She's not going to be earning the 35, 40 thousand you may like her to. You will need to give her some support.' **Rosie (L)**

Kate stressed that the concept of neutrality did not prevent her from reality-testing to ensure that the agreement represented the views of both parties. Rosie then noted that a mediator could give more support to a weaker party, although she did not clarify what this meant in practice. This preference for reality-testing furthers the argument that mediators consider the quality of agreement, increasing the importance of the evaluative framework and quasi-legal space. In fact, it appears that reality-testing takes up a larger part of mediator practice post-LASPO. Hitchings and Miles interviewed 16 mediators dealing with financial matters and found that reality-testing was mentioned by a 'smaller number of interviewees'.³⁸ By contrast, reality-testing was discussed by roughly two-thirds of the sample in this study. Where Hitchings and Miles' research was conducted before LASPO, the current study indicates that mediator reality-testing (and more evaluative tools in general) has become more prevalent in recent years. This again alludes to a change in the conceptualisation of the family mediator, going beyond the limited helper.

Eight participants also mentioned shuttle mediation, a model where the parties sit in separate rooms and the mediator moves between them. Mediators felt shuttle mediation could give a voice to weaker parties, as described by Megan and Jane:

'...depending on the dynamics, um, caucusing and actually splitting them up. They might be able to speak than when they're with just you. They might answer questions better in a shuttle mediation.' **Megan (T)**

'If I feel that there's any power imbalance I'll say, 'I think we need a break.' And I'll caucus that meeting then. Just invite them for some time out until the mediation can start again.' **Jane (T)**

Nonetheless, most of the mediators who mentioned shuttle mediation had reservations about its effectiveness. They only used the model when the negotiations reached a standstill, or a party had become aggressive. In general, shuttle mediation was viewed as a time-consuming intervention that prevented open discussions between the parties. This is explained by Kate:

'Well the whole beauty of mediation is that people are hearing things directly. The mediator will help them unravel really important things that they need to discuss... If

³⁸ Emma Hitchings and Joanna Miles (n 25) 184.

they can't hear that and are getting my summary of what the other said- it's in my voice. It's not coming from each person's voice and their body language and visual expressions. That's often what makes mediation work.... Whereas in a shuttle... I always say it's not true mediation. It's the next best thing.' **Kate (L+T)**

A recurring theme emerged in the data: family mediators were comfortable with intervening (and implicitly departing from their neutrality) but limited this action to circumstances where they felt it was appropriate to do so. All interviewees recognised that neutrality was fundamental to their role as a mediator yet also allowed themselves some room for movement along Riskin's continuum. To Kate, shuttle mediation was the 'next best thing' but weakened the improving communication and conflict resolution objective. While the use of shuttle mediation in the sample shows that mediators felt they had the professional capacity to assess the party dynamic throughout sessions, they only intervened when required. Family mediators continued to align with facilitation, but accepted evaluation as a regulated part of their work.

This finding has important consequences for the neutrality or impartiality debate. The suggestion that many mediators prefer to understand their role as impartial rather than neutral could act as evidence of a marked difference between the two terms. This alone may be seen by some as enough to justify adopting the former term in mediation theory. However, this study also shows that mediators place the same limitations on their role, regardless of whether they align with impartiality or neutrality. The preference for impartiality appears to have no impact *in theory* and may simply be a knock-on effect of several factors, including the attitudes around mediator reflexivity. The key question is whether mediators place the same limitations on their role *in practice*. Thus, an important task for future research and debate is to consider whether a mediator who identifies as 'impartial' responds to power imbalances any differently than a 'neutral' mediator.

6.4 Barriers to recognising a shared conceptualisation

Towards the start of this chapter, *figure eight* depicted all interviewees on two axes based on, first, the facilitative to evaluative continuum and, second, the two mediation objectives of settlement and improving communication and conflict resolution. At first look, the mediators were primarily clustered towards facilitation and settlement. As the nuances in the conceptualisation of family mediation revealed through the interviews were discussed in this chapter, it became apparent that mediators also understood their role in terms of evaluation and providing quality settlement. This is not to suggest that the mediators thought they were

purely evaluative: all participants emphasised the helper function throughout their interview. Nevertheless, the interviewees adopted a much weaker interpretation of facilitation than expected in light of the traditional orthodoxies. It appears that mediators are able to go beyond their limited image, paving the way for the new type of modern mediator anticipated in the post-LASPO climate. This conclusion is based on the responses of all participants, regardless of geographical location, professional background and length of experience.

Figure nine repositions the 17 mediators in light of this realisation.³⁹ The majority of participants are now situated towards the middle of the facilitative to evaluative continuum, demonstrating the fluidity of Riskin's continuum and modern mediator practice.⁴⁰

³⁹ While *figure eight* listed the three words or phrases selected by each participant, this detail has been removed in *figure nine*. This is primarily because the mediator clusters have become closer, leading to overlap in responses which would have rendered the figure difficult to read.

⁴⁰ It must be acknowledged that a handful of interviewees, such as Megan, were more aware of their evaluative framework when selecting the three phrases and therefore were not moved for *figure nine*.

Figure nine: Mediators' alignment following analysis, presented via axes of action and objective



Despite the promotion of both neutrality and flexibility in interviewees' responses, mediator practice remains shrouded in ambiguity. The lack of transparency is a frequent theme throughout this thesis. For instance, in the FMC consultation on consent orders (outlined in *chapter two*), over half of respondents felt that mediator neutrality would be jeopardised if they drafted a consent order.⁴¹ Nearly half also thought a mediator could draft a consent order without giving advice. Whilst the results of the consultation were far from conclusive, it confirmed that many mediators rejected a more visibly evaluative role, in effect the image of the modern mediator. It is questioned how far drafting consent orders, particularly if a mediator gives information on its proposals, differs from the routine evaluative techniques identified in this chapter. These methods include giving information⁴² and predicting court outcomes, as well as reality-testing. The key difference is that drafting a consent order brings evaluation into the spotlight, thus rendering mediator practice susceptible to critique.

The lack of any explicit recognition that the modern mediator (symbolised by flexibility) *could* uphold mediator neutrality also infers that the participants were unable to explain the intricacies of mediator practice. *Chapter three* previously recognised that a crucial task for future reform was to rework mediator neutrality so the concept aligns with the demand for flexibility, reinstating the fluidity of Riskin's continuum (and subsequently acknowledging the modern mediator). The interview data suggest that this is possible as the mediators believed they were neutral but could also redress power imbalances. However, this reality was not openly recognised. When asked how mediator neutrality operated in the presence of a power imbalance, the mediators did not reflect on the neutrality dilemma identified throughout this thesis. Instead, they gave examples of intervention. It is concerning that the mediators did not discuss how evaluation worked alongside a facilitative framework as it alludes to a lack of recognition that this modern role occurs in the first place. Mediators may already be well-equipped to provide extra support to a diverse and complex client base post-LASPO, but there is no general recognition within the profession that this flexibility occurs.

If the wider discussions around mediation have not openly acknowledged the demand to move away from absolute mediator neutrality, it is unsurprising that the modern mediator role has not been openly acknowledged. Moreover, the lack of awareness surrounding this role and its evaluative functions is to be expected. If mediators lack the appropriate forums to talk about how they go beyond complete neutrality, they have little opportunity to openly explore the

⁴¹ Family Mediation Council, 'Overview of Consultation Responses: Family Mediators Drafting Consent Orders' (FMC 2017) <www.familymediationcouncil.org.uk/wp-content/uploads/2017/05/FMC-Overview-consultation-responses-family-mediators-drafting-consent-orders.pdf> accessed 5 March 2020.

⁴² As previously argued by Mavis Maclean and John Eekelaar (n 26) 123.

value of the evaluative framework. This comes back to an important underlying message throughout this thesis: mediator practice needs to be openly discussed and transparent if mediation is to support access to justice in the long-term post-LASPO landscape. To conclude with a quote from Mary:

‘The reality is that each mediator has a COMPLETELY different style. Some are MUCH more directive than you would imagine could be in the mediation forum. Some are SO neutral that nothing ever gets settled. There are people doing their own thing but no-one’s really saying it. I think it would be better when they’re SAID because then they can be explored and understood.’ **Mary (L+T)**

6.5 Conclusion

Cracks in the facilitative façade are not only visible in Codes of Practice, but in the responses of mediators themselves. It is clear from this study that mediators largely follow a shared conceptualisation of family mediation and their role. Much of the evidence suggests that mediators commence mediation as helpers and become more evaluative when required. So, neutrality is prioritised at the start of mediation but balanced alongside flexibility as negotiations continue. The mediator must consequently remain alert at all times and change their role in light of the parties’ needs. Kate acknowledged the fluidity of the role of mediators:

‘I think the role of the mediator is a lot more than in a way one can describe, because it’s very subtle in terms of how you are helping them move forward. Just the way you say something back, you reframe it in a different way. Whatever skills the mediator will use, it involves you thinking on your feet all the time, because you never know what will happen in the room. But at the end of the day, that’s what our main role is. It’s to help them.’ **Kate (L+T)**

This is a succinct explanation of the helper function in practice. The limited mediator role is perhaps best viewed as a starting point for mediators who evaluate in light of the parties’ needs. From Kate’s perspective, the role of the mediator is to help parties create an agreement that works for their particular situation. They can also refer parties to legal support when extra support is necessary. However, mediators adopt what Kate described as ‘subtle’ techniques to promote settlement (or improve communication and conflict resolution) which begin to move into their evaluative functions, specifically assessment and intervention. In effect, they take on

the responsibility of the modern mediator. This provides the much-needed flexibility discussed in the mediation literature, but remains concealed by the facilitative proxy in many instances.

If mediators are continuously moving across the facilitative to evaluative continuum, it is disappointing that reform to recognise and guide the new type of mediator (going beyond the limited conceptualisation) remains stagnant. Without this realisation, the potential for family mediation to ensure access to justice in the contemporary climate is significantly limited. The next chapter considers some of the contextual and structural problems revealed in the interviews that might prevent a shift towards this desired openness and reform.

Chapter 7. The future for family mediation

Thus far, this thesis has found evidence of a shared conceptualisation of family mediation that allows for the flexible evaluative practices that can facilitate access to justice in the current climate. It has been argued that the full potential of the modern mediator role is unlikely to be realised without an open acknowledgement of the shift towards evaluative practice. However, finding the *momentum* through which to accomplish change is a whole other challenge. This chapter discusses findings from the interview data that reveal another barrier to recognising the modern mediator: the existence of structural and contextual problems around family mediation. It first recognises that the FMC has introduced reform over the last two decades, alluding to some momentum through which to accomplish change. However, it is argued that these changes are limited in their impact. The second section of the chapter subsequently considers some of the obstacles to reform which derive from the impact of LASPO, namely reported trends towards one-off legal advice sessions to supplement mediation, an increased commercial drive within mediation services and an aging mediator profession. The chapter next considers the problems caused by large fragmentations across the mediator profession. It reveals major tensions amongst mediators, particularly in relation to professional background. The discussion also identifies a weak professional identity for mediators nationally, with the sample interviewed sharing a larger sense of professional community at a local level. The resulting professional fragmentation is important because it reduces the opportunity to recognise and act upon the reality that, post-LASPO, there is a shared conceptualisation of family mediation that is sympathetic to a reinstatement of the facilitative to evaluative continuum. The final section of this chapter considers some of the future reforms desired by mediators in the study, before asking if mediators should be explicitly recognised as a quasi-legal profession in order to fully remove this structural barrier to reform.

7.1 Recognising the barriers to reform

Towards the end of *chapter six*, it was submitted that the lack of openness and transparency surrounding mediator evaluation prevents reform. If general debate casts the modern mediator and her evaluation aside as bad mediation (subsequently viewing the limited mediator with facilitation as good mediation), it comes as no surprise that the interviewees did not openly acknowledge the evaluative remit of their work. The broad understanding of family mediation is subsequently incomplete, and the circular debate around mediation reform

continues. This argument – which underpins much of the discussions in this thesis – focuses on the intrinsic problems within mediation, specifically its orthodox theory of absolute neutrality. Another significant line of investigation is the barrier to reform at an extrinsic level. Even if reforms to the theoretical underpinnings of family mediation were to be countenanced, would this be enough to sustain the process long-term in the post-LASPO climate? It quickly became apparent when analysing the interview data that some mediators were pessimistic about the future of family mediation. For example, Mary was worried that mediation would become progressively inaccessible to those seeking public funding:

‘We’re in such a state of flux. We can’t say what is going to happen in ANY area. I have a fear that useful systems like mediation, arbitration, are going to become simply part of a private process. Like private education and state education. There will be a grossly underfunded safety net type thing for people who can’t afford services.’ **Mary (L+T)**

Rebecca thought that mediation was going to be overlooked in government budgets:

‘It depends on spending priorities. I dare say there are a few other things they [the Ministry of Justice] are going to be spending on first before this [mediation]... There’s a tiny budget. No-one’s getting excited. No-one’s being optimistic about it.’ **Rebecca (L)**

Lauren cited the lack of a collective effort to create change:

‘I’m afraid I’m pessimistic, having seen forty years of it [mediation]. There is such a lot of half-hearted talk... it’s very sad because if the whole thing was stronger and there was a more concerted effort, I think much more could be achieved and NEEDS to be.’ **Lauren (T)**

Finally, Michael claimed he would now discourage those interested in becoming a mediator:

‘I genuinely believe that if somebody was coming to me, to work for me, saying they really wanted to mediate, I’d say, ‘Don’t waste your money or your time on it.’ As a practice yes, but you’re HARDLY ever going to get the experience in it. It’s not going to earn you enough money. I think that- that’s the reality of it.’ **Michael (L)**

Such pessimism reflected a variety of concerns, from the lack of adequate public funding for family mediation to problems within the mediator profession itself. Over several decades, changes to the operation and administration of family justice, identified in *chapter one*, have had serious implications for the standing of family mediation. Many of the reforms from the late 20th century, as well as the recent LASPO reforms, intended to move mediation to the

centre of family justice. At the same time, the state sought to reduce the costs of administering family justice. But the price of these reforms is felt elsewhere: the number of family mediation legal aid starts has dwindled since LASPO, and the mediators in the sample said that the government was reluctant to fund new mediation initiatives. Family mediation has suffered significant damage, and reversing the impact of these developments will certainly prove challenging.

Some steps have been taken to support family mediation in this challenging landscape. This section focuses on recent changes implemented by the FMC, the main regulatory body for family mediation in England and Wales.

7.1.1 Recent steps taken by the FMC

The FMC has taken massive strides towards reform since it was established in 2007. Webley previously described the UKCFM, the regulatory body for family mediators before the FMC, as more 'the supervisor of its members than a gatekeeper'.¹ She predicted that the organisation would move towards the latter function as the profession developed over time. While the FMC has since replaced UKCFM, Webley's hypothesis has proved accurate. The FMC has taken action to transition from supervisor to gatekeeper, such as introducing its first Code of Practice in 2010.² It then published a Standards Framework in 2014 which led to a register of accredited mediators. In 2016, accreditation was streamlined and FMC Accredited Family Mediator (FMCA) status became available through the FMC.³ FMCA mediators were also required to apply for reaccreditation every three years.⁴ Another example is the FMC's 2016 guidance on online video mediation which has been increasingly publicised in the COVID-19 pandemic.⁵ Furthermore, the FMC Standards Framework was modified in June 2019 to allow trainee mediators to submit a case commentary where mediation did not reach completion (as long as

¹ Lisa C Webley, *Adversarialism and Consensus? The Professions' Construction of Solicitor and Family Mediator Identity and Role* (Quid Pro 2010) 146.

² John McEldowney, *Family Mediation in a Time of Change: FMC Review Final Report* (FMC 2012) para 60.

³ Family Mediation Council, 'FMC accreditation scheme' (FMC 2020) <www.familymediationcouncil.org.uk/mediator-area/standards-codes-guidance/fmc-accreditation-faqs/> accessed 23 April 2020.

⁴ Family Mediation Council, 'Renewal of Accreditation – Guidance Notes' (FMC 2019) <www.familymediationcouncil.org.uk/wp-content/uploads/2019/03/Renewal-of-Accreditation-Guidance-Notes-v1.pdf> accessed 23 April 2020.

⁵ Family Mediation Council, 'Guidance for Online Video Mediation' (FMC 2016) <www.familymediationcouncil.org.uk/wp-content/uploads/2016/09/FMC-Guidance-for-Online-Video-Mediation-September-2016.pdf> accessed 7 September 2020.

the mediator could explain why agreement was not possible).⁶ The majority of these reforms were implemented in the post-LASPO climate and are a welcome response to the difficulties currently faced by mediators, as this chapter will go on to investigate.

Despite the pessimism felt by several mediators, some interviewees recognised that the FMC had taken some steps in the right direction. They felt the FMC had improved mediator practice and was a visible spokesperson for the profession:

[The FMC] ARE making improvements. So, when I started you had to be a member of the Council, but you were kind of like, 'Who- who is the Council? What do they do? What part do they play in our role?' They were very sort of REMOVED from practice.'

Jane (T)

'But the FMC I do think has had a unifying effect. They've had some rough passages, but it is much, much stronger. I think they've raised standards.'

Lauren (T)

'So, the FMC have made lots of- not lots of, but have changed certain things, like short-term fixes, to make things easier for the mediators. It's feeling a much more cohesive body of people than it's ever been before. I think that's really positive. Yeah. Long may that last. *laughs*' **Kate (L+T)**

A notable example of recent changes brought by the FMC is their work on Professional Practice Consultants (PPC). All family mediators must meet regularly with their PPC, a consultant who gives guidance and completes forms for accreditation (or reaccreditation). In July 2018, the FMC published a consultation on creating a PPC Code of Practice. This consultation aimed 'to put in place a structure for the consultee/PPC relationship'.⁷ A PPC Code of Practice was then introduced in January 2019.⁸ Kate mentioned this Code of Practice in her interview:

'There is now a PPC Code of Practice as well. That was a lot of discussion and that's fab, I was really pleased with it... It now means the supervisors, the PPCs, have a Code by which they must adhere to, to enable the support to provide to their consultees... It's again all about trying to make it more of a profession. A reputable profession. As

⁶ Family Mediation Council and Family Mediation Standards Board, 'Changes to the FMC Standards Framework agreed by the FMC Board 12.6.19' (FMC 2019) <www.familymediationcouncil.org.uk/wp-content/uploads/2019/06/Changes-to-Standards-Framework-Agreed-12.6.19.pdf> accessed 23 April 2020.

⁷ Family Mediation Council, 'FMSB Consultation: Draft PPC Code and Guidance' (FMC 2018) <www.familymediationcouncil.org.uk/wp-content/uploads/2018/07/PPC-Code-of-Practice-Guidance-draft-for-consultation-July-2018.pdf> accessed 23 April 2020.

⁸ Family Mediation Council, 'Professional Practice Consultant (PPC) Code of Practice' (FMC 2019).

opposed to just anything goes. So that's in a way good. There has been enormous progress actually, since the Standards Framework came into being.' **Kate (L+T)**

Kate sensed there had been some progress towards mediators becoming 'a reputable profession' as opposed to 'anything goes'. She even mentioned that there had been 'enormous progress' since the FMC began to introduce regulatory documents, suggesting that there was some demand for regulatory reform. In fact, many changes incited by the FMC may be connected to the developments in the conceptualisation of family mediation. This thesis has repeatedly recognised that the traditional view of mediation no longer holds true in a post-LASPO world. If mediators have become increasingly evaluative over time, the structure surrounding mediation may have been changed, albeit incrementally, to account for these developments. Nevertheless, the lack of transparency surrounding these reforms remains concerning.

To see both optimism and pessimism for the future of family mediation in the mediator sample is unsurprising. The existence of the FMC and its implementation of recent changes provides some hope for its members. Thus, there appears to be some momentum through which to accomplish change, some of which has already begun. Yet whether this momentum is enough to support mediation long into the post-LASPO landscape is a key source of the pessimism identified in the sample. Family justice has undergone significant changes since the late 20th century, and some mediators feel the future of mediation is now uncertain. In fact, the mediator interviews uncovered unanticipated data on the structural and contextual obstacles to reform which may hamper this impetus for change. These issues also act as major obstacles to realising mediation's full potential in achieving modern access to justice, even if a fluid continuum of mediator practice is acknowledged. This investigation is particularly crucial where academic commentary must not only consider the short-term effects of LASPO, but how to ensure access to justice in the long-term.

7.2 The impact of LASPO

The majority of discussions around the impact of LASPO on family mediation are centred on intake. For example, the two MIAM studies commissioned by the Ministry of Justice (discussed in *chapter two*) found that the limited opportunities for solicitors to be paid for legal advice disincentivised them from referring parties onto mediation.⁹ A report by the House of

⁹ Anna Bloch, Rosie McLeod and Ben Toombs, *Mediation Information and Assessment Meetings (MIAMs) and mediation in private family law disputes: Qualitative research findings* (Ministry of Justice 2014) 12;

Commons Justice Committee similarly showed that solicitors were no longer the first port of call for family law disputants without legal aid, causing referrals to mediation to decrease.¹⁰ The data from the mediator interviews in this study confirm these findings. Participants were asked about the effect of LASPO on their mediation service. Many spoke about the immediate fall in casework:

‘It [solicitor referrals] just fell off a cliff. As you’ve probably heard numerous times it just COMPLETELY fell off a cliff. It just died for a few months.’ **Rebecca (L)**

‘For about two years, I think we just (pause) we dipped. So, we had to cut hours, it was REALLY bad. There were lots of services that folded.’ **Jane (T)**

‘At the peak we were getting as many as one hundred referrals a MONTH. There were ten mediators, and we were really busy. We then took on a second administrator because there was so much work. I would say there was a good reputation with all these referrals. It was going well and then it suddenly crashed. Whereas before lawyers HAD to refer if they wanted legal aid and then we would actually move quite a lot into mediation. Suddenly all of that stopped.’ **Lauren (T)**

These quotes represent the majority of participants who saw mediation numbers decrease straight after LASPO was enacted. In the words of Rebecca, solicitor referrals ‘fell off a cliff’. Jane reinforced this statement by mentioning that mediation numbers ‘dipped’. These mediators felt this setback was inevitable, regardless of their connections within the local community. Lauren’s organisation, for instance, had around 100 referrals to mediation each month and hired two administrators to help with case management. The service closed soon after LASPO, even though they had created a ‘good reputation’ with local lawyers to gain referrals. Rebecca also said later in her interview that she had ‘good business relationships’ with local solicitors, but ‘never heard from them again’ after the cuts to legal aid. In general, many of the mediation services within the sample struggled after the LASPO reforms.

On the other hand, a minority of interviewees found the opposite and said their workload had increased following LASPO. Judith was a lawyer mediator with therapeutic training who worked for a large law firm in London. Her mediation numbers rose after the cuts to legal aid:

Becky Hamlyn, Emma Coleman and Mark Sefton, *Mediation Information and Assessment Meetings (MIAMs) and mediation in private family law disputes: Quantitative research findings* (Ministry of Justice 2015) 20-21.

¹⁰ House of Commons Justice Committee, *Impact of Changes to Civil Legal Aid Under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012* (HC 2014-15, 311) 54-55.

‘I think mediation bounced for me. We had a huge increase because we knew, we could see, that the court system was getting so bunged up. It was a sort of perfect storm because that came in and then we started shutting courts, and then we started not paying judges enough... For clients who wanted things sensibly sorted out more quickly, they wanted to come to mediation.’ **Judith (L+T)**

Judith saw numerous problems within the court system following LASPO, such as the rise of LiPs (with the court system ‘getting so bunged up’) and administrative issues. She claimed this led many parties to attempt mediation. There are likely to be several factors associated with Judith’s rise in mediation work, though the evidence specifically points to her employment at a law firm that did not provide legal aid.

By contrast, the mediators that still conducted legal aid work (such as **Rebecca (L)** and **Jane (T)**) or had a legal aid contract before LASPO (including **Lauren (T)**) saw a significant drop in caseload. **David (L+T)** estimated that his mediation service made £4,500 a month from legal aid cases pre-LASPO, dropping to roughly £1,500 after the legislation was enacted. He was optimistic that legal aid income had risen to around £4,000 a month at the time of interview, though commented that this was ‘not as high’ as before. This finding supports the claim that LASPO had significantly more impact on service providers for publicly funded mediation.

While these excerpts are important to understanding the short-term consequences of LASPO, the reality is not as clear-cut as the statistics may suggest. The following analysis considers several contextual factors that explain why some mediators have felt the negative effects of LASPO, whereas others seem to have benefited from the reforms. Further research in this area is highly desirable, but these findings provide an indication of current mediator practice and the long-term effects of LASPO. Its discussion is separated into three parts: the shift towards one-off legal advice, the heightened focus on commercial interests, and the aging mediator profession.

7.2.1 Changing demand for legal advice

Some excerpts from the interviews point to a decline in legal advice for mediation users. **Jessica (T)** worked for a private law firm and an NFM Direct service, the latter of which was an outreach mediation programme across England and Wales, designed and funded by NFM. When asked what proportion of her clients accessed legal support, she responded: ‘Here [the law firm], nearly all of them. At NFM, hardly any’. **Lauren (T)** said a ‘small minority’ of her clients obtained

legal advice, though she mainly mediated children's matters. Nevertheless, it was apparent throughout most of the interviews that the majority of parties attending mediation obtained legal advice:

'Roughly what proportion of your clients would you say have legal advice?' **Interviewer**

'I'd say probably about seventy or eighty percent.' **Amy (L)**

'The majority have got something. I'd say seventy-five to eighty percent.' **Emma (L)**

'In financial cases, I'd say seventy percent. In children only cases (pause) maybe thirty, forty percent? It's something like that.' **Megan (T)**

'...the reality is that if its finances, they will ALL have legal advice. I say to them they have to. With children, they don't.' **Kate (L+T)**

The accessibility of legal advice is a key backdrop to this thesis; if fewer parties have access to a solicitor, the responsibility to evaluate both the party dynamic and proposed settlement falls to the mediator. The wide use of legal advice post-LASPO was therefore unexpected, particularly where the participants in the study worked at a range of services that saw a mixture of socio-economic groups.

However, these findings alone do not capture the intricacies of modern legal advice. A more nuanced analysis must recognise that while the majority of mediation users continue to obtain legal advice post-LASPO, the nature of that legal advice has changed dramatically. Rather than expecting parties to see a solicitor *throughout* their dispute, mediators now encourage them to seek legal advice *at some point* in negotiations. Rebecca would clarify to parties that they only had to speak to a solicitor once:

'I basically recommend EVERYONE who is doing financial matters at some point in the process. Maybe not after the first meeting...but DEFINITELY after the second. I will always say- but I will say with a caveat. They look terrified sometimes. I say it's not that you go to a solicitor and they take on your case and there is bill, bill, bill. You can be very specific and say you just want to go to someone and literally buy an hour's worth of their time.' **Rebecca (L)**

Multiple mediators spoke about clients who received thirty minutes of free advice from a solicitor.¹¹ There was also some suggestion in the sample that parties now accessed a variety

¹¹ For example, 'It might only be a free half hour, but they normally have spent a bit of time.' (**Michael (L)**) and '...he'd been for a free appointment with somebody. A lot of people have done that.' (**Amy (L)**).

of (mainly self-help) services, including Citizens' Advice,¹² online information,¹³ and pro bono work.¹⁴ Collectively, these data allude to a change in direction for legal advice in family mediation and potentially family justice at large. Returning to Rebecca:

'When people thought, 'I need to go and get a divorce, I need to see a solicitor', they would walk to their office and the solicitor would then tell them EVERYTHING. They won't have that starting point any longer... the WHOLE way that people approach law and legal advice, and sorting out their separation, is going through a massive change, in my view.' **Rebecca (L)**

In effect, legal advice has become a one-off event or a pay-as-you-go service that is topped up when required. This development will undoubtedly impact the role of the mediator and, relevant to this discussion, how mediation is provided in the context of the whole family justice process. Mediation is no longer a supplement to legal advice. Rather, legal advice appears to be an add-on for disputes heard in mediation. This implies that mediators are then expected to depart from their traditional limited role and provide the legal advice service – or something analogous to its provision – when a party does not pay for additional advice. There is thus increased pressure for mediators to not only take on the role of the modern mediator and evaluate, but spend more time on cases where parties have little access to legal support. Mediators will similarly be expected to have a heightened awareness of the legal issues that may arise. If these evaluative tasks are not openly recognised, they cannot be fully regulated, which could result in inaccurate or incomplete legal information (or advice) being provided.

7.2.2 The post-LASPO "success stories": focusing on the commercial

In the late 20th century, family mediation was dependent on voluntary schemes and precarious government funding.¹⁵ Many services that helped to establish mediation, such as the Bristol Courts Family Conciliation Service (discussed in *chapter two*), relied on the voluntary work of lawyers, therapists and court staff. Mediation was typically provided by voluntary bodies, although lawyers became interested in practising mediation from the late 1980s.¹⁶ Later

¹² 'There's a lot of advice services. CAB and things like that. They'll now give information and direct parties to forms online.' **Jane (T)**.

¹³ 'there is quite a lot of information, legal information they can access on various websites. Which is useful for people who can afford to pay a lawyer.' **Lauren (T)**.

¹⁴ 'I know in [LOCATION] you can book an appointment with a solicitor who will give a sort of pro bono type thing.' **Harley (T)**.

¹⁵ Lisa Parkinson, *Family Mediation* (Sweet & Maxwell 1997) 2.

¹⁶ Robert Dingwall, 'Some Observations on Divorce Mediation in Britain and the United States' (1986) 1986(11) *Mediation Quarterly* 5, 8.

governments funded family mediation as an effective alternative to adversarialism.¹⁷ Today, mediation tends to be provided by private, commercial businesses, though some not-for-profit models remain. During the interviews, participants spoke of what could be considered “success stories” for family mediation services. These mediators were not necessarily making large profits; in fact, many participants spoke about the difficulties of running a mediation service in the current climate. Regardless, a noticeable trend in the data was the strong focus on the commercial needs of a service, specifically to ensure its financial viability.

The previous section in this chapter hinted at the declining availability of legal aid mediation services. Five participants in the study stopped providing legal aid mediation after LASPO because of the ‘scarcity’ of work (**Lauren (T)**).¹⁸ Mediators spoke negatively about the bureaucracy around legal aid funding:

‘The Legal Aid Agency, whatever they say about encouraging mediation, they weren’t. They were heavily auditing mediation organisations in such a way that if you hadn’t got your forms EXACTLY right, they would reject the claim. On average you get paid a thousand pounds for mediation and they’d try and claw that back... You wouldn’t touch legal aid with a barge pole.’ **Michael (L)**

‘They just claw money back and you’re not making a fortune here. If you then claw back ALL this money and we’re spending the first sort of thirty-five minutes dealing with vulnerable people who may have been thrown out of their house, you say, ‘Well why haven’t you got your last payslip?’ For goodness sake! We’re not talking mega bucks. I used to get really neurotic about these forms. I hated it. I could feel my stomach going and thinking, ‘I don’t want to put my name to this.’ The focus was all on these stupid forms and not on what you could do to help.’ **Emma (L)**

Both Michael and Emma felt that legal aid mediation had become inaccessible in recent years.¹⁹ They were critical of the Legal Aid Agency and cited this as the key reason why they only worked with private clients post-LASPO. In a similar vein, **Kate (L+T)** said that legal aid mediation carried an ‘administrative burden’; as a sole mediator, she would have spent a large portion of her time

¹⁷ Gwynn Davis, *Partisans and Mediators: The Resolution of Divorce Disputes* (Clarendon Press 1988) 9.

¹⁸ There may be some bias in the sample as these five mediators practised in the South West of England. However, it is submitted that their prominence reflects the position of the South West of England as the pioneer for family mediation in England and Wales. For further information, see Lisa Parkinson, *Family Mediation: Appropriate Dispute Resolution in a new family justice system* (2nd edn, Family Law 2011) 6.

¹⁹ **Emma (L)** also said: ‘There was a time when the green form for legal aid, you could do ANYTHING under the green form. It was money for old rope... And then they started making it more difficult. You had these hideous forms... you had to be on income support and not own a home basically. The chances of you being eligible were SO negligible it was unbelievable. Even if you thought you SHOULD be, you’d get tripped up.’

completing audits that were ‘very easy to get wrong’. For many mediators, applying for legal aid funding was simply not worth the time or effort.

While some mediators responded to LASPO by revoking their legal aid contracts, several interviewees saw this as an opportunity to monopolise the local market. Both Charlotte and David spoke about a rise in legal aid cases:

‘We got the legal aid contract subsequently because the two other services had shut down. There was a gap in the market, and we filled it. I think we had our contract from around 2015. From then, we were really, really busy. So, for my service, it’s all been fine, but that’s only because the other services were no longer operating.’ **Charlotte (T)**

‘The five largest charitable organisations in this region closed... Which was, in a way, good for us, because we weathered the storm and came out of it the other end. Although it took a long time.’ **David (L+T)**

Charlotte was based in South Wales but also worked part-time at a mediation service in the South West of England. She mentioned that the latter service accepted legal aid work following the closure of several competitors following LASPO. Meanwhile, David’s service had provided legal aid mediation since the mid-2000s and continued to do so after LASPO when a number of large services had closed. He specifically spoke about ‘charitable organisations’ that shut down, suggesting that the disincentives to provide legal aid work led to a reduction in the number of not-for-profit or charitable mediation services in England and Wales. This has led the legal aid mediation market to become unsaturated after LASPO, enabling a small number of services to monopolise their local area. There is thus some evidence that legal aid work increased for a small pool of mediation services. It is regrettable that this may have been influenced by a decline in not-for-profit organisations, and demonstrates the increasing need for mediation services to consider their financial viability.

A heightened commercial mindset was demonstrated through the rise of sole mediators. Five participants in the study worked as sole, independent mediators (or set up their own service) from 2013. These mediators spanned across all three regions selected for the study with varying levels of experience.²⁰ This is not to suggest that these mediators were purely driven by profit – commercial drive and awareness did not equate to a lack of philanthropy. For instance, Lauren cited the lack of mediators in her area as the reason why she continued to

²⁰ **Lydia (T)** and **Victoria (L+T)** had worked as mediators for 5-10 years (and also provided legal aid work), whereas **Kate (L+T)**, **Rosie (L)** and **Lauren (T)** had 15-20, 20-25, and 30+ years of experience respectively (but did not conduct legal aid mediation post-LASPO).

mediate children's matters.²¹ She was worried about the costs of mediation at her previous company and left to become a sole mediator:

'I then left [LAW FIRM] and decided to just work on my own. Partly because their fees for mediation actually were so high. People couldn't afford them... I went solo. I find I'm not the only sort of sole mediator who will reduce fees or negotiate and be more flexible. There are parents who are clearly desperate for help.' **Lauren (T)**

The altruistic motivation to help parties resolve their family problems was noticeable across the whole sample when participants discussed their reasons for becoming a mediator (as discussed in *chapter six*). However, the four remaining participants who established their own services post-LASPO mainly spoke about the commercial aspect of mediation. Kate and Rosie said it was 'quick' and 'easy' to get their mediation businesses up and running:

'The work came in, touch wood *laughs*, without any problems at all. It happened very quickly. It was probably to do with the fact that there are few of us in this area that have been going quite a long time. I was already known anyway. I was one of the small handful who had been practising for a while in the area.' **Kate (L+T)**

'Actually, it was quite easy. So, things like the insurance and other rates, I covered it in the business plan and started from there.' **Rosie (L)**

By contrast, Lydia and Victoria recalled the challenges in becoming a sole mediator, mainly in relation to referrals and making a profit.²²

'It's been hard. Just having a website isn't enough... I also made connections with law firms. One of the people that I trained with works at [LAW FIRM], which is a big law firm. So, she was referring people to me for mediation. Generally just mediation assessments because they wanted to go to court. So, I got work through there and other law firms started referring to me. People from [LAW FIRM] moved to different law firms and would then refer to me.' **Lydia (T)**

'It's probably just turning now. This is probably going to be the first year where we might not make a loss. I'm just at that point now. I think my gross income is about 50 [thousand pounds], and my expenses are 53. I've got two more weeks of this financial

²¹ 'I'm focusing much more on issues concerning children because there is a real shortage of mediators who are qualified and experienced in child-inclusive mediation. I'm now focusing on that area and stopping *laughs* supposedly.' **Lauren (T)**.

²² Financial difficulties were felt across the sample. As recognised by **David (L+T)**, '...we just worked harder for less. I mean we probably made a loss that year or didn't make much profit, but we survived.'

year. That sounds like a load of money, but I've taken just half of that for income, 25 grand. Considering my background experience and the responsibilities, that's little.'

Victoria (L+T)

Nonetheless, it is interesting that all four mediators saw sole practice as the most viable business model, especially when solicitor services have tended to move in the opposite direction. In the early 2000s, Mather, McEwen and Maiman identified a 'long-term decline in sole practice'.²³ The researchers argued that solicitors rarely worked alone because of the high costs of running a legal practice. They furthermore warned of 'significant differences' between solicitors in firms and sole practitioners in their willingness to support those with 'limited resources'.²⁴ By contrast, the present interviews allude to rising interest in sole mediator services. The increasing diversification of mediation business structures could hamper crucial reform on the regulation of family mediators and, furthermore, the dominant conceptualisation of the process. This latter consequence is particularly concerning where not-for-profit mediation appears unsustainable, suggesting that any benefits from openly permitting the modern mediator role will not further access to justice for many of those who cannot afford mediation themselves.

How far has the family mediator profession become the survival of the fittest? Working as a sole mediator or setting up a new service may be more financially viable compared to working in a larger company. A sole practice will take on fewer mediation cases, but its running costs will also be lower. Nonetheless, this drive for financial viability reflects a sad reality that some mediators believe they operate best alone. Numerous mediation services (both in public and private practice) have closed their doors in recent years. For those that have remained, more attention is paid to the commercial parts of the business. Thus, a key concern for mediators today is how their mediation service can be financially sustainable. Revenue was undeniably an important factor pre-LASPO, but the dominance of privately funded work is significantly different from mediation's traditional voluntary or government-funded structure. If mediation is to continue down this trajectory and become increasingly commercialised or possibly privatised (with even fewer services providing legal aid), wider discussions around its position in family justice, and how it could be supported financially, are crucial to its success.

²³ Lynn Mather, Craig A McEwen and Richard J Maiman, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (Oxford University Press 2001) 184.

²⁴ *ibid* 184.

7.2.3 Barriers to becoming a mediator: an aging and declining profession

When inviting family mediators to participate in the study, the lack of newly qualified mediators quickly became apparent. As mentioned in *chapter four*, most participants (10 out of 17) had over 20 years' experience as a mediator. The sample reflected an aging mediator population, hinting at a lack of newer entrants to the profession. Some reasons for this decline were noticeable in the data.

A major barrier to becoming a family mediator was financial. Megan started her mediation training in 2016 and qualified late 2018. She discussed the lack of paid work during this period:

'I know it's a big expense and stuff. It's hard to be able to get into this role. I think I was really lucky because I was only four days a week at the time [in her previous job]. I had a free day that I could use to come here and work voluntarily. Just shadow and work. Whereas if I had been working full-time in a different career- I think it's so impossible to change and do this job.' **Megan (T)**

Megan claimed she was 'lucky' because she was able to secure an income while training as a mediator. In some instances, financial support may be provided by the trainee's spouse. Charlotte began her training in 2012:

'It was terrible. Because I wasn't earning any money, it was taking a lot of time... where I did it [training], they'd say there was an appointment and that I could come, but then people wouldn't turn up. I had to arrange childcare, you know. My husband was working and earning so that was what was subsidising the training. I don't know how anybody does it who is trying to support themselves, I don't think it's possible to do. There used to be paid placements, didn't there? They've all disappeared. No wonder there are no new mediators.' **Charlotte (T)**

Charlotte was concerned that it was extremely difficult, if not impossible, to train as a mediator without financial support. She was dependent on her partner's income to continue training: her placement was unpaid and she regularly had to arrange for childcare even though clients would regularly miss their appointments. Her experience suggests that the shortage of paid work for trainee mediators means they often depend on an alternative source of income. These opportunities may be inaccessible to young professionals who, in many cases, lack the income or capital to adequately support themselves through accreditation. This problem was highlighted by Lydia, who also started her training in 2012:

‘...none of us [mediators] are eighteen. It’s very much a career for people who have gone through other bits. People fresh out of university are not going to train to be mediators, so we’re an aging population... I got LUCKY in my sort of apprenticeship. Lucky in the way that I was able to afford to do that. If I was a young person, I might not have been able to afford it.’ **Lydia (L)**

The lack of placements available for trainee mediators was another barrier to entering the profession:

‘It’s sad that THAT library of experience is fast disappearing. And because there aren’t enough cases around, we can’t actually train others up. That’s what we’d love to do.’

Michael (L)

‘It’s all fair and well training these people to become mediators but there needs to be PRACTICE. There needs to be GUIDANCE. There needs to be more support with that. Financially because it costs a service. You’ve got somebody new coming in, you’re taking time to give that person feedback. There is no support system financially for us.’

Jane (T)

With fewer mediation cases after LASPO, there are fewer opportunities for trainee mediators to observe and mediate. There is also no government nor FMC support available for mediation services to take on trainee mediators, leading to a lack of placements. Bramwell recently described the career route for family mediators as ‘notoriously difficult’, acknowledging that there was little incentive to support trainee mediators when they would later become ‘commercial competitors’.²⁵ Building on Bramwell’s argument, if mediators have to pay more attention to the commercial aspect of their service, the interests of trainee mediators will have little weight in their business decisions. The combination of both factors prevents many trainees from gaining experience – and subsequently accreditation – post-LASPO.

The impact of these barriers must not be understated. They have knock-on effects for the development of mediation theory and practice as the shortage of new mediators joining the profession could delay reform. **Judith (L+T)** felt that her younger colleagues provided ‘a different slant, a different take’ on the process, promoting flexibility.²⁶ Beyond the theoretical framework, the aging mediator profession puts mediation in a precarious position. The number

²⁵ Lorraine Bramwell, ‘Creative Paths to Practice: Helping New Mediators to Navigate the Route to Artistry’ in Marian Roberts and Maria Federica Moscati (eds), *Family Mediation: Contemporary Issues* (Bloomsbury Professional 2020) 251.

²⁶ **Jane (T)** also mentioned that ‘new people come in and they bring something extra’, believing that more experienced mediators ‘get quite relaxed and in their ways.’

of mediators leaving the profession may now be higher than those entering it. At the very least, the lack of family mediators is a foreseeable problem in the future. Mediation now sits at the centre of the family justice system, but its mediators are slowly becoming an endangered profession. If this trajectory continues, it may lead to the near extinction of mediators. Thus, there is an urgent need to reintroduce further prospects and funding to incentivise new, in particular young, mediators into the profession, and encourage current mediators to support their accreditation.

7.3 Closed doors in the family mediation profession

Chapter six argued that the dominant conceptualisation of family mediation in contemporary times was not openly recognised throughout the mediator sample. It is suggested that *communities of practice* have contributed to this lack of transparency. Mather, McEwen and Maiman studied lawyers' understanding of community in the late 1990s.²⁷ Following interviews with 163 divorce lawyers, they argued that divorce lawyers made choices (and attempted to understand them) through communities of practice: 'groups of lawyers with whom practitioners interact and to whom they compare themselves and look for common expectations and standards.'²⁸ Examples included the Bar, specialist groups of lawyers and work colleagues. The following discussion uses this concept to reveal a fragmented mediator profession. The mediators in the sample tended to understand their profession, first, through their background and, second, through discourses held at a local (rather than national) level.

7.3.1 Mediator sub-groups and perceptions

Communities of practice can first be evidenced through the perceptions of the two general family mediator sub-groups, based on professional background.²⁹ Whilst this study was not designed to explore mediators' views on the legal or therapeutic professions, it became apparent in the early stages of data collection that mediators generally held negative perceptions of the other sub-group. This finding is consistent with earlier research, with tensions having first become visible amongst lawyers and family mediators. Walker spoke in

²⁷ Lynn Mather, Craig A McEwen and Richard J Maiman (n 23) 6.

²⁸ *ibid* 6.

²⁹ The remainder this chapter separates mediators into two sub-groups: lawyer mediators and therapeutic mediators. The former group includes the five mediators from a legal background with therapeutic training because these participants tended to distinguish themselves from purely therapeutic mediators (rather than lawyer mediators).

the late 1990s about the 'mutual mistrust' between the two groups; while both professions had a 'healthy respect' for one another, they thought the other group would completely monopolise family dispute resolution.³⁰ This fear of invasion was later identified within the legal profession itself by Mather, McEwen and Maiman, who discovered a lack of community between generalist lawyers and divorce specialists.³¹ More recently, the McEldowney Report claimed there was a strained relationship and 'some degree of distrust' amongst mediators according to background.³² Maclean and Eekelaar separated their findings on mediator practice into lawyer mediators and non-lawyer mediators, though they did not explicitly consider any differences in their approaches or their perceptions of the other sub-group.³³ This thesis contributes to these discussions by providing findings on the divide between mediator sub-groups in detail.

Most interviewees made a distinction between the two mediator sub-groups. In many instances, this discussion was raised without any prompt from the interviewer. Rosie, a lawyer mediator, spoke about the different stereotypes:

'I trained with FMA in 1999 and they did this lovely exercise, because half of us were lawyers and half of us were therapists. It was really funny because after we had been together for quite a few days, they then asked us to explain to the other group what our perceptions were of them, coming from their background. They thought we would be really snooty and posh, and I thought that they'd be in tie-dye, caftans and dangly earrings. *laughs*' **Rosie (L)**

Lawyers were stereotyped as arrogant, 'posh' upper-class professionals, and therapists as relaxed, laidback 'hippies'. These stereotypes may appear to be harmless reflections of the public perceptions of the two professions, but reveal a strained relationship amongst mediators. Rosie criticised therapeutic mediators, despite dismissing the stereotypes of each profession:

'I think family therapists are needed to give- particularly in children's work. But where I do think they struggle is when it's money. They don't understand what the court can or will do. You get arrangements back which just don't make sense. Whereas if I've got

³⁰ Janet Walker, 'Is There a Future for Lawyers in Divorce?' (1996) 10 *International Journal of Law, Policy and the Family* 52, 58.

³¹ Lynn Mather, Craig A McEwen and Richard J Maiman (n 23) 53.

³² John McEldowney (n 2) para 14.

³³ Mavis Maclean and John Eekelaar, *Lawyers and Mediators: The Brave New World of Services for Separating Families* (Hart Publishing 2016).

clients who want to go to mediation for money, I get them to choose a lawyer mediator because they would then come back with something that's more realistic.' **Rosie (L)**

The general perception held by lawyer mediators was that therapeutic mediators lacked both the knowledge and legal training required to mediate, particularly when it came to financial matters.³⁴ Several lawyer mediators, including Rosie, felt that this limited therapeutic mediators' ability to produce a 'realistic' agreement that followed the law. In general, the lawyer mediators thought they provided a more holistic service:

'I say to them [the parties] that I am a solicitor but acting as a mediator. Not as a solicitor so I can't give you advice, but I can give you information. As I said I have a lot of experience in doing this. This is what I do. I go to court with people, so I know what the court does. I think it's just an extra layer then if you're SIMPLY- that sounds a bit rude- simply a family mediator.' **Amy (L)**

'We're fortunate enough still in [LOCATION] to have a few of my old colleagues, who I used to work for, who are family lawyers. You need a family lawyer to do the finance. I don't generally think that social work type trained mediators know enough. I've certainly come across some mediated agreements that are appalling. You see them and think if that's the standard of your expertise, no wonder mediation is taking a hit.'
Michael (L)³⁵

Both Amy and Michael felt that their legal background provided an 'extra layer' to their mediation practice. Michael even attributed the lack of legal training for therapeutic mediators to the decline in mediation cases post-LASPO. In general, the lawyer mediators in the study devalued the work of therapeutic mediators to promote the importance of their skillset. This reinforced the separation of the two sub-groups, revealing a fragmented profession.

This underplay was not one-sided, and the interviews also revealed negative attitudes amongst therapeutic mediators towards lawyer mediators. Therapeutic mediators tended to perceive lawyer mediators as unavailable. They portrayed lawyer mediators as uncommitted and too

³⁴ A similar point was raised in *chapter six* in relation to **Judith's (L+T)** realisation that one dispute involved a particular legal issue. It was questioned whether a therapeutic mediator would identify the same issue, though this is for future research to consider.

³⁵ In a similar fashion, **Judith (L+T)** emphasised that without legal training, mediators could overlook vital elements in an agreement: '...one party has moved out and wants to transfer their interest to the other party. That would trigger capital gains tax. So, I have to know that. You find a lot of mediators without a legal background don't know it. That could be HORRENDOUS.'

preoccupied with their legal practice.³⁶ Jessica spoke about the high numbers of lawyers that stopped practising mediation once they realised its low profit margins:

‘...the biggest change is a LOT of lawyers training as mediators. Which isn’t a BAD thing on some accounts. I think in my experience what I’ve found is the ones that then trained, they didn’t have the time commitments to get their accreditation... I think what they actually found was you don’t make anywhere near as much money as a mediator. If you’re a trained solicitor, your time is far more valuable using your law degree as a solicitor than it is a mediator. So, they all sort of GAVE UP.’ **Jessica (T)**

Some mediators went beyond Jessica’s frustration and claimed that lawyer mediators lacked the headspace and skillset required to respond to the emotional needs of parties:³⁷

‘Sometimes they [the parties] just want to use mediation to beat each other up.’ **Mary (L+T)**

‘Ah, is that common?’ **Interviewer**

‘Yes.’ **Mary (L+T)**

‘What do you do in that scenario?’ **Interviewer**

‘I may mention it. I think a lot of solicitors wouldn’t do that. They wouldn’t say, ‘What I’m noticing is that you’re being- you’re using these sessions to express a lot of the anger that you’ve got.’ I think a lot of solicitors will just try and suppress it. You know, ‘Well, moving to THE WHITEBOARD’. So, the clients have got an opportunity. Sometimes they’ll go, ‘Yes! I fucking hate him. He’s a bastard.’’ **Mary (L+T)**

Whilst Mary was a lawyer mediator, she emphasised her therapeutic training throughout the interview.³⁸ She suspected that pure lawyer mediators would overlook the party dynamic and avoid any anger or resentment between parties, preferring to focus on settlement. Her stance represented the majority of therapeutic mediators in the sample who believed they were best

³⁶ This was acknowledged by a lawyer mediator with therapeutic training, **Mary (L+T)**, who claimed that ‘they’ve got enough on their plates trying to be solicitors’. She later added that ‘solicitors are just very, very busy people.’

³⁷ ‘Lawyers who are keeping their practice going and fitting in the time for mediation, I doubt they have the headspace, maybe, to be thinking of things like that [the parties’ emotions and wellbeing]. Maybe they push them both out of the door in a hurry. *laughs*’ **Lauren (T)**.

³⁸ **Lydia (T)** similarly believed that her previous experience working in education gave her an advantage over mediators from an adversarial background: ‘they don’t go into law necessarily for the same reasons that I went into my career. So, I think they might develop that over time and think, ‘Actually it’s quite nice talking to people and making something work, rather than fighting for things.’ But, for me... I’ve always understood the importance of listening well.’

placed to deal with the emotional aspects of divorce. This promotes their therapeutic training, parallel to the lawyer mediators who believed they provided a holistic legal service.

On the whole, the participants in the study frequently undermined the work of the other mediator sub-group in order to promote their work and background. Therapeutic mediators were supposedly ill-equipped to deal with legal issues (notably in financial matters). By comparison, lawyer mediators were uncommitted and unappreciative of parties' emotional needs. It is thus hypothesised that the widespread nonacceptance of the other mediator sub-group has significantly contributed to the fragmented mediator profession and may hamper future reform.

7.3.2 A sense of community at the national and local level

The divide amongst mediator backgrounds raises subsequent questions of whether, and if so how, these different sub-groups meet and engage with one another. This section will consider family mediators' professional identity at both a national and local level.

7.3.2.1 The national level: the FMC and Codes of Practice

Interviewees were asked about their Codes of Practice, the FMC and its regulation of family mediation over time.

Codes of Practice were analysed for the first stage of this research, covered in *chapter five*. It was recognised that mediators may not always refer to their Codes of Practice and that further research was required to understand mediators' approach in the modern climate. None of the 17 interviewees were highly critical of the FMC Code of Practice. There was some recognition of the value in a codified document that set out mediation's key principles, as discussed by Kate:³⁹

'...[the FMC Code of Practice is] absolutely CRUCIAL. That is the groundwork. It gives the basics of how mediators should operate... It gives a really important regulatory aspect to the mediator's work and makes it more of a profession... Those that are FMC mediators, have to adhere to that Code of Practice. It's crucially important.' **Kate (L+T)**

³⁹ As suggested by **Judith (L+T)**, 'the idea of a Code of Practice is HUGELY helpful'.

The presence of a national community was vital to Kate. She reiterated that the regulatory guidance bound 'FMC mediators', unifying the profession under one body. However, her sense of national community was barely represented throughout the rest of the data. Most interviewees felt the Code of Practice simply provided 'a basic framework of ethics' (**Rebecca (L)**), rather than a document that brought mediators together. Most lawyers in Mather, McEwen and Maiman's study adopted a similar stance and understood Codes of Practice as an ethical 'reference point'.⁴⁰ If a Code of Practice only contained the 'main principles', as noted by Kate, many mediators would look at other communities of practice to understand, as well as develop, the intricacies of their role.

This premise was supported by further data that mediators rarely referred to the FMC Code of Practice in their day-to-day work. Only one mediator mentioned the FMC Code of Practice without a prompt or question from the interviewer.⁴¹ The typical response amongst interviewees was that they did not regularly refer to the Code of Practice but recognised its value when mediators were working towards accreditation:

'In the early days, the first two or three years, I probably looked at it [the FMC Code of Practice] quite a lot. I probably haven't looked at it more recently, and I should read it again.' **Victoria (L+T)**

'Obviously I had to look at it [the FMC Code of Practice] A LOT when I was training. All the points you have to prove for accreditation are there. I suppose you're really kind of aware of it when you're training. Once you get into practice, it's just kind of- you forget it, as in it's a Code of Practice. You have your way of working. You know how YOU'RE supposed to work.' **Megan (T)**

The general stance, as reflected in these quotes, was that mediators rarely referred to the FMC Code of Practice and would develop their own 'way of working' over time. Interestingly, this suggests that mediators refine their conceptualisation of mediation through their day-to-day work, possibly influenced by their communities of practice (rather than a sense of national community).

The same conclusion can be reached when considering the Codes of Practice created by Member Organisations. The FMC is the umbrella body of five Member Organisations, with the College of Mediators and Resolution enforcing individual Codes of Practice. All four mediators

⁴⁰ Lynn Mather, Craig A McEwen and Richard J Maiman (n 23) 45.

⁴¹ **David (L+T)** mentioned the Code in relation to predicting court outcomes: 'Now our Code of Conduct says that we mustn't try to say what a judge would decide. But that doesn't stop us from giving very CLEAR guidance about the principles that would apply.'

registered with the College of Mediators were unaware that the organisation had a Code of Practice. In the interview with **Charlotte (T)**, she said that ‘the College of Mediators work with all sorts of different mediators’, so ‘probably’ did not have any regulatory guidance. By comparison, the three mediators from Resolution were aware of its Code of Practice. These contrasting results demonstrate the different holding powers Member Organisations can have over their members. On the other hand, **Judith (L+T)** was the only Resolution member who said she ‘used [the Resolution guidance] quite a lot’. The two other mediators registered with Resolution, **Mary (L+T)** and **Kate (L+T)**, did not refer to the Code of Practice at all, again suggesting that the organisation had little influence over its members.⁴² A note of caution is due here because of the low number of participants from Resolution and the College of Mediators. Nevertheless, these findings support the claim that Codes of Practice are largely seen as symbolic documents, rather than a strict policy that directs and shapes mediator practice. While the content of such material remains fundamental to understanding family mediation from the perspective of regulatory bodies, it appeared to have little influence over the identity of mediators. This hypothesis echoes Mather, McEwen and Maiman who found that the everyday actions of lawyers and their peers heavily influenced the application of regulatory rules (including those in Codes of Practice).⁴³ This effect was particularly evident when rules were ambiguous or contradictory, similar to the findings on the family mediation Codes of Practice in *chapter five*.

These arguments are reinforced by the sample’s detachment from the FMC as a governing organisation. Michael was highly critical, and at points sceptical, of the FMC:

‘To be honest, [the FMC is] not a great organisation. It can be very frustrating working with other mediators and I’m afraid they’re not easy to agree with. There are things that they’ve been doing which- I get the sense that they’re actually in it for other reasons rather than doing the day-job. I think a lot of the UK market- MY take is that it’s more to sort of do with helping those who make money out of training for mediators and the costs of all the assessing.’ **Michael (L)**

This excerpt demonstrates the major task faced by the FMC in the post-LASPO climate: appealing to and engaging with its members. Michael was noticeably exasperated with the FMC. His frustration became accusatory and he suggested that the organisation was ultimately

⁴² For example, ‘As far as I’m concerned the one that I would adhere to is the FMC Code of Practice. I don’t think there’s anything in the Resolution one that would not be in the FMC one. I think they’re very similar.’ **Kate (L+T)**.

⁴³ Lynn Mather, Craig A McEwen and Richard J Maiman (n 23) 47.

driven by profits.⁴⁴ This high level of disengagement with the regulatory bodies could create serious problems if found across the entire profession. It may hamper any attempts to unify family mediators, encourage standard practice and, crucially, promote a national identity.

While Michael's response gives an insight into the negative perceptions held by some mediators towards the FMC, his detachment from the regulatory body does not represent the whole sample. The more general criticism identified during interviews was that the FMC had not resolved a number of issues with the training and accreditation process. Interviewees described these procedures as 'really tedious' (**Rosie (L)**), 'unclear', 'ambiguous' and 'SO time-consuming' (**Mary (L+T)**), in addition to 'a bit haphazard' (**Emma (L)**). Under the FMC Manual of Professional Standards, a mediator seeking accreditation must submit three case commentaries.⁴⁵ These three cases must reach completion and involve a children's dispute, financial dispute, and all-issues dispute respectively.⁴⁶ **Megan (T)** struggled to reach this standard because, from her experience, 'to get those three cases from start to finish is not that easy, especially if you're only doing one day a week.'⁴⁷ This not only demonstrated the barriers to obtaining accreditation (which could deter people from joining the profession) but widespread dissatisfaction with the accreditation process.

Some areas of concern remain completely unresolved, such as the lack of protection for the title of 'family mediator'. Solicitors are a controlled profession, meaning any individual must fulfil various training and accreditation requirements before describing themselves as a 'solicitor' to a public audience. By contrast, anyone can promote themselves as a 'family mediator'. To incentivise individuals to join a Member Organisation (and subsequently the FMC), a family mediator can only conduct MIAMs or publicly funded mediation following accreditation.⁴⁸ However, some interviewees were still concerned about the little protection afforded to the name of the profession:

'...there is no qualification to become a mediator. It is not a controlled profession. I think that's a real worry because we have ENORMOUS power in people's lives. Solicitors

⁴⁴ In line with Michael, **Judith (L+T)** said that the FMC 'is not very respected by mediators' and 'takes money for jam'.

⁴⁵ Family Mediation Council, 'FMC Manual of Professional Standards and Self-Regulatory Framework' (FMC 2019) <www.familymediationcouncil.org.uk/wp-content/uploads/2019/06/FMC-Manual-of-Professional-Standards-Regulatory-Framework-v1.3-Updated-June-2019.docx.pdf> accessed 21 April 2020 14.

⁴⁶ Mediators can alternatively submit four case commentaries consisting of two children's disputes and two financial disputes. See *ibid* 14.

⁴⁷ **Victoria (L+T)** also recognised this problem: 'You need to do it in three years, and you need the outcomes. Cases don't always get an outcome, and neither should they.'

⁴⁸ Legal Aid Agency, 'Family Mediation Guidance Manual' (Legal Aid Agency 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/738258/Family_Mediation_GuidanceManual_V5_Sep2018.pdf> accessed 23 April 2020.

are of course protected. Therapists I would always tell a client to check that they're on the right registers. But mediation's not like that. You can get people who call themselves mediators who REALLY aren't clued up.' **Amy (L+T)**

'Obviously I did the accreditation which was the biggest pain in the world. It took ages. *sighs* There is I suppose a bureaucracy as well. It all makes a mockery when you've got any person in the street who can call themselves a mediator anyway. Yet they bend you over backwards.' **Rosie (L)**

Both excerpts provide insight into the national identity of mediators. Amy felt mediators had a large influence over people's lives, and so the profession should be better controlled. By the same token, Rosie was frustrated with the lengthy accreditation process when 'any person in the street' could call themselves a mediator. While the regulation of the 'mediator' title goes beyond the FMC and is a matter for parliament, this frustration could cause Rosie to become detached from the accreditation process, as well as her profession. Moreover, the lack of protection may damage the larger, national community of family mediators. According to Mather, McEwen and Maiman, the national community was a 'source of both identity and esteem' for lawyers.⁴⁹ In contrast, the findings from the mediator interviews allude to frustration with the lack of protection around the profession. This could lead to decreased morale amongst family mediators, potentially furthering the divide between lawyer mediators and therapeutic mediators.

7.3.2.2 The local level: communities of practice

The interview data suggest that mediators prefer to engage with their peers through local communities of practice. Some participants spoke about the different conferences, training programmes and trips they attended. These events involved mediators of different backgrounds, promoting collegiality:⁵⁰

'...there is a group called [MEDIATION GROUP]. So [MEDIATOR] does these talks four times a year, with lots of different people. Mediators and solicitors will come, and we'll

⁴⁹ Lynn Mather, Craig A McEwen and Richard J Maiman (n 23) 46.

⁵⁰ As mentioned by **Rebecca (L)**: '...there is a group of us who go away once every two years to [LOCATION]. We have a whole weekend away. They're a GOOD mixture of legal backgrounds and non-legal backgrounds. You do poetry and there is a guy who is a consultant psychiatrist. It's many different angles but it's great to beef up your thoughts and soft skills.'

have a chance to chat. Plus, we get to hear really interesting people. And it's free!' **Lydia (T)**

The sample generally praised these events as opportunities to develop their skills and keep in touch with other mediators. Mediators also established communities of practice in their mediation services or law firms, as explained by Harley:

'How do you find working in a mediation service?' **Interviewer**

'It's nourishing. When I was working in [LOCATION], I spent a lot of time doing venues. I would be on my own. You aren't able to offload. Being able to give mediators an opportunity to offload, it's wonderful and lovely.' **Harley (T)**

Harley suggested that working with other mediators promoted reflexivity and open practice. It enabled him to 'offload' about any issues and feel part of a community. Essentially, communication with peers could reassure a mediator that she was acting within the confines of her role.⁵¹ Mediators may, therefore, enhance their understanding of family mediation through interactions with other mediators, particularly those in the same service. This form of collaboration points to a shared conceptualisation of family mediation (and the role of the mediator) that is developed at a local, rather than national, level.

There was some evidence that local communities of practice could promote positive and collaborative relationships between the different mediator sub-groups. Despite the widespread suspicion seen in the way the different types of mediator perceived each other, some participants felt that both sub-groups brought a valuable set of skills to mediation:

'If you're a counsellor, you have all of these sorts of counselling mechanisms. It's been my thought for ages that even as solicitors- we're meant to be HARD. Yet children-related work, some are AWFUL cases. Yet you didn't get any help. You were getting through to the most difficult family circumstances. Children are being taken away and you're part of all that system. No, solicitors we come from a completely different ethos from the counselling side.' **Rebecca (L)**

'At a simple level- when we started mediating, we always started with two of us. With the Family Mediator's Association, back in the early 1990s, there was always a lawyer and a family trained person, you've heard of this. It was also a man and a woman. I used

⁵¹ **Amy (L)** would often contact other mediators to look at meeting notes and was positive about the affirmation she received back: 'I sent a note of yesterday's meeting to [MEDIATOR] and to [MEDIATOR] and they both emailed back to say it sounds fine. One of them had one query about something... it's just quite nice to have somebody independent looking at it to say 'Yes'. I do value that.'

to work with a lovely lady who was a Transactional Analysis therapist. We did a LOT of work together and she would stop me at times, if I was being too lawyerish and say, 'David, can you just explain that?' That was of course her way of enabling the conversation to be explained...' **David (L+T)**

What brings these excerpts together is the notion that mediators could learn from one another (with regard to the legal and therapeutic elements of mediation) and use this shared knowledge to shape their identity and conceptualisation of the mediation process.

The appreciation of the diverse skills across the two mediator sub-groups was demonstrated by the universal acceptance of a co-mediation model, as mentioned by David. Co-mediation was a popular model in late 20th-century where two mediators mediated the same case.⁵² After the introduction of all-issues mediation, co-mediation tended to involve a lawyer mediator and therapeutic mediator. Barlow, Hunter, Smithson and Ewing argued that this cross-disciplinary approach 'offer[ed] an ideal set of skills and knowledge' for all types of disputes.⁵³ Ten mediators in the sample discussed co-mediation; they either advocated its use or mentioned that they co-mediated in the past. Megan qualified in 2018 and thought co-mediation helped her understand the purpose of family mediation:

'...when I was training in co-mediation, I found it made a big difference. Really noticing how the family mediators didn't go into the past. It was future-focused.' **Megan (T)**

Megan recognised that family mediation was a 'future-focused' process through the co-mediation model, implying that collaboration supported her professional development. Other mediators in the sample also praised the involvement of both mediator sub-groups as it introduced both legal and therapeutic expertise into the sessions. As explained by Michael:

'The other mediator that you would co-mediate with, was their background different or were they also a solicitor?' **Interviewer**

'No, no. Often a social-type mediator.' **Michael (L)**

'How did that work?' **Interviewer**

'Much better, yeah. Because you have somebody from both backgrounds, they might deal more with the- you can rely on their expertise a bit more for the children and me

⁵² Lisa Parkinson (n 18) 92.

⁵³ Anne Barlow and others, *Mapping Paths to Family Justice: resolving family justice in neoliberal times* (Palgrave Macmillan 2017) 27.

for the finance. It's sad that THAT library of experience is fast disappearing.' **Michael**

(L)

By bringing the two sub-groups together, co-mediation combined knowledge from the legal and therapeutic fields to create an optimum process for parties. This 'library of experience' was seen as incredibly valuable and helped interviewees shape their practice. To quote **Charlotte (T)**, 'the more inputs and the more influences, the better. You can see what worked really well and nick it.' Mediators could use this information to understand the remit of their role and, ultimately, what family mediation aimed to achieve. This confirms the importance of different communities of practice in order to foster positive relationships between the two mediator sub-groups.

Despite co-mediation's advantages, many interviewees recognised that the model was also inaccessible. Michael preferred co-mediation but acknowledged that the model was 'fast disappearing' in practice. Today, co-mediation is primarily used for training purposes.⁵⁴ The model is expensive and thus unavailable to most parties. Co-mediation (and other collaborative practices) may foster positive relationships between the two mediator groups but was rarely used in the sample post-LASPO. With fewer opportunities in place for mediators to engage with one another, the negative, often stereotypical, perceptions of lawyer mediators and therapeutic mediators may become entrenched. This continues to demonstrate how the wider contextual and structural problems within family mediation post-LASPO act as a significant obstacle to successful reform.

7.3.3 Frustrations within the profession: 'mediators mediating themselves'

Family mediation was designed to bring together the key elements of law and therapy into a settlement-oriented process. Yet clear divisions between the two backgrounds remain. A small group of mediators recognised that the profession was heavily divided. David was critical of the regulatory structure surrounding the FMC and its Member Organisations, describing it as 'out of this world'. When asked what could be done in response, he proposed to 'close them [the Member Organisations] all down':

'We're all members of the FMC. It's a complete duplication. So, it's as simple as that.'

David (L+T)

⁵⁴ *ibid* 129.

To David, the five Member Organisation structure was unnecessarily complicated and prevented family mediators from recognising that they were 'all members of the FMC'. He viewed mediators as operating under the same organisation – the FMC – and adopted a national identity.

Two other mediators recognised the hypocrisy of a fragmented mediator profession that aimed to bring people together and foster agreements. Their responses provided a valuable insight into the tensions within the national mediation community:

'All the regulatory bodies were just such a shamble before. It's just ironic that they're all fighting with each other, and you think aren't we mediators here?' **Emma (L)**

'The irony has been lost on NO-ONE that the mediation community is ridden with strife. *laughs*...my view when we're talking at the Family Mediation Council who has representatives from all the regulatory bodies- my view is that we- I think there is this sort of passive aggression from ALL sides. We know that there's these issues that divide us and we haven't really got them on the table. My view is, let's talk about them. We're mediators. We expect our clients to do EXACTLY that. We expect our clients to have ALL those issues onto the table and tackle them. WHY oh WHY have we not been doing that? Isn't it odd? You know, mediators mediating ourselves. *laughs*' **Rebecca (L)**

Rebecca's comment about whether mediators could mediate themselves strikes a chord around the current status of the mediator profession. When parties attend mediation, they are expected to be open, understanding towards each other and willing to reach a solution. Do mediators uphold the same values when engaging with their wider profession? At this point, the answer is unclear, and more must be done to mediate the national discussions around family mediation to promote cohesion across the profession.

7.4 Looking Forward: pressing "refresh" on the profession

Family mediation has come into its own since the early days of the conciliation pilots. To quote Parkinson, 'family mediation is not just an ideology; it can now claim the status of a professional discipline.'⁵⁵ Yet this chapter has set out a range of issues that may obstruct mediation reform. Some changes enacted by the FMC suggest that significant changes to the regulatory structure surrounding mediation may already be in action. But these developments will be unsuccessful

⁵⁵ Lisa Parkinson, 'Ideology or New Discipline? Part II' (2011) 41(2) *Family Law* 196, 199.

in the short-term. If these problems are left unresolved, it could have serious repercussions for the long-term future of family mediation.

The FMC continues to work towards reform. *Chapter four* previously discussed the FMC's Standards Review. Set up in Autumn 2018, the review evaluates procedures and rules in four areas: accreditation; complaints and appeals; the Standards Framework, and; documenting mediation outcomes to be submitted to court.⁵⁶ Some proposed changes from its 2018-2019 strategy have already been implemented, including the rules around case commentaries for accreditation and the opportunity for a mediator to be observed by another PPC when their consultant is unavailable.⁵⁷ Its 2020-2021 strategy has not yet been released in light of the COVID-19 pandemic, although it will probably continue any unresolved actions from the previous strategy.⁵⁸ The Chair of the Family Mediation Standards Board, Robert Creighton, acknowledges that reform will take time:

‘...we need to ensure that regulatory requirements more appropriately balance the high standards required for the protection of the public with the viability of the profession... All of this constitutes a large agenda, but given the investment of time and energy by the members of the Working Group and the evident commitment in the wider profession I am confident that we will make progress. Inevitably the more substantial changes will require careful planning.’ **FMC (April 2019)**⁵⁹

The FMC is undoubtedly dedicated to improving the regulation of mediation and its mediators. However, a broader approach to reform must be taken in order to resolve many of the problems covered in this chapter. This is not to suggest that the Standards Review is meaningless; it may go some way to strengthen mediators' national identity, particularly if it can resolve some of the issues surrounding accreditation. Furthermore, if qualification is easier to obtain, more individuals may consider becoming a mediator. Yet the Standards Review alone cannot resolve *all* the structural and contextual problems that prevent the modern mediator from being recognised. In reality, many of the changes crucial to strengthening mediation's

⁵⁶ Family Mediation Council and Family Mediation Standards Board, 'Summary of context and the work streams in FMC Standards Review' (FMC 2018) <www.familymediationcouncil.org.uk/wp-content/uploads/2018/11/FMC-FMSB-Standards-Review-Summary.pdf> accessed 23 April 2020.

⁵⁷ Family Mediation Council and Family Mediation Standards Board (n 6).

⁵⁸ Family Mediation Council, 'Review of the Family Mediation Council Two-Year Strategy 2018/2019' (FMC 2020) <www.familymediationcouncil.org.uk/wp-content/uploads/2020/03/Review-of-FMC-Strategy-2018-19.docx.pdf> accessed 7 September 2020; Family Mediation Council, 'FMC Newsletter: March 2020' (FMC 2020) <www.familymediationcouncil.org.uk/wp-content/uploads/2020/03/FMC-Newsletter-March-2020.pdf> accessed 7 September 2020.

⁵⁹ Family Mediation Council, 'FMC/FMSB Review of the Accreditation Process' (FMC 2019) <www.familymediationcouncil.org.uk/2019/04/30/fmc-fmsb-review-of-the-accreditation-process/> accessed 23 April 2020.

standing go beyond the responsibility of the FMC. This means a coordinated effort is required to resolve many of the issues in the contemporary climate. Pressing refresh on the mediator profession is not instantaneous and requires cultural, as well as procedural, change. What, then, are some of the potential directions for future reform?

7.4.1 The direction of reform: mediators' recommendations

While it is not the objective of this thesis to recommend a specific way forward in the post-LASPO era, participants were asked about the changes they wanted to see going forward. The responses shed some light on the many directions policy could take and their various effects on the conceptualisation of family mediation.

7.4.1.1 Increased funding for family mediation

Unsurprisingly, many interviewees wanted to reverse the effects of LASPO and increase funding for mediation. **Jane (T)**, for example, commented that 'pay is a big thing'. She said that if there were going to be changes in the 'calibre and the work that mediators do, they [the Ministry of Justice] need to provide funding for it.'⁶⁰ Two participants proposed to change the funding structure in relation to legal aid. First, Rebecca wanted to remove capital from the legal aid eligibility criteria as it prevented some disputants from obtaining public funding.⁶¹ She then proposed a modified version of HwFM (discussed in *chapter two*) where advising solicitors would get paid for referring disputes into mediation, giving advice and then acting as a party's advisor if mediation was unsuccessful:

'I'd put together a very simple system whereby you paid the solicitors a beefed-up Help with Family Mediation at similar rates to the fixed fees for mediation. Again, you have stages. You get one fee for the initial advice plus referral. Second if you advise them through the process and then third to help them facilitate settlement from mediation... if at the end of that it didn't go any further they [the solicitor] would have a CLEAR

⁶⁰ In a similar vein, **Victoria (L+T)** said, 'I hope that legal aid increases. It absolutely has to.'

⁶¹ She commented: 'Prior to 2013, mediation had never assessed capital. It only assessed income. I think it was PURE (pause) mistake or lack of attention that mediation got brought in having a capital. Particularly because if you've got a home. So, you can have a home with negative equity but if it's over the capital limits you can only take off £100,000 on the mortgage which is nonsense. Where would you get that money? People particularly in [LONDON], there's a lot of people who are ineligible for legal aid mediation because of that. That's a simple point. It could have easily been done...'

green light that they could have taken that client on as a private client after that.'

Rebecca (L)

Second, Michael suggested paying solicitors under legal aid for initial advice regardless of the client's income, but only if they also referred them to mediation:

'When there have been so-called consultations in the past, the feedback I've given was ignored completely. My suggestion was, and I still think it's a really GOOD one, basically what I would offer is or any client wanting to come in to see a solicitor for an initial meeting, that solicitor will be offered a fee of say £100 plus VAT, if they have a legal aid contract. That would ONLY be payable if a referral was made to a mediation organisation. And that would be on a non-means tested basis. It would have to be because you couldn't trust the Legal Aid Agency to audit correctly. Does that make sense? If it was just done on the basis that you've got their ID and evidence that you sent a referral to a mediator- clients if they had the choice of paying the hundred odd quid to a lawyer or getting it free as long as they go see a mediator, then they'll choose that option I think. That will encourage a lot more lawyers to go back to selling mediation, because they don't do it now.'

Michael (L)

Both Rebecca and Michael were frustrated that their recommendations had been overlooked by policymakers. Interestingly, the intention behind both of their proposals was to return to the traditional reliance on family solicitors in mediation. However, a recurring argument throughout this thesis is that a manifesto for family mediation reform solely based on reintroducing (or adjusting) funding is unrealistic. Furthermore, the FMC does not determine legal aid, so any changes would first require different policymakers and government to be convinced that reform is needed. Participants were aware of this problem, including Michael:

'Why do you think it [Michael's recommendation] hasn't been taken on board?'

Interviewer

'Because they think it's going to cost money. And it will. But it will actually save a lot of money as well. I always thought that was quite a cunning little plan, but nobody- I seemed to be alone in this. By all means, sell it. *laughs* If you can, by all means. I genuinely do think it's got merit. It would cost a bit to run it through the Legal Aid Agency. The risk they've got is THAT idea will not pay off in another five or ten years' time because there won't be any legal aid firms left. That's what is going to happen, it will die.'

Michael (L)

Michael thought his preventative measure was expensive but could save costs in the long-term. He was worried that such reform would, however, be too late to reverse the impact of LASPO. In line with Michael's perspective, the demand for further funding is justified in the short-term, but reform must remain pragmatic. If funding is unlikely to be reintroduced, family mediators and policymakers must consider more viable solutions in the long-term post-LASPO climate.

7.4.1.2 Triage within family dispute resolution

Some mediators in the study also mentioned further triage within family law. Triage has been previously recommended in the context of in-court conciliation, with Trinder, Connolly, Kellet, Notley and Swift calling for 'a low judicial control or mixed form of conciliation... within the context of a differentiated case management system offering an appropriate range of services.'⁶² Barlow continued the idea of triage in a 2017 article where she proposed that family mediation should be supplemented with 'bundled packages' involving several other out-of-court dispute resolution procedures, including support from lawyers or child consultants.⁶³ Recommendations within the mediator sample included a similar idea to the Family Hubs in Australia.⁶⁴ This system would provide individuals with a one-stop service for their family disputes:

'...my own vision of mediation would be that you would have more of the kind of Family Hubs approach, like in Australia. Everyone who is separating would know that the NORM is to go along to somewhere that provides all the services. So, the Separating Parents Information Programme, mediation, counselling, domestic abuse counselling, perpetrator programmes, all of that would be potentially under one roof... The reality is that many people I see in mediation would REALLY benefit from a Separated Parents Information Programme first, or from having some therapeutic support, alongside the mediation process. That's really giving a much more holistic approach to it.' **Kate (L+T)**

Two mediators suggested a tiered dispute resolution system that moved parties from mediation to arbitration, a more adjudicatory process, when required. **Mary (L+T)** wanted to

⁶² Liz Trinder and others, *Making contact happen or making contact work? The process and outcomes of in-court conciliation* (Department for Constitutional Affairs Research Series 3/06, 2006) 100.

⁶³ Anne Barlow, 'Rising to the post-LASPO challenge: How should mediation respond?' (2017) 39(2) *Journal of Social Welfare and Family Law* 203, 213.

⁶⁴ Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) (AU).

see 'a formal progression that goes from mediation into arbitration'.⁶⁵ Rosie also hoped for further collaboration between dispute resolution procedures in the future:

'It's always been you do this and that. Why can't you just go between the two, or three, or four? Using the different models for different things. As long as you come out the other end, then it doesn't matter that it wasn't strictly collaborative law, or it wasn't strictly mediation, or it wasn't strictly arbitration. If you've got all of the things sorted, it should be great.' **Rosie (L)**

Many interviewees sought a holistic approach to family dispute resolution. Their proposed reforms could provide a much-needed structure that referred parties into mediation, potentially leading to a rise in cases and economic stability for mediators. However, these recommendations rely on triage being accessible in the first place. While triage is appealing, policymakers will need to be convinced that funding these initiatives is a worthwhile investment. This issue returns to the problem identified with proposals to increase funding for family mediation.

At a deeper level, the proposals relating to funding and triage attempt to restore the traditional family justice system, with family mediation being one of many options available to disputants. It may even seek a return to the strictly limited mediator by assuming that legal support and evaluation can be provided by other legal professionals. This thesis does not intend to undervalue these recommendations: a triage system with funding would indeed promote access to justice. Instead, it recognises that the likelihood of the Ministry of Justice funding these endeavours is low as it reverses many of the steps taken to create the contemporary system. This creates an immediate and almost unscalable hurdle to providing traditional access to justice. As recognised at the start of this thesis, future reforms for family mediation must go beyond orthodox convention and take into account modern access to justice, namely an access to justice that acknowledges family mediation's central positioning in private family law.

7.4.1.3 Mediator training

Another proposal discussed by the sample was to provide additional training for family mediators. This chapter has revealed a fragmented profession that was partly caused by negative perceptions amongst the two primary mediator sub-groups: lawyer mediators and

⁶⁵ This approach is known in the family mediation literature as 'Med-Arb', as discussed by Barlow in relation to her idea of bundled mediation services. See Anne Barlow (n 63) 214.

therapeutic mediators. Much of this criticism came from a belief that each sub-group had a monopoly in their relevant area. Yet the original intention behind mediation was to combine these two backgrounds to provide an optimum service for families. Five participants had training in both legal and therapeutic areas, and it is questioned whether this merger of skills could be implemented across the mediator profession.

Improving mediator training could promote consistency within the profession in relation to the conceptualisation of family mediation, as well as how mediators act in practice. Rebecca was in favour of specific training in the legal and therapeutic areas:

‘Maybe family law solicitors need MORE of the sort of information about children or whatever. And those who’ve come from CAFCASS [therapeutic mediators] don’t need that but they need a LOT more in terms of the finances. Particularly if people are drafting consent orders you perhaps need a different level of training altogether. A bit like child inclusive mediation which is now a thing where you go to get yourself accredited. You go to the training and get a badge I suppose.’ **Rebecca (L)**

Under such a proposal, mediators would attend different training modules and receive a ‘badge’, allowing them to advertise their areas of expertise. Rebecca mentioned that this was similar to the recent reforms around child-inclusive mediation. Since September 2019, all mediators working towards accreditation are required to attend a training course on child-inclusive mediation.⁶⁶ This reform suggests that the FMC could stipulate whether certain courses were mandatory or an add-on for those that sought accreditation in a particular specialism. This balance will have to be managed carefully, as too much mandatory training could lead to frustration and criticism. For instance, **Michael (L)** was frustrated that he had to attend a child-inclusive training course. He said the training cost ‘a LOT of money’ not only in terms of the fee but the missed income for that day. He may have preferred for the course to be optional, similar to the proposal by Judith:

‘I think there should be DIFFERENT levels of qualification for mediators. A bit like you have for financial advisers. For example, some of them can advise on mortgages, some can advise on different products. They have different professional exams to do that.’

Judith (L+T)

⁶⁶ Mediators with FMCA status had to attend this course by January 2020: Family Mediation Council, ‘Important Information for Family Mediators about the new FMC Standards for Child-Inclusive Mediation’ (FMC 2018) <www.familymediationcouncil.org.uk/wp-content/uploads/2018/05/Important-Information-new-FMC-standards-re-CIM-14.5.18.pdf> accessed 23 April 2020.

This system would have different tiers for mediator accreditation. Barlow makes a similar recommendation by putting forward ‘a system of specialist accreditation’, enabling mediators to take further training in areas such as ‘high conflict couple mediation, child inclusive mediation or complex financial cases.’⁶⁷ This proposal would continue triage as mediators could refer cases to one another depending on the specialism required for the parties’ situation.

Nevertheless, these proposals are reliant on a strong and cooperative relationship amongst family mediators and their professional sub-groups. In the current context of a fragmented profession, both lawyer mediators and therapeutic mediators may worry that mediators from the other sub-group will “steal” their work if they can specialise in the same area. Mary mentioned this problem:

‘People are very in their own kind of professional ambits. I would like to see something start to- that those walls start to dissolve. To enable more help to be given to people. But I think the professions are frightened of that.’ **Mary (L+T)**

‘In what way?’ **Interviewer**

‘Well, I think the professions are frightened of being invaded. Each profession is frightened of being invaded by the other.’ **Mary (L+T)**

In Mary’s words, the mediator sub-groups were ‘frightened of being invaded’ by each other. If a mediator’s monopoly over an area (law or therapy) is taken away, she has fewer opportunities to promote her services by distinguishing it from mediators in the other sub-group. Barlow also recognised this issue, suggesting that the reform ‘require[d] more solidarity and less direct internal competition among mediators.’⁶⁸ Thus, the fragmentation of family mediators could seriously damage the likelihood and value of future regulatory reform.

A further issue is the quality and coherency of the training provided. Foundational mediation training is provided by six organisations as of March 2021.⁶⁹ Guidance states that these courses must follow the FMC competence standards which require mediators to bear in mind both the legal and therapeutic elements of mediation.⁷⁰ Mediators must, for example, work within legal guidelines and take into account the impact of mental health on negotiations. These

⁶⁷ Anne Barlow (n 63) 212.

⁶⁸ *ibid* 211.

⁶⁹ Family Mediation Council, ‘Approved Foundation Training Courses’ (FMC 2020) <www.familymediationcouncil.org.uk/approved-foundation-training-courses/> accessed 24 March 2021.

⁷⁰ Family Mediation Standards Board, ‘Approval of foundation training courses for family mediators’ (FMC 2016) <www.familymediationcouncil.org.uk/wp-content/uploads/2016/09/COURSE-APPROVAL-Guidance-Notes.pdf> accessed 23 April 2020 7, 12-13.

requirements are, however, a low threshold for mediator training. The FMC does not provide any information about the evaluation of these courses or whether the attendees are properly trained in both areas. In general, there is no evidence to suggest that the seven providers provide a coherent and consistent training system. It is hoped that this issue will be investigated through the FMC Standards Review.

7.4.2 Family mediators as a quasi-legal profession

The post-LASPO climate has prompted ‘radical thinking’ around family mediation reform, as predicted by Hitchings and Miles.⁷¹ Yet underpinning these discussions is a further question about the role of the family mediator in contemporary family justice. The remaining pages of this chapter briefly consider whether future reform involves envisioning its mediators as a *quasi-legal* profession. The studies into lawyers’ professionalism and ethics have long called for a major overhaul of the profession.⁷² By comparison, the smaller mediation literature has mainly considered the professionalism of mediators through the debates around mediators giving consent orders or, ultimately, advice, considered below.

Recognising family mediators as a quasi-legal profession is one of the more controversial options for future reform. Through two studies, this thesis has revealed that the modern mediator is accepted by regulatory bodies and their mediators, even if this is only achieved at an implicit or subconscious level. Family mediators now have an evaluative remit of which often encompasses the making of legal judgements. This is a stark departure from the limited mediator seen in the early mediation pilots and traditional theory, discussed in *chapters two* and *three*. Mediators also offer a number of services that were traditionally carried out by lawyers before LASPO, such as screening and potentially drafting consent orders. To quote Maclean and Eekelaar, ‘family mediation appears to be becoming increasingly integrated into legal practice.’⁷³ An obvious reform, then, is to accept that family mediators are legal professionals and potentially provide a service akin to solicitors. Maclean and Eekelaar recommend that mediators should be allowed to give advice, no longer confined to the unrealistic concept of information.⁷⁴ They propose a new model called ‘legally assisted family

⁷¹ Emma Hitchings and Joanna Miles, ‘Mediation, financial remedies, information provision and legal advice: the post-LASPO conundrum’ (2016) 38(2) *Journal of Social Welfare and Family Law* 175, 192.

⁷² Richard Moorhead, ‘Precarious Professionalism: Some Empirical and Behavioural Perspectives of Lawyers’ (2014) 67 *Current Legal Problems* 447; Pascoe Pleasence, Nigel J Balmer and Richard Moorhead, *A Time of Change: Solicitors’ Firms in England and Wales* (The Law Society 2012); Richard Susskind and Daniel Susskind, *The Future of the Professions* (Oxford University Press 2015).

⁷³ Mavis Maclean and John Eekelaar (n 33) 122.

⁷⁴ *ibid* 132.

mediation' under which the mediator gives legal advice during mediation, regardless of her background. At a more theoretical level, the model removes what Maclean and Eekelaar describe as an 'artificial distinction between acting as a mediator and acting as a lawyer', as well as the further distinction between information and advice.⁷⁵ However, would family mediators as a collective accept such a proposal? The information and advice divide has placed limits on the mediator since the process was introduced in the 1970s and 1980s, distinguishing their role from other family dispute resolution professionals. If one thing is clear, it is that the FMC faces a difficult balancing act between extending the role of its members and gaining their approval.

The best way forward may be for these developments to be phased in over time, slowly working towards this idea of mediator advice. Skinner's 'Family Matters' service is relevant to this discussion. In collaboration with Resolution, Skinner designed a family dispute resolution model similar to Maclean and Eekelaar's legally assisted family mediation with one key difference: the professionals, called Guides, could not give legal advice.⁷⁶ Guides were lawyer mediators (although most only became mediators for the experiment)⁷⁷ who worked with both parties together, gave legal information, supported them to reach an agreement and, ultimately, responded to their problems in a 'holistic way'.⁷⁸ Skinner's study involved interviews with six Guides from March to April 2015, as well as a focus group.⁷⁹ The Guides felt they continued their role as a mediator but could also 'challenge' parties' different perceptions and stances.⁸⁰ However, this thesis suggests that the Guides are simply modern family mediators in all but name. Its interview data show that mediators conceptualise their role to involve a variety of steps in order to 'challenge' an unfair agreement, from strongly encouraging legal advice to reality-testing and predicting the probable legal outcome. This directness is frequently permitted by mediation's regulatory bodies, though it remains concealed by a facilitative proxy. In line with the findings from this thesis, it is perhaps preferable to make the evaluative undercurrents of family mediation more explicit in mediation theory and regulation, rather than create a hybrid profession. It would also be desirable to provide mediators with more comprehensive training of this quasi-legal role in order to ensure this evaluation is provided properly, particularly as all the Guides were legally qualified. These actions still

⁷⁵ *ibid* 134.

⁷⁶ Christine Skinner, 'One lawyer acting for two clients: implications arising from an experimental practice model 'Family Matters'' (2019) 41(3) *Journal of Social Welfare and Family Law* 265, 271.

⁷⁷ Christine Skinner and Ida Foster, *Guiding Parents Through Separation: Family Matters – an innovative support service from Resolution* (Resolution 2016) 20.

⁷⁸ *ibid* 8.

⁷⁹ *ibid* 18-19.

⁸⁰ *ibid* 26-27.

require significant attitudinal change around the family mediation process, but may be more readily accepted than a sudden move towards open mediator advice. The idea of hybridity within family justice is a highly topical discussion and will be briefly be considered in the *Conclusion* chapter of this thesis.

The transition towards a quasi-legal profession is perhaps unavoidable, particularly where reforms are becoming more progressive and seek to make the mediator profession more structured and cohesive. It may also be an inevitable consequence of LASPO and the contemporary family justice system: solicitors are increasingly withdrawn from family law and a range of initiatives, such as self-help guides, University pro bono clinics and McKenzie Friends, have begun to replace the legal support that was previously available through legal aid.⁸¹ Yet this gap is also occupied by family mediators who, in line with the findings from this research, provide an increasingly legal service. This thesis advocates for flexibility in mediator practice which, ultimately, requires the conceptualisation of family mediation to acknowledge that the modern mediator uses both evaluative and facilitative functions. It must, therefore, also advocate for further recognition that mediators are increasingly occupying a quasi-legal space. This is a natural conclusion to this thesis, although how it is achieved is a question for future research and debate.

7.5 Conclusion

This thesis has sought to provide optimism in the post-LASPO landscape, along with further understanding of how the conceptualisation of family mediation can be altered to recognise (and permit) the modern mediator role, in addition to access to justice. However, family mediation and its mediators are now in a precarious position. While the FMC has taken many steps towards developing the structures around mediation, and continues to do so, the impact of these reforms is likely to be limited. The impact of LASPO suggests that the pressures on mediators have increased, and the fragmented status of the profession will prevent full discussions about reform from taking place. For example, mediation may stop operating altogether if there are not enough mediators to run services across England and Wales. The FMC's Standards Review may lead to further developments, but it cannot resolve all the

⁸¹ Mavis Maclean and John Eekelaar, *After the Act: Access to Family Justice after LASPO* (Hart Publishing 2019); Leanne Smith, Emma Hitchings and Mark Sefton, *A study of fee-charging McKenzie Friends and their work in private family law cases* (The Bar Council 2017).

structural and contextual problems facing mediators today. This is a significant barrier to recognising the modern mediator.

Family mediation is in the midst of change. There are several potential directions for future reform, including the reinstatement of legal aid across private family law, triage and improved training. Controversially, this thesis suggests that one of the reforms required involves seeing mediators as part of, not separate from, the legal profession. Research and debate must ask: what does this mean for family mediation in the future? As a profession, what will family mediators look like? The future appears to be an exciting time for family mediation reform, and the concluding chapter of this thesis will consider some of the implications of increased regulation.

Conclusion

This thesis has provided an insight into family mediation and access to justice several years after LASPO was first enacted. It is a response to the dearth of academic commentary on, first, the importance of family mediation in the current landscape and, second, on how the process could be changed to support those in need. Family mediation has seen little comprehensive reform since it was introduced in the 1970s and 1980s despite drastic developments in the legal landscape. But these developments have still triggered significant, albeit implicit, changes regarding how mediation is understood, which is likely to reflect changes to how mediator practice is carried out.

This thesis set out to answer a primary research question: ***what is the dominant conceptualisation of family mediation and the role of the family mediator in the contemporary climate?*** It also considered a follow-up question: ***how far does the dominant conceptualisation support access to justice within family mediation?***

Chapter one showed that mediation now sits at the centre of family justice, although an orthodox view of access to justice – associated with access to the courts – continued to dominate academic thought. It set out the objective of this thesis: to add to the limited evidence base on family mediation post-LASPO and consider the *conceptualisation* of the process in the contemporary climate. Both late 20th-century and early 21st-century policy portrayed mediation as the solution to concerns about the effectiveness of court for family matters, the desire to promote settlement and the perceived need to reduce legal aid. The chapter argued that whilst neoliberal critiques of modern family justice and LASPO are valuable, debate must now consider the potential ways forward for reform and advancing access to justice. It submitted that it was necessary to investigate how far, if at all, the modern conceptualisation of family mediation has been developed to respond to the issues facing contemporary family justice.

Chapter two examined the conceptualisation of family mediation through studies and commentary on the development of mediator practice, ranging from the earliest pilots to discussions at the time of LASPO. It demonstrated the lack of critique surrounding the family mediator's role in the late 20th century and that earlier research on family mediation subsequently depicted mediators as being bound to an absolute vision of her neutrality, as well as a facilitative assistance-giving role. The chapter labelled this traditional role as the *limited mediator*. It went on to show that mediation users have diversified in recent years and traditional legal support has been withdrawn from family justice. This has led to calls for a new

type of mediator, described in this thesis as the *modern mediator*, who could go beyond the orthodox model of information-giving.

Chapter three subsequently considered family mediation theory through two key concepts: the facilitative to evaluative continuum and mediator neutrality. The former idea, initially developed by Riskin, illustrated how mediators adopt a range of strategies ranging from facilitation (supporting discussion) to evaluation (directing an outcome).¹ However, the orthodox conceptualisation of the limited mediator was bound to the facilitative framework and thus became reliant on solicitors to provide advice or, in other words, evaluation. Yet a growing body of research suggested that mediators do evaluate, often in response to a power imbalance. This thesis argued that mediation theory must be redesigned to reflect modern practice. In particular, if mediator practice is to successfully respond to the post-LASPO climate, debate must recognise the reality of the modern mediator. Neutrality must then be reinterpreted in a way that re-establishes facilitation and evaluation as an open continuum to enable the modern mediator to provide further flexibility.

The original research in this thesis adopted a two-stage approach. First, there was a qualitative text analysis of family mediation Codes of Practice in England and Wales. *Chapter five* used this analysis to consider the conceptualisation of family mediation from the perspective of regulatory bodies, tracking its development since the earliest Codes of Practice in the 1980s. The second stage involved qualitative interviews with 17 family mediators. The interview data was used in *chapters six* and *seven* to explain mediators' dominant understandings of family mediation and the structural and contextual problems surrounding their profession. Altogether, both studies provided original and crucial data on the purpose of family mediation post-LASPO. The relevance of the findings to the two research questions will now be considered.

What is the dominant conceptualisation of family mediation and the role of the family mediator in the contemporary climate?

Originally, family mediation was designed to engender settlement alongside improved communication and conflict resolution between the parties. The data show that both regulatory bodies and mediators uphold the two objectives. Regulatory bodies present mediation as a process that primarily improves communication and conflict resolution because

¹ Leonard Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1 *Harvard Negotiation Law Review* 7.

settlement is written in autonomy-based language, with a particular focus on encouraging the parties to reach their own decision. By comparison, the interviewed mediators follow the rhetoric seen in policy and generally understand improving communication and conflict resolution as a means through which to achieve settlement.² The promotion of settlement related by mediators in the interviews is predictable as the concept has dominated the work of family justice professionals since the late 20th century.³ Nonetheless, there is a subtle difference between regulatory bodies and mediators regarding the main objectives of family mediation. While regulatory bodies and mediators recognise both the traditional aims of family mediation, the divergence in their conceptualisations raises questions as to whether mediation's therapeutic element – encapsulated by the improving communication and conflict resolution objective – has weakened under the contemporary conceptualisation. Thus, there are initial signs that mediation has become more legal over time with a focus on settlement in practice, though this finding is emblematic of the family justice system at large.

In order to better understand the contemporary role of the family mediator, this thesis proposed a new theoretical framework for understanding mediator practice: the four mediator functions. These functions, plotted across Riskin's continuum, were first uncovered through the text analysis of Codes of Practice and their existence later reinforced through the mediator interviews. Starting at the facilitative end of the continuum, mediators are understood to be *helpers*. They facilitate discussions, give information and are expected to remain neutral at all times. This function was represented in the dominant image of family mediators in late 20th-century policy, research and theory. Mediators are also *referrers* that signpost parties to additional support. This function heavily reflects the original reliance on solicitors to provide legal advice, thereby also confining mediators to an information-giving role towards the facilitative end of the spectrum.⁴ However, the third and fourth functions, *assessors* and *intervenors*, are more explicitly evaluative. Regulatory bodies allow mediators to assess through screening and reality-testing. Mediators feel they can predict court outcomes; most interviewees conflate this technique with providing information about the law and legal process. The profession can then intervene to combat power imbalances or abuse, including

² The settlement rhetoric was first noticeable in policy from the 1970s, though it became more explicit in the following decade. This includes the Matrimonial Causes Procedure Committee who stated 'primary decision-making responsibility should rest with the spouses themselves'. See Matrimonial Causes Procedure Committee, *Report of the Matrimonial Causes Procedure Committee* (Stationery Office 1985) para 3.2.

³ Much of the literature is covered in *chapter one*. This includes work by Sarat and Felstiner, who found that lawyers and their clients viewed settlement as preferable to adjudication. See Austin Sarat and William L F Felstiner, *Divorce Lawyers and their Clients: Power & Meaning in the Legal Process* (Oxford University Press 1995) 108.

⁴ Legal advice alongside mediation is largely understood as the 'optimum process': Anne Barlow and others, *Mapping Paths to Family Justice: resolving family justice in neoliberal times* (Palgrave Macmillan 2017) 133.

through termination or using shuttle mediation. Altogether, the four functions reflect a range of mediator strategies ranging from facilitation to evaluation, showing that the modern mediator already exists.

However, there is widespread evidence that the orthodox understanding of family mediation (reliant on the limited mediator type) continues to be promoted: mediators are understood as an absolutely neutral profession that can only give information. As a result, the modern mediator (who can move across the facilitative to evaluative continuum) is hidden. Both studies confirm the existence of *mediator evaluation by facilitative proxy*, a process whereby mediators are portrayed as facilitative helpers even whilst they use evaluative techniques to progress the dispute.⁵ In the Codes of Practice, evaluative techniques are regularly depicted as a form of information-giving. The mediators interviewed largely align with a facilitative framework when discussing the purpose of family mediation, but simultaneously recognise the importance of obtaining a 'good' settlement which requires an evaluative judgment to be made. In both sets of data, this evaluation is concealed by the promotion of the limited facilitative mediator.

Overall, this thesis shows that the modern understanding of family mediation, evident amongst mediators and their regulatory bodies, is highly nuanced. On the face of it, the orthodox conceptualisation of family mediation, whereby limited mediators encourage discussions but do not evaluate, appears to persist. This perspective is particularly apparent in the fact that neutrality remains the cornerstone of mediation theory. Upon closer inspection, the modern mediator role is already in operation. Mediator evaluation underpins the current dominant conceptualisation. For example, the referrer function now requires mediators to determine if legal advice is necessary, rather than refer every dispute to further support. Both studies also confirm that mediators' screening responsibilities have increased in the post-LASPO landscape. However, these evaluations are often hidden from the parties attending mediation. This is because most instances of mediator evaluation continue to operate under the guise of information-provision in order to uphold the traditional image of neutrality. In concluding this line of investigation, this thesis advances that the dominant conceptualisation of family mediation no longer follows an absolute vision of neutrality. It departs from the notion of the limited mediator as both regulatory bodies and their mediators implicitly accepted the modern

⁵ Evaluation by facilitative proxy was first acknowledged in *chapter three* as earlier research suggested that mediators would intervene yet appear as a neutral third party. Examples include: Janet Rifkin, Jonathan Millen and Sara Cobb, 'Toward a New Discourse for Mediation: A Critique of Neutrality' (1991) 9(2) *Mediation Quarterly* 151; Janet Smithson and others, 'The Moral Order in Family Mediation: Negotiating Competing Values' (2017) 35(2) *Conflict Resolution Quarterly* 173.

mediator. However, attention must be paid to the word 'implicitly', as the reluctance to explicitly accept the modern mediator role means there is a lack of transparency surrounding mediator practice. This has serious repercussions for access to justice, as detailed below.

How far does the dominant conceptualisation support access to justice within family mediation?

The dominant conceptualisation of family mediation identified in this thesis is a significant step towards achieving access to justice post-LASPO once it is fully recognised. It builds on the previous evidence base and suggests that the modern mediator role has become more prominent in response to the contemporary landscape. Regulatory bodies have increasingly permitted mediator evaluation in their Codes of Practice. Mediators speak freely about screening and predicting court outcomes, two techniques that were traditionally reserved for lawyers. Combined, the two studies point to a new claim that mediators are adapting to the post-LASPO climate and increasingly occupying a quasi-legal space. While the mediators in the sample do not explicitly associate mediation with access to justice, they feel they work towards more than mere settlement. In actuality, mediators understand their role to involve a responsibility to consider the *quality* of agreement. This duty requires mediators to refer to legal norms and mediate in the shadow of the law. It is concluded that the dominant conceptualisation of family mediation can support access to justice because it enables the modern mediator to evaluate and subsequently provide the flexibility that is widely sought after LASPO.

Nonetheless, access to justice cannot be fully supported if the modern conceptualisation remains hidden. There are two significant barriers to recognising the modern mediator. First, and as noted above, the necessary evaluation undertaken by the modern mediator remains concealed by a facilitative proxy. These proxies operate to ensure harmony with the absolute, albeit outdated, interpretation of mediator neutrality. Thus, the circular and stagnant debate around mediation (that reform is necessary but cannot occur as it requires a departure from the neutral, limited mediator) continues. This thesis consequently advocates a re-envisioned mediation theory that does not adopt an absolute, strict approach to mediator neutrality. If this is achieved, specifically by recognising that neutrality is no longer an unconditional concept that completely binds mediators to a facilitative arena, the circular debate comes to an end. The dominant, modern conceptualisation of family mediation, identified through this thesis, helps to provide such an approach.

The ambiguity surrounding modern mediator practice and evaluation is caused by a lack of awareness within the profession itself. During the interviews, mediators were asked how their neutrality operated when there was a power imbalance. None of the mediators explicitly reflected on how they balanced neutrality with responding to any power imbalances, instead opting to provide specific examples of intervention. It is submitted that the mediators did not fully grasp that they frequently carried out evaluation which departed from the orthodox and strictly facilitative framework. The interview schedule may have influenced this finding, and, on reflection, the question could have been clarified to mediators. Nevertheless, there is a strong possibility that the lack of explicit acknowledgement around mediator evaluation has limited the profession's ability to recognise that a modern mediator can evaluate alongside her neutrality.

The second barrier to recognising the modern mediator (therefore damaging access to justice post-LASPO) is the prominence of structural issues surrounding the mediator profession. Even if the shared conceptualisation of family mediation is openly acknowledged so the modern mediator role can be developed to further support access to justice, the changes to family justice over the last several decades (including LASPO) have left mediation in a precarious position. The interview data used in *chapter seven* uncovered a concerning level of pessimism amongst mediators. While the FMC has developed mediation's regulatory structure in recent years, the various barriers mean these reforms are limited in their impact. The mediator profession is both aging and declining in number, and there are serious tensions across the mediator sub-groups. There is a very real risk that mediation could become a process reserved for the wealthy, or disappear from family justice altogether. If family mediation is to support access to justice in the future, reform must also address these wider, more extrinsic issues.

Future directions and implications

This thesis provides new, original data on the conceptualisation of family mediation in the post-LASPO climate.⁶ It recognises a disconnect between orthodox theory and the modern purpose behind family mediation, as demonstrated through its empirical work, and argues that understanding and openly acknowledging the contemporary conceptualisation of family mediation is a crucial step towards providing access to justice in modern times.

⁶ Findings from this thesis have already been published: Rachael Blakey, 'Cracking the code: the role of mediators and flexibility post-LASPO' (2020) 32(1) *Child and Family Law Quarterly* 53.

This argument is particularly demonstrated through the new four mediator functions developed in *chapters five* and *six*. The functions can be referred to in the same way as Riskin's continuum and provide further clarity on mediation practice post-LASPO. It is hoped that the functions will be applied in future research to understand how mediators move between, as well as balance, their various roles. For instance, the four functions could be applied to observational data on mediator practice. This would be particularly useful where the arguments made within this thesis primarily relate to the *conceptualisation*, rather than *application*, of family mediation. Moving beyond mediators, the four functions are also applicable to the work of other family dispute resolution professionals, including lawyers and judges. Future research could identify new functions across the continuum, as well as any divergences in interpretation amongst different professions. Overall, the four functions developed in this thesis are a valuable and novel contribution to the family law (and wider professionalism) literature.

Rethinking access to justice

This thesis considers the meaning and purpose of access to justice in the post-LASPO climate. To return to the concluding argument in *chapter one*, the dominant access to justice discourse has not yet caught up to reflect family mediation's central positioning post-LASPO. Access to justice continues to be associated with access to the courts and legal support. Yet policy spanning several decades has slowly moved mediation to the centre of contemporary family justice. LASPO also led to a diverse client base attending mediation with little access to legal support and advice. Prominent commentators within the family law literature have subsequently voiced concerns that mediation is not a one-size-fits-all solution. This includes Barlow, Hunter, Smithson and Ewing,⁷ Maclean and Eekelaar⁸ and Hitchings and Miles.⁹

The same stance is echoed throughout the wider access to justice literature. Genn's seminal 'Judging Civil Justice', published in 2010, questioned the capacity of mediation to further access to justice:

'...when it is asserted that mediation improves 'access to justice', what does that mean? Does mediation contribute to access to the courts? No, because it is specifically non-

⁷ Anne Barlow and others (n 4).

⁸ Mavis Maclean and John Eekelaar, *Lawyers and Mediators: The Brave New World of Services for Separating Families* (Hart Publishing 2016).

⁹ Emma Hitchings and Joanna Miles, 'Mediation, financial remedies, information provision and legal advice: the post-LASPO conundrum' (2016) 38(2) *Journal of Social Welfare and Family Law* 175.

court based. Does it contribute to substantive justice? No, because mediation requires the parties to relinquish ideas of legal rights during mediation and focus, instead, on problem solving. Are mediators concerned about substantive justice? Absolutely not. That is the wrong question to ask. Mediation is about searching for a solution to a problem. There is no reference to the hypothesised outcome at trial. The mediator's role is to assist the parties in reaching a settlement of their dispute. The mediator does not make a judgement about the quality of the settlement. Success in mediation is a settlement that the parties can live with. The outcome of mediation is not about *just* settlement, it is *just about settlement*.¹⁰

This thesis agrees that mediation cannot cure all the issues facing modern family justice. However, the same statement rings true of other procedures, such as adversarialism and solicitor negotiation, that are accepted as fundamental parts of the access to justice discourse. It is unfortunate that the value of family mediation in contemporary justice has not been fully recognised, or even questioned. While Genn frequently refers to the haste of civil justice reforms in lieu of empirical research in her monograph, describing such actions as 'policy making in the dark', she similarly makes no reference to the research on mediator evaluation before claiming that mediation cannot ensure access to justice.¹¹ Perhaps mediation has been cast aside from the access to justice discourse for the wrong reasons, leading to reform in the dark.

The data from this thesis suggest that Genn was only correct on the first ground in the excerpt above, namely that mediation does not contribute to access to the courts (though the view that access to justice is access to court is no longer viable, nor true, post-LASPO). In terms of 'contributing' to substantive justice, this thesis confirms that legal norms and 'ideas of legal rights' are increasingly prominent in family mediation. Parties continue to be referred to legal advice, particularly in financial matters, but there are certain situations where the legal information provided by mediators could have the same effect as advice. Mediators may also implicitly contribute to substantive justice by mediating cases and altering their own perspective of a just settlement over time. Moving onto whether mediation is 'concerned' with substantive justice, Genn adopts a sharp distinction between facilitation and evaluation because the role of the mediator is to 'assist'. The findings from this thesis suggest the opposite. Mediators believe they can hypothesise the probable judicial outcome, a form of evaluation, yet also assist parties and facilitate discussions. The mediator sample clearly made judgements

¹⁰ Hazel Genn, *Judging Civil Justice* (Cambridge University Press 2010) 116-117.

¹¹ *ibid* 52, 62.

about the quality of settlement and believed they could intervene in some circumstances. In many instances, family mediation is, in the words of Genn, now about ‘*just settlement*’.¹²

It is hoped that this thesis will encourage further discussions of the relationship – both existing and potential – between family mediation and access to justice. It shows that mediation is an exciting, innovative area of modern family law. The contemporary family law literature on access to justice has, however, tended to concentrate on the rise and needs of LiPs in court. This is a particular problem where many mediation users are, in effect, LiPs and cannot access legal support. It is hoped that this thesis can act as a foundation from which to construct a full picture of the post-LASPO family justice system. While mediation is not a universal remedy, academic commentary must consider how the process – and family law system – has developed, will continue to develop, and what this means for the future of access to justice. In particular, a more nuanced understanding of the modern mediator could help the provision of support for LiPs and other disputants. Thus, this thesis seeks to signpost some of the ways in which mediation could be seen as a viable part of the solution to the problems facing family justice post-LASPO.

Moving beyond the traditional family justice system

While the content and substance of this solution is a task for future debate and research, this thesis has emphasised that reform must resist the temptation to seek a return to the conventional family justice system. It is easy to retreat to calling for legal aid and support to be reinstated. Hitchings, Miles and Woodward, writing in 2013, concluded that neither legal information services nor mediators can ‘fill the gap left by solicitors’.¹³ Lawyers provided tailored legal support and advice that was complemented, not replaced, by dispute resolution. Despite the ‘clear, economically efficient rationale for the public funding of legal services’, as identified by Hitchings, Miles and Woodward, this solution is impractical in light of two unrealistic assumptions.¹⁴ First, reinstating traditional family justice assumes that the system was successful pre-LASPO, whereas neither adjudication nor legal support are panaceas to resolving family disputes.¹⁵ Second, its reintroduction is reliant on state support at a time when funding for family matters are not the government’s top priority, as shown in the Ministry of

¹² Certain professional developments will be required to ensure that mediation is effective at delivering just settlement, as considered below.

¹³ Emma Hitchings, Joanna Miles and Hilary Woodward, *Assembling the Jigsaw Puzzle: Understanding Financial Settlement on Divorce* (University of Bristol 2013) 155.

¹⁴ *ibid* 160.

¹⁵ This was previously explained towards the end of *chapter one*.

Justice's recent post-LASPO review.¹⁶ The decision not to fund mediation further is unlikely to be reversed in the COVID-19 pandemic and subsequent economic uncertainty. Hitchings and Miles acknowledged this reality in a later 2016 article by describing solutions based on public funding for lawyers as 'probably futile'.¹⁷ And so, future reform must recognise the value of family mediation and other non-adjudicatory procedures. But if the dominant conceptualisation of family mediation is to support access to justice, the modern mediator must be openly recognised.

Much of orthodox family justice has been eroded, including the strict separation of powers amongst family justice professionals. In 1999, Davis and Pearce identified a 'degree of merging, or hybridity' in the work of solicitors, welfare officers and district judges.¹⁸ This hybridity has expanded in the last two decades, and involves a quasi-legal space for both legal and non-legal professionals in the post-LASPO era. The space is occupied by solicitors and court workers, in line with Davis and Pearce's argument, but now includes services such as McKenzie Friends,¹⁹ Citizens Advice (or other advice services),²⁰ and, as advanced in this thesis, mediators. There is also the possibility that this space includes non-professions, with many divorcing parties seeking the support of their friends, families and colleagues.²¹ The size of the quasi-legal space is unclear, but appears to have grown exponentially since LASPO.

Mediators cannot replace the work of solicitors in its entirety, but this thesis has produced evidence of a quasi-legal space, increasing in size, where the roles of mediators and solicitors are distorted. The family law literature shows that solicitors are envisioned as partisan, adversarial advisers yet tend to adopt a consensus-based, facilitative approach. Wright, for example, notes that solicitors have 'absorbed some of the ethos behind mediation'.²² Similarly, this thesis has discovered that mediators are portrayed as facilitative helpers but understood

¹⁶ Ministry of Justice, *Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)* (CP 37, 2019).

¹⁷ Emma Hitchings and Joanna Miles (n 9) 192.

¹⁸ Gwynn Davis and Julia Pearce, 'The hybrid practitioner' (1999) 29(8) *Family Law* 547.

¹⁹ 'it is not just the scope of the role [of McKenzie Friends] that has altered; the people playing the role have changed too.' See Leanne Smith, Emma Hitchings and Mark Sefton, *A study of fee-charging McKenzie Friends and their work in private family law cases* (Cardiff University 2017) 5.

²⁰ Maclean and Eekelaar comment that 'many of the matters dealt with by lawyers under the previous legal aid system could be treated in a different way by advisers with enhanced training', including 'Citizens Advice or other settings.' See Mavis Maclean and John Eekelaar, *After the Act: Access to Family Justice after LASPO* (Hart Publishing 2019) 171.

²¹ For further information on informal partisanship (and informal mediation), see Gwynn Davis, *Partisans and Mediators: The Resolution of Divorce Disputes* (Clarendon Press 1988) 35.

²² Katherine Wright, 'The Role of Solicitors in Divorce: A Note of Caution' (2007) 19(4) *Child and Family Law Quarterly* 481, 490.

to evaluate and promote access to justice post-LASPO. The two professions have blended their practices, creating a hybridity within the gap left by the withdrawal of traditional legal support.

The merger of the two professions is also visible in the mediator sample. Interviewees were grouped according to professional background: lawyer, therapeutic or lawyer with therapeutic training. The identification of the third group is an important contribution to the literature as the debates around mediation reform tend to separate mediators into two firm categories of *lawyer* and *non-lawyer*. In line with the interview data, this new type of mediator adopts the same, dominant conceptualisation of family mediation, although most of them continue to distinguish their work from therapeutic mediators. Future research should consider whether the sub-group applies the conceptualisation differently in practice. More specifically, it must be asked whether the hybrid mediator provides a better service for family disputants, although what is meant by 'better service' is another question for future debate.

Concluding remarks on the professionalism of mediators: the need for attitudinal change

Recognising that the role of the family mediator is more nuanced than initially suggested brings professionalism and ethics to the forefront of reform considerations. Academic commentators, such as Wright and Davis and Pearce, recognise that the rising hybridity within family justice can create 'confusion and contradiction'²³ as different professional groups 'lose their clear identities'.²⁴ Even so, family mediators' identity has been unclear since mediation was first introduced. Scrutiny of family mediators' professionalism and regulation has always been overshadowed by the work on solicitors. Of course, the different levels of academic scrutiny given to family solicitors and family mediators is to be expected. It must be remembered that solicitors have operated in the English and Welsh legal system for several centuries and are much more numerous, whereas family mediators are a relatively new profession. Even in the quasi-legal space, solicitors' monopoly over legal advice and rights of audience provides the profession with a unique selling point to preserve their professional identity. The profession is also subject to an extensive and legally enshrined regulatory framework. By contrast, family mediators have struggled to create a distinct identity from the very beginning as mediation involves a combination of legal and therapeutic elements. Mediation is often explained through what it is *not*, rather than what it *is*.

²³ *ibid* 491.

²⁴ Gwynn Davis and Julia Pearce (n 18).

Family mediation reform now sits at its next crossroad. One road returns to the traditional conceptualisation of family mediation and the limited mediator, continuing a strict – but certain – vision of neutrality. It is a well-trodden path with familiarity for family mediators. The other road leads to explicit acknowledgement and development of the new dominant conceptualisation that endorses the modern mediator, recognising that neutrality can accommodate more evaluative practices and thus provide flexibility (to do what is necessary to engender just settlement). While the latter route may invigorate modern mediator practice, it requires a consensus that family mediation should depart from its traditional conceptualisation. The modern mediator *can* deliver access to justice: much of this thesis shows that mediators are already concerned with obtaining good-quality agreements in light of legal norms. However, it is not unreasonable to remain sceptical of the modern mediator in achieving access to justice, as it is still unclear how she specifically delivers just settlement. This line of reasoning is particularly relevant where therapeutic mediators have little legal training. Thus, the modern mediator must update her skillset and knowledge to ensure her role is properly fulfilled. This professional development can only occur if the modern mediator is explicitly acknowledged, though it may also necessitate comprehensive, attitudinal change to envision family mediation as a quasi-legal process.

This thesis was designed to understand the modern conceptualisation of family mediation. However, it also exposes an urgent need to understand the professionalism of mediators in light of their current and potential role in delivering contemporary family justice. There is a need to build on the current discussions about the information and advice divide, potentially moving on to consider whether mediators should be recognised as a type of *legal professional* in the future and what this might mean for their training and professional oversight. This work should be of particular interest to the FMC and their current Standards Review, in addition to policymakers and the other family justice professions.

Thus far, the FMC has been responsible for navigating mediation reform, removing most – if not all – responsibility from the state. The 2012 McEldowney Report emphasised the difficulties in achieving legislative reform and remained optimistic that the FMC could incite real change within the profession:

‘Statutory regulation of mediation is not a simple option or one that is likely to be introduced overnight, even if a case was made in its favour that would be accepted by the Government. Statutory regulation would take considerable time to plan and execute... Strong evidence would need to be produced to show that there are significant problems that cannot be addressed under the present, if improved,

arrangements. In the meantime the FMC has a real opportunity to set its own house in order.²⁵

These comments were echoed by the Family Mediation Task Force two years later which concluded that the 'onus on the FMC and its organisations to deliver reform would increase' as it developed.²⁶ The recent steps undertaken by the FMC to regulate the process (detailed in *chapter seven*) are a source of optimism in challenging times, though change may have come too late to reverse much of the damage caused by LASPO.

Broader structures prevent mediation's role in modern family justice from being recognised. For example, the Legal Services Act 2007 drastically transformed the delivery of legal services. Webley comments that the legislation led to an 'unprecedented process of de(re)regulation', reducing the monopoly that legal professionals, such as solicitors, held over the market.²⁷ Section 12 of the Legal Services Act 2007 defines *reserved legal activity* and *legal activity*, the former of which can only be carried out by authorised legal professionals. Subsection 4 then states: '*legal activity* does not include any activity of a judicial or quasi-judicial nature (including acting as a mediator)'.²⁸ Mediation is not, therefore, a legal activity under statute. However, Maclean and Eekelaar argue that a mediator could provide legal advice because it is not a reserved activity.²⁹ This position is reinforced by the findings throughout this thesis which reveal an increasingly evaluative role for family mediators. Subsection 4 therefore appears out of sync with the reality of mediator practice.

If family mediation is expected to engender access to justice post-LASPO, the fluidity of the evaluative to facilitative continuum must be recognised. Mediators must be able to evaluate with full transparency, following appropriate training. Yet this first requires widespread acceptance across different groups (including mediators) that mediation is (or can be) designed to provide access to justice in the modern family law system. The Legal Services Act 2007 embodies a wider structure that goes beyond the powers of the FMC. Without an explicit recognition that mediation is a quasi-legal service, reform that supports access to justice is unlikely.

²⁵ John McEldowney, *Family Mediation in a Time of Change: FMC Review Final Report* (FMC 2012) para 106.

²⁶ Family Mediation Task Force, *Report of the Family Mediation Task Force* (Ministry of Justice 2014) para 23.

²⁷ Lisa C Webley, 'Legal Professional De(Re)Regulation, Equality, and Inclusion, and the Contested Space of Professionalism within the Legal Market in England and Wales' (2015) 83(5) *Fordham Law Review* 2349, 2357.

²⁸ Legal Services Act 2007, s 12(4).

²⁹ Mavis Maclean and John Eekelaar (n 8) 127.

This thesis is not oblivious to the challenges of exploring alternative regulatory regimes. Neither does it purport to have considered in depth what reform might be appropriate or feasible. However, Mayson's 2020 review of legal services regulation merits brief consideration.³⁰ He concluded that whilst dispute resolution services, such as mediation, do not include advice or legal representation, they support parties 'in relation to legal rights and duties' and thus should fall under the relevant legal services regulation.³¹ This could involve delegation to regulatory bodies, namely the FMC. Rather than provide 'voluntary self-regulation', Mayson recommends that the FMC should become a mandatory regulator, meaning all mediators must adhere to its standards.³² Many jurisdictions go further than Mayson's proposals, imposing statutory regulation over mediators. For instance, Ireland's Mediation Act 2017 applies to most civil disputes, including family matters, and provides a statutory definition of mediation.³³ It also states that the parties are to determine whether the mediated agreement (written by the mediator) is to be legally binding, suggesting that mediators hold the competency to draft a legally binding document.³⁴ Civil and family mediation is also regulated by statute in France, Germany and Canada.³⁵ There may, then, be statutory ramifications for future reform which seeks to ensure a legal or quasi-legal role for mediators. Yet if the neoliberal state is unlikely to reinstate funding for legal aid and support, it may also be reluctant to support family mediation through legislation.

A major task going forward, then, is to not only decide how family mediation should be regulated, but also how the dominant attitudes toward the process and access to justice can be transformed to allow this change to occur. Mediation is integral to the current family justice landscape and the modern mediator role is emerging because of new demands on mediator practice. Professional change must follow. The first steps are already in motion as the FMC has begun to professionalise the mediation and its mediators. Yet whilst change begins with family mediators and the FMC, reform may extend to discourse within the state, as well as the legal and policy communities. This task will not be straightforward. One way or another, what is clear

³⁰ Stephen Mayson, *Reforming Legal Services: Regulation Beyond the Echo Chambers (Final Report of the Independent Review of Legal Services Regulation)* (Centre for Ethics & Law UCL 2020) 9.

³¹ Recommendation 11 of the report explicitly states that dispute resolution procedures should be considered a legal service, including 'mediation and conciliation, and online dispute resolution'. See *ibid* 118-119.

³² *Ibid* 119, 223.

³³ Mediation Act 2017, No. 27/2017 (Ireland), s 11(1)-(2).

³⁴ Sinéad Conneely and Róisín O'Shea, 'Family Mediation: the Irish Perspective' in Marian Roberts and Maria Federica Moscati (eds), *Family Mediation: Contemporary Issues* (Bloomsbury Professional 2020) 67. Also see Deirdre McGowan, 'Reframing the mediation debate in Irish all-issues divorce disputes: from mediation vs. litigation to mediation and litigation' (2018) 40(2) *Journal of Social Welfare and Family Law* 181.

³⁵ Leonardo V P de Oliveira and Carolyn Beckwith, 'Is there a need to regulate mediation? The English and Welsh case study' (2016) 42(3) *Commonwealth Law Bulletin* 327.

from this thesis is that there is a need to carefully consider and articulate the status of the mediator profession in light of other legal support providers and access to justice. Recognising the modern mediator is, important, if not vital, to achieving this goal.

Bibliography

- Association of Internet Researchers, *Internet Research: Ethical Guidelines 3.0* (Association of Internet Researchers 2019)
- Astor H, 'Mediator Neutrality: Making Sense of Theory and Practice' (2007) 16(2) *Social & Legal Studies* 221
- Atkinson P and Coffey A, 'Analysing Documentary Realities' in Silverman D (ed), *Qualitative Research: Issues of Theory, Method and Practice* (3rd edn, SAGE Publications 2011)
- Auerbach J, *Justice without Law? Resolving Disputes without Lawyers* (Oxford University Press 1983)
- Baitar R and others, 'Post-divorce wellbeing in Flanders: Facilitative professionals and quality of arrangements matter' (2012) 18(1) *Journal of Family Studies* 62
- Banakar R and Travers M, 'Introduction' in Banakar R and Travers M (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005)
- 'Introduction to Section Six' in Banakar R and Travers M (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005)
- Barlow A, 'Rising to the post-LASPO challenge: How should mediation respond?' (2017) 39(2) *Journal of Social Welfare and Family Law* 203
- and Hunter R, 'Reconstruction of Family Mediation in a Post-Justice world' in Roberts M and Moscati M F (eds), *Family Mediation: Contemporary Issues* (Bloomsbury Professional 2020)
- and others, *Mapping Paths to Family Justice: Briefing Paper and Report on Key Findings* (University of Exeter 2014)
- and others, *Mapping Paths to Family Justice: resolving family justice in neoliberal times* (Palgrave Macmillan 2017)
- Batagol B and Brown T, *Bargaining in the Shadow of the Law* (Themis Press 2011)
- Becker D, 'The Controversy over Mediator Neutrality: Input from New Zealand Mediators' (Master of Laws, University of Otago 2013)
- Blakey R, 'Cracking the code: the role of mediators and flexibility post-LASPO' (2020) 32(1) *Child and Family Law Quarterly* 53
- Bloch A, McLeod R and Toombs B, *Mediation Information and Assessment Meetings (MIAMs) and mediation in private family law disputes: Qualitative research findings* (Ministry of Justice 2014)
- Bogdanoski T, 'The 'Neutral' Mediator's Perennial Dilemma: to Intervene or not to Intervene?' (2009) 9(1) *Queensland University of Technology Law and Justice Journal* 26
- Bottomley A, 'Resolving family disputes: a critical review' in Freeman M (ed), *State, Law, and the Family* (Tavistock Publications 1984)

- Boulle L, *Mediation: Principles, Process, Practice* (2nd edn, LexisNexis 2005)
- Braithwaite A, 'Mediators drafting consent orders' (2016) 46(11) *Family Law* 1362
- Bramwell L, 'The UK College of Family Mediators' (2008) 38(2) *Family Law* 172
- 'Creative Paths to Practice: Helping New Mediators to Navigate the Route to Artistry' in Roberts M and Moscati M F (eds), *Family Mediation: Contemporary Issues* (Bloomsbury Professional 2020)
- Brinkmann S and Kvale S, *Interviews: Learning the Craft of Qualitative Research Interviewing* (3rd edn, SAGE Publications 2015)
- Brooke H, 'The History of Legal Aid 1945-2010' (Fabian Society 2017) <www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission-Appendix-6-F-1.pdf> accessed 3 April 2020
- Brown H, 'Standards and survival: enhancing the practice model: Part 1' (2015) 45(2) *Family Law* 202
- Brown W, *Undoing the Demos: Neoliberalism's Stealth Revolution* (MIT Press 2015)
- Bryan P E, 'Killing Us Softly: Divorce Mediation and the Politics of Power' (1992) 40 *Buffalo Law Review* 441
- Bullock A, 'Conduct one-to-one qualitative interviews for research' (2016) 27(4) *Education for Primary Care* 330
- Cambridge Dictionary, 'mediation, n' (*Cambridge Dictionary*, 4th edn, Cambridge University Press 2013) <www.dictionary.cambridge.org/dictionary/english/mediation> accessed 22 September 2020
- Cameron G, 'Family justice reforms: how are they working in practice?' (2015) 45(9) *Family Law* 1025
- Cherry A L, 'Choosing Substantive Justice: A Discussion of "Choice", "Rights" and the New Reproductive Technologies' (1997) 11 *Wisconsin Women's Law Journal* 431
- Children and Families Bill Deb 14 March 2013
- Choudhry S and Herring J, 'A human right to legal aid? – The implications of changes to the legal aid scheme for victims of domestic abuse' (2017) 39(2) *Journal of Social Welfare and Family Law* 152
- Clarke J, 'Dissolving the Public Realm? The Logics and Limits of Neo-liberalism' (2004) 33(1) *Journal of Social Policy* 27
- Coben J, 'Gollum, Meet Sméagol: A Schizophrenic Ruminant on Mediator Values Beyond Self Determination and Neutrality' (2004) 5 *Cardozo Journal of Conflict Resolution* 65
- Cohen O, Dattner N and Luxenburg A, 'The Limits of the Mediator's Neutrality' (1999) 16(4) *Mediation Quarterly* 341
- College of Mediators, *Code of Practice for Mediators* (College of Mediators 2019)
- Committee on One-Parent Families, *Report of the Committee on One-Parent Families: Volume 1* (Cmd 5619, 1974)

- Conneely S and O'Shea R, 'Family Mediation: the Irish Perspective' in Roberts M and Moscati M F (eds), *Family Mediation: Contemporary Issues* (Bloomsbury Professional 2020)
- Cooks L M and Hale C L, 'The Construction of Ethics in Mediation' (1994) 12(1) *Mediation Quarterly* 55
- Cookson G, *Unintended Consequences: the cost of the Government's Legal Aid Reforms* (King's College London 2011)
- Cowan D and Wincott D (eds), *Exploring the 'Legal' in Socio-Legal Studies* (Palgrave Macmillan 2016)
- Cretney S, *Family Law in the Twentieth Century* (Oxford University Press 2003)
- Crowe J and Field R, 'The Empty Idea of Mediator Impartiality' (2019) 29(4) *Australasian Dispute Resolution Journal* 273
- Davis G, *Report of a Research to Monitor the Work of the Bristol Courts Family Conciliation Service in its First Year of Operation* (University of Bristol 1980)
- *Partisans and Mediators: The Resolution of Divorce Disputes* (Clarendon Press 1988)
- 'A Research Perspective' in Westcott J (ed), *Family Mediation: Past, Present and Future* (Jordan Publishing 2004)
- Cretney S and Collins J, *Simple Quarrels: Negotiating Money and Property Disputes on Divorce* (Clarendon Press 1994)
- and others, *Monitoring Publicly Funded Family Mediation: Report to the Legal Services Commission* (Legal Services Commission 2000)
- and Pearce J, 'The hybrid practitioner' (1999) 29(8) *Family Law* 547
- and Roberts M, *Access to Agreement* (Open University Press 1988)
- Delgado R and others, 'Fairness and formality: Minimizing the risk of prejudice in alternative dispute resolution' (1985) 6 *Wisconsin Law Review* 1359
- Della Noce D J, 'Evaluative mediation: In search of practice competencies' (2009) 27(2) *Conflict Resolution Quarterly* 193
- Department for Constitutional Affairs, *A Fairer Deal for Legal Aid* (Cm 6591, 2005)
- Devlin P, *The Judge* (Oxford University Press 1979)
- Dewar J, 'The Normal Chaos of Family Law' 61(4) *Modern Law Review* 467
- Dick A H, 'Family Mediation: the Scottish Perspective' in Roberts M and Moscati M F (eds), *Family Mediation: Contemporary Issues* (Bloomsbury Professional 2020)
- Diduck A, 'Autonomy and vulnerability in family law: the missing link' in Wallbank J and Herring J (eds), *Vulnerabilities, Care and Family Law* (Routledge 2014)
- 'Justice by ADR in private family matters: is it fair and is it possible?' (2014) 44(5) *Family Law* 616

- ‘Autonomy and family justice’ (2016) 28(2) *Child and Family Law Quarterly* 133
- Dingwall R, 'Some Observations on Divorce Mediation in Britain and the United States' (1986) 1986(11) *Mediation Quarterly* 5
- Doughty J and Murch M, 'Judicial Independence and the restructuring of family courts and their support services' (2012) 24(3) *Child and Family Law Quarterly* 333
- Douglas S, 'Mediator Neutrality: A Model for Understanding Practice' (DPhil, University of the Sunshine Coast 2009)
- Edwards J, 'Closer collaboration between the judicial and mediation communities Part 1: Mediation/ MIAMs – how they work in practice' (2016) 46(9) *Family Law* 1168
- Eekelaar J, 'The Arbitration and Mediation Services (Equality) Bill 2011' (2011) 41(11) *Family Law* 1209
- and Dingwall R, 'The Development of Conciliation in England' in Dingwall R and Eekelaar J (eds), *Divorce Mediation and the Legal Process* (Clarendon Press 1988)
- and Maclean M, *A Reader in Family Law* (Oxford University Press 1994)
- Maclean M and Beinart S, *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing 2000)
- Eisenberg M A, 'Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking' (1976) 89(4) *Harvard Law Review* 637
- Elson A, 'The Rushcliffe Report' (1946) 13(2) *University of Chicago Law Review* 131
- Email from Joseph Sapu, Ministry of Justice, to Rachael Blakey (3 August 2018)
- Exon S N, 'How Can a Mediator Be Both Impartial and Fair: Why Ethical Standards of Conduct Create Chaos for Mediators' [2006] *Journal of Dispute Resolution* 387
- Family Justice Review, *Family Justice Review: Final Report* (Crown 2011)
- *Family Justice Review: Interim Report* (Crown 2011)
- Family Mediation Council, 'Consultation: Family Mediators Drafting Consent Orders' (FMC 2016) <www.familymediationcouncil.org.uk/wp-content/uploads/2016/11/Consultation-Family-Mediators-Drafting-Consent-Orders-30.11.16.pdf> accessed 5 March 2020
- 'Guidance for Online Video Mediation' (FMC 2016) <www.familymediationcouncil.org.uk/wp-content/uploads/2016/09/FMC-Guidance-for-Online-Video-Mediation-September-2016.pdf> accessed 7 September 2020
- 'About Us' (FMC 2017) <<http://web.archive.org/web/20170925214007/https://www.familymediationcouncil.org.uk/us/>> accessed 3 April 2020
- 'Overview of Consultation Responses: Family Mediators Drafting Consent Orders' (FMC 2017) <www.familymediationcouncil.org.uk/wp-content/uploads/2017/05/FMC-Overview-consultation-responses-family-mediators-drafting-consent-orders.pdf> accessed 5 March 2020
- *Code of Practice for Family Mediators* (FMC 2018)

- ‘FMC Newsletter: September 2018’ (FMC 2018) <www.familymediationcouncil.org.uk/wp-content/uploads/2018/09/FMC-Newsletter-September-2018.pdf> accessed 21 April 2020
- ‘FMSB Consultation: Draft PPC Code and Guidance’ (FMC 2018) <www.familymediationcouncil.org.uk/wp-content/uploads/2018/07/PPC-Code-of-Practice-Guidance-draft-for-consultation-July-2018.pdf> accessed 23 April 2020
- ‘Important Information for Family Mediators about the new FMC Standards for Child-Inclusive Mediation’ (FMC 2018) <www.familymediationcouncil.org.uk/wp-content/uploads/2018/05/Important-Information-new-FMC-standards-re-CIM-14.5.18.pdf> accessed 23 April 2020
- ‘Safeguarding Policies and Procedures for Family Mediators’ (FMC 2018) <www.familymediationcouncil.org.uk/safeguarding-policies-and-procedures-for-family-mediators/> accessed 21 April 2020
- ‘Summary of Two-Year Strategic Plan, 2018/2019’ (FMC 2018) <www.familymediationcouncil.org.uk/wp-content/uploads/2018/03/Summary-of-FMC-Strategic-Plan-2018-19.pdf> accessed 11 March 2020
- ‘About Us’ (FMC 2019) <www.familymediationcouncil.org.uk/about-us/> accessed 21 May 2019
- ‘FMC/FMSB Review of the Accreditation Process’ (FMC 2019) <www.familymediationcouncil.org.uk/2019/04/30/fmc-fmsb-review-of-the-accreditation-process/> accessed 23 April 2020
- ‘FMC Manual of Professional Standards and Self-Regulatory Framework’ (FMC 2019) <www.familymediationcouncil.org.uk/wp-content/uploads/2019/06/FMC-Manual-of-Professional-Standards-Regulatory-Framework-v1.3-Updated-June-2019.docx.pdf> accessed 21 April 2020
- ‘Professional Practice Consultant (PPC) Code of Practice’ (FMC 2019)
- ‘Renewal of Accreditation – Guidance Notes’ (FMC 2019) <www.familymediationcouncil.org.uk/wp-content/uploads/2019/03/Renewal-of-Accreditation-Guidance-Notes-v1.pdf> accessed 23 April 2020
- ‘Approved Foundation Training Courses’ (FMC 2020) <www.familymediationcouncil.org.uk/approved-foundation-training-courses/> accessed 24 March 2021
- ‘Family Mediation Survey 2019 – Results’ (FMC 2020) <www.familymediationcouncil.org.uk/wp-content/uploads/2020/01/Family-Mediation-Survey-Autumn-2019-Results.pdf> accessed 27 March 2020
- ‘Find Your Local Mediator’ (FMC 2020) <www.familymediationcouncil.org.uk/find-local-mediator/> accessed 27 March 2020
- ‘FMC accreditation scheme’ (FMC 2020) <www.familymediationcouncil.org.uk/mediator-area/standards-codes-guidance/fmc-accreditation-faqs/> accessed 23 April 2020

- ‘FMC Newsletter: March 2020’ (FMC 2020) <www.familymediationcouncil.org.uk/wp-content/uploads/2020/03/FMC-Newsletter-March-2020.pdf> accessed 7 September 2020
- ‘News’ (FMC 2020) <www.familymediationcouncil.org.uk/news/> accessed 27 March 2020
- ‘Review of the Family Mediation Council Two-Year Strategy 2018/2019’ (FMC 2020) <www.familymediationcouncil.org.uk/wp-content/uploads/2020/03/Review-of-FMC-Strategy-2018-19.docx.pdf> accessed 7 September 2020
- ‘What is family mediation?’ (FMC 2020) <www.familymediationcouncil.org.uk/family-mediation/> accessed 22 September 2020
- and Family Mediation Standards Board, ‘Summary of context and the work streams in FMC Standards Review’ (FMC 2018) <www.familymediationcouncil.org.uk/wp-content/uploads/2018/11/FMC-FMSB-Standards-Review-Summary.pdf> accessed 23 April 2020
- and Family Mediation Standards Board, ‘Changes to the FMC Standards Framework agreed by the FMC Board 12.6.19’ (FMC 2019) <www.familymediationcouncil.org.uk/wp-content/uploads/2019/06/Changes-to-Standards-Framework-Agreed-12.6.19.pdf> accessed 23 April 2020
- Family Mediation Standards Board, ‘Approval of foundation training courses for family mediators’ (FMC 2016) <www.familymediationcouncil.org.uk/wp-content/uploads/2016/09/COURSE-APPROVAL-Guidance-Notes.pdf> accessed 23 April 2020
- Family Mediation Task Force, *Report of the Family Mediation Task Force* (Ministry of Justice 2014)
- Family Mediators Association, ‘Conflicts and Consent Orders – initial overview for FMA members’ (FMA 2016) <<https://thefma.co.uk/news/conflicts-consent-orders-initial-overview-fma-members/>> accessed 5 March 2020
- Feenan D (ed), *Exploring the 'Socio' of Socio-Legal Studies* (Palgrave Macmillan 2013)
- Felstiner W L F, Abel R L and Sarat A, ‘The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...’ (1980) 15(3/4) *Law & Society Review* 631
- Fineman M A, *The Autonomy Myth: A Theory of Dependency* (The New Press 2004)
- Franklyn R and others, *Findings from the Legal Problem and Resolution Survey, 2014-15* (Ministry of Justice 2017)
- Freeman M, ‘Questioning the Delegalization Movement in Family Law: Do We Really Want a Family Court?’ in Eekelaar J and Katz S (eds), *The Resolution of Family Conflict: Comparative Legal Perspectives* (Butterworth & Co 1984)
- ‘Divorce: Contemporary Problems and Future Prospects’ in Freeman M (ed), *Divorce: Where Next?* (Dartmouth Publishing Company 1996)
- Galanter M, ‘Justice in Many Rooms’ in Cappelletti M (ed), *Access to Justice and the Welfare State* (European University Institute 1981)

— ‘Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law’ (1981) 13(19) *Journal of Legal Pluralism* 1

Genn H, *Judging Civil Justice* (Cambridge University Press 2010)

George A L, ‘Quantitative and qualitative approaches to content analysis’ in Pool I S (ed), *Trends in Content Analysis* (University of Illinois Press 1959)

Giddings J and Robertson M, ‘“Lay people, for God’s sake! Surely I should be dealing with lawyers?” Towards an assessment of self-help legal services in Australia’ (2002) 11(2) *Griffith Law Review* 436

Girdner L, ‘How People Process Disputes’ in Folberg J and Milne A (eds), *Divorce Mediation: Theory and Practice* (The Guildford Press 1988)

Glaser B G and Strauss A L, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine de Gruyter 1967)

Goriely T, ‘Rushcliffe Fifty Years On: The Changing Role of Civil Legal Aid Within the Welfare State’ (1994) 21(4) *Journal of Law and Society* 545

Gov.UK, ‘Family Mediation Voucher Scheme’ (Gov.UK 2021) <www.gov.uk/guidance/family-mediation-voucher-scheme> accessed 30 March 2021

Greatbatch D and Dingwall R, ‘Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators’ (1989) 24(4) *Law & Society Review* 613

Guggenheimer L, ‘A Modest Proposal: The Feminomics of Drafting Premarital Agreements’ (1996) 17(2) *Women’s Rights Law Reporter* 147

Hale B, ‘Equal Access to Justice in the Big Society’ (Sir Henry Hodge Memorial Lecture, London, 27 June 2011) <www.supremecourt.uk/docs/speech_110627.pdf> accessed 3 April 2020

Hamlyn B, Coleman E and Sefton M, *Mediation Information and Assessment Meetings (MIAMs) and mediation in private family law disputes: Quantitative research findings* (Ministry of Justice 2015)

Harvey D, *A Brief History of Neoliberalism* (Oxford University Press 2005)

HC Deb 15 November 2017, vol 631

HC Deb 17 April 2012, vol 543

HC Deb, 25 February 2013, vol 559

Hester M and others, *Domestic violence: A National Survey of Court Welfare and Voluntary Sector Mediation Practice* (The Policy Press 1997)

Hitchings E, ‘Official, operative and outsider justice: the ties that (may not) bind in family financial disputes’ (2017) 29(4) *Child and Family Law Quarterly* 359

— and Miles J, ‘Mediation, financial remedies, information provision and legal advice: the post-LASPO conundrum’ (2016) 38(2) *Journal of Social Welfare and Family Law* 175

— Miles J and Woodward H, *Assembling the Jigsaw Puzzle: Understanding Financial Settlement on Divorce* (University of Bristol 2013)

HL Deb 27 January 2017, vol 778

HM Treasury, *Spending Review 2010* (Cm 7942, 2010)

Home Office, *Marriage Matters: A Consultative Document by the Working Party on Marriage Guidance* (Crown 1979)

House of Commons Justice Committee, *Government's proposed reform of legal aid: Volume II* (HC 2010-11, 681-II)

— *Government's proposed reform of legal aid: Volume III* (HC 2010-11, 681-III)

— *Impact of Changes to Civil Legal Aid Under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012* (HC 2014-15, 311)

Hughes S, 'Family Mediation Task Force Report' (Ministry of Justice 2014)

<www.justice.gov.uk/downloads/DOC017.pdf> accessed 1 April 2020

Hunter R, 'Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law' (2003) 30(1) *Journal of Law and Society* 156

— 'Inducing demand for family mediation – before and after LASPO' (2017) 39(2) *Journal of Social Welfare and Family Law* 189

— and others, 'Mapping Paths to Family Justice: matching parties, cases and processes' (2014) 44(10) *Family Law* 1404

— and others, 'Access to What? LASPO and Mediation' in Flynn A and Hodgson J (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Hart Publishing 2017)

Izumi C, 'Implicit Bias and the Illusion of Mediator Neutrality' (2010) 34 *Washington University Journal of Law & Policy* 71

Joint Committee on Human Rights, *Enforcing Human Rights* (2017-19, HL 171, HC 669)

Justice Committee, 'Oral evidence: Impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, HC 311 Monday 1 December' (Parliament.UK 2014)

<[http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/impact-of-changes-to-civil-legal-aid-under-laspo/oral/16072.pdf%20\(Q280\)](http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/impact-of-changes-to-civil-legal-aid-under-laspo/oral/16072.pdf%20(Q280))> accessed 26 June 2020

Kaganas F, 'Justifying the LASPO Act: authenticity, necessity, suitability, responsibility and autonomy' (2017) 39(2) *Journal of Social Welfare and Family Law* 168

King C J, 'Burdening Access to Justice: the cost of divorce mediation on the Cheap' (1999) 73(2) *St John's Law Review* 375

Kishore S, 'The Evolving Concepts of Neutrality and Impartiality in Mediation' (2006) 32(2) *Commonwealth Law Bulletin* 221

Kovach K K and Love L P, ‘“Evaluative” Mediation Is An Oxymoron’ (1996) 14(3) *CPR Institute for Dispute Resolution* 31

— and Love L P, ‘Mapping Mediation: The Risks of Riskin’s Grid’ (1998) 3 *Harvard Negotiation Law Review* 71

Krippendorff K, *Content Analysis: An Introduction to its Methodology* (2nd edn, SAGE Publications 2003)

Lacey N, ‘Feminist Legal Theory Beyond Neutrality’ (1995) 48(2) *Current Legal Problems* 1

Law Centres Network, ‘Law Centres Alphabetically’ (Law Centres Network 2020) <www.lawcentres.org.uk/about-law-centres/law-centres-on-google-maps/alphabetically> accessed 23 March 2021

Law Commission, *Reform of the Grounds of Divorce: The Field of Choice* (Cmnd 3123, 1966)

— *Facing the Future: A Discussion Paper on the Ground for Divorce* (Law Com No 170, 1988)

— *Family Law: The Ground for Divorce* (Law Com No 192, 1990)

Law Society, ‘Law Society response to Family Mediation Council consultation on family mediators drafting consent orders’ (Law Society 2017) <www.lawsociety.org.uk/policy-campaigns/consultation-responses/documents/family-mediation-council-consultation-on-family-mediators-drafting-consent-orders/> accessed 3 April 2020

— ‘Our governance’ (Law Society 2020) <www.lawsociety.org.uk/about-us/our-governance> accessed 7 September 2020

Legal Aid Agency, ‘Family Mediation Guidance Manual’ (Legal Aid Agency 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/738258/Family_Mediation_GuidanceManual_V5_Sep2018.pdf> accessed 23 April 2020

Legal Aid, Sentencing and Punishment of Offenders Bill Deb 12 July 2011

Legal Aid, Sentencing and Punishment of Offenders Bill Deb 6 September 2011

Legal Services Commission, *Legal aid and mediation for people involved in family breakdown* (HC 2006-07, 256)

Levin J, ‘The Divorce Reform Act 1969’ (1970) 33(6) *Modern Law Review* 632

Lewis P, *Assumptions about Lawyers in Policy Statements: A Survey of Relevant Research* (Lord Chancellor’s Department 2000)

Lord Chancellor, *Summary of the Proposed New Service* (Cmnd 7563, 1948)

Lord Chancellor’s Department, *Looking to the Future: Mediation and the ground for divorce a Consultation Paper* (Cm 2424, 1993)

— *Looking to the Future: mediation and the ground for divorce* (Cm 2799, 1995)

— *Striking the Balance: The Future of Legal Aid in England and Wales* (Cm 3305, 1996)

— *Modernising Justice* (Cm 4155, 1998)

Low Commission, *Getting it Right in Social Welfare Law: The Low Commission's follow-up report* (Low Commission 2015)

Maclean M and Eekelaar J, *Lawyers and Mediators: The Brave New World of Services for Separating Families* (Hart Publishing 2016)

— and Eekelaar J, *After the Act: Access to Family Justice after LASPO* (Hart Publishing 2019)

Magnusson E and Marecek J, *Doing Interview-based Qualitative Research: A Learner's Guide* (Cambridge University Press 2015)

Main T O, 'ADR: The New Equity' (2005) 74 *University of Cincinnati Law Review* 329

Mant J, 'Neoliberalism, family law and the cost of access to justice' (2017) 39(2) *Journal of Social Welfare and Family Law* 246

— and Wallbank J, 'The Mysterious Case of Disappearing Family Law and the Shrinking Vulnerable Subject: The Shifting Sands of Family Law's Jurisdiction' (2017) 26(5) *Social & Legal Studies* 629

Marshall T F, 'The Power of Mediation' (1990) 8(2) *Mediation Quarterly* 115

Marshall T H, *Citizenship and Social Class* (Cambridge University Press 1950)

Mather L, 'Changing Patterns of Legal Representation in Divorce: From Lawyers to Pro Se' (2003) 30(1) *Journal of Law and Society* 137

— McEwen C A and Maiman R J, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (Oxford University Press 2001)

Matrimonial Causes Procedure Committee, *Report of the Matrimonial Causes Procedure Committee* (Stationery Office 1985)

Mayer B, 'What We Talk About When We Talk About Neutrality: A Commentary on the Susskind-Stulberg Debate, 2011 Edition' (2012) 95(3) *Marquette Law Review* 859

Mayson S, *Reforming Legal Services: Regulation Beyond the Echo Chambers (Final Report of the Independent Review of Legal Services Regulation)* (Centre for Ethics & Law UCL 2020)

McEldowney J, *Family Mediation in a Time of Change: FMC Review Final Report* (FMC 2012)

McEwen C A, Rogers N H and Maiman R J, 'Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation' (1995) 79 *Minnesota Law Review* 1317

McGowan D, 'Reframing the mediation debate in Irish all-issues divorce disputes: from mediation vs. litigation to mediation and litigation' (2018) 40(2) *Journal of Social Welfare and Family Law* 181

McKee A, *Textual Analysis* (SAGE Publications 2011)

Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales* (Cm 7967, 2010)

— *Government Response to Justice Committee's Third Report of Session 2010/11: The Government's proposed reform of legal aid* (Cm 8111, 2011)

- *Reform of Legal Aid in England and Wales: the Government Response* (Cm 8072, 2011)
- ‘Written evidence from the Ministry of Justice (LAS 73): Impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012’ (Parliament.UK 2014) <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/impact-of-changes-to-civil-legal-aid-under-laspo/written/8982.pdf>> accessed 3 April 2020
- *Legal Support: The Way Ahead. An action plan to deliver better support to people experiencing legal problems* (CP 40, 2019)
- *Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)* (CP 37, 2019)
- ‘Family Court Statistics Quarterly: July to September 2020’ (Gov.UK 2020) <www.gov.uk/government/statistics/family-court-statistics-quarterly-july-to-september-2020/family-court-statistics-quarterly-july-to-september-2020> accessed 22 March 2021
- ‘Legal aid statistics England and Wales detailed civil data July to Sep 2020’ (Gov.UK 2020) <www.gov.uk/government/statistics/legal-aid-statistics-july-to-september-2020> accessed 23 March 2021
- ‘Legal aid statistics England and Wales tables July to September 2020’ (Gov.UK 2020) <www.gov.uk/government/statistics/legal-aid-statistics-july-to-september-2020> accessed 22 March 2021
- and Legal Aid Agency, *Implementing reforms to civil legal aid* (HC 2014-15, 784)
- Mnookin R and Kornhauser L, ‘Bargaining in the Shadow of the Law: the Case of Divorce’ (1979) 88(5) *The Yale Law Journal* 950
- Moore S and Newbury A, *Legal aid in crisis: Assessing the impact of reform* (Policy Press 2017)
- Moorhead R, ‘The Passive Arbitrator: Litigants in Person and the Challenge to Neutrality’ (2007) 16(3) *Social & Legal Studies* 405
- ‘Precarious Professionalism: Some Empirical and Behavioural Perspectives of Lawyers’ (2014) 67 *Current Legal Problems* 447
- and Pleasence P, ‘Access to Justice after Universalism: Introduction’ (2003) 30(1) *Journal of Law and Society* 1
- and Sefton M, *Litigants in person: Unrepresented litigants in first instance proceedings* (Department for Constitutional Affairs 2005)
- Morris P, ‘Mediation, the Legal Aid, Sentencing and Punishment of Offenders Act of 2012 and the Mediation Information Assessment Meeting’ (2013) 35(4) *Journal of Social Welfare and Family Law* 445
- ‘Screening for Domestic Violence in Family Mediation: An Investigation into how Mediators Manage Disclosures of Domestic Abuse and Associated Emotions’ (PhD Thesis, Brunel University 2015)

- Moscato M F, 'We Have the Method but still there is so much to do: Mediation for Gender and Sexually Diverse Relationships' in Roberts M and Moscato M F (eds), *Family Mediation: Contemporary Issues* (Bloomsbury Professional 2020)
- Mulcahy L, 'The Possibilities and Desirability of Mediator Neutrality – towards an ethic of partiality?' (2001) 10(4) *Social & Legal Studies* 505
- Murch M and Hooper D, *The Family Justice System* (Family Law 1992)
- National Family Conciliation Council, 'The Code of Practice for Conciliation Services' (1984) 14 *Family Law* 107
- 'Extended Code of Practice for Family Conciliation Services' (1985) 15 *Family Law* 274
- Nelson N, Zarankin A, and Ben-Ari R, 'Transformative Women, Problem-Solving Men? Not Quite: Gender and Mediators' Perceptions of Mediation' (2010) 26(3) *Negotiation Journal* 287
- Neuberger D, 'Equity, ADR, Arbitration and the Law: Different Dimensions of Justice' (The Fourth Keating Lecture, London, 19 May 2010)
- 'Keynote Address: A View From On High' (Civil Mediation Conference, London, 12 May 2015)
- Noble H and Mitchell G, 'What is grounded theory?' (2016) 19(2) *Evidence-Based Nursing* 34
- Nolan-Haley J, 'Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking' (1998) 74(3) *Notre Dame Law Review* 775
- Office for National Statistics, 'Divorces in England and Wales: 2019' (ONS 2020) <www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/bulletins/divorce/sinenglandandwales/2019> accessed 21 December 2020
- Ogus A, Walker J and Jones-Lee M, *The Costs and Effectiveness of Conciliation in England and Wales* (University of Newcastle 1989)
- Oliveira L V P and Beckwith C, 'Is there a need to regulate mediation? The English and Welsh case study' (2016) 42(3) *Commonwealth Law Bulletin* 327
- Oxford English Dictionary, 'mediation, n' (*OED Online*, 3rd edn, Oxford University Press 2001) <www.oed.com/view/Entry/115665> accessed 22 September 2020
- Parkinson L, 'Bristol Courts Family Conciliation Service' (1982) 12(1) *Family Law* 13
- *Conciliation in Separation and Divorce* (Routledge 1986)
- *Family Mediation* (Sweet & Maxwell 1997)
- 'Family Mediation in Practice: 'A Happy Concatenation?'' in Westcott J (ed), *Family Mediation: Past, Present and Future* (Jordan Publishing 2004)
- *Family Mediation: Appropriate Dispute Resolution in a new family justice system* (2nd edn, Family Law 2011)
- 'Ideology or New Discipline? Part II' (2011) 41(2) *Family Law* 196

- ‘The Place of Mediation in the Family Justice System’ (2013) 25(2) *Child and Family Quarterly* 200
- ‘Expanding the model without breaking the mould: developing practice and theory in family mediation’ (2016) 46(1) *Family Law* 110
- and Bull A, ‘Separate meetings and confidentiality in family mediation’ (2015) 45(1) *Family Law* 1268
- Peacey V and Hunt J, *I’m not saying it was easy... Contact problems in separated families* (Gingerbread 2009)
- Piper C, *The Responsible Parent: A Study in Divorce Mediation* (Harvester Wheatsheaf 1993)
- and Sclater S D, ‘Changing Divorce’ in Sclater S D and Piper C (eds), *Undercurrents of Divorce* (Ashgate Publishing Company 1999)
- Pleasence P and others, *Causes of Action: Civil Law and Social Justice* (Legal Services Commission 2004)
- Balmer N J and Moorhead R, *A Time of Change: Solicitors’ Firms in England and Wales* (The Law Society 2012)
- Prior L, *Using Documents in Social Research* (SAGE Publications 2003)
- Punch M, *The Politics and Ethics of Fieldwork* (SAGE Publications 1986)
- Reece H, *Divorcing Responsibly* (Hart Publishing 2003)
- Resolution, ‘New group will be “voice of mediation” in UK (Resolution 2007) <https://web.archive.org/web/20160913051128/http://www.resolution.org.uk/news-list.asp?page_id=228&page=1&n_id=21&n_year=2007&n_month=10> accessed 3 April 2020
- ‘Family Mediators Drafting Consent Orders: Resolution’s response to the Family Mediation Council’ (Resolution 2017) <www.resolution.org.uk/site_content_files/files/resolution_response_to_fmc_mediators_drafting_consent_orders_january_2017.pdf> accessed 11 July 2018
- *Guide to Good Practice on mediation* (Resolution 2018)
- ‘Resolution – first for family law’ (Resolution 2020) <www.resolution.org.uk/> accessed 28 March 2020
- Rifkin J, Millen J and Cobb S, ‘Toward a New Discourse for Mediation: A Critique of Neutrality’ (1991) 9(2) *Mediation Quarterly* 151
- Riskin L, ‘Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed’ (1996) 1 *Harvard Negotiation Law Review* 7
- ‘Decisionmaking in Mediation: The New Old Grid and the New Grid System’ (2003) 79(1) *Notre Dame Law Review* 1
- Roberts M, *Mediation in Family Disputes: Principles of Practice* (3rd edn, Ashgate Publishing 2008)

- ‘Quality Standards for Family Mediation Practice’ (2010) 40(6) *Family Law* 661
- Roberts S, ‘Mediation in Family Disputes’ (1983) 46(5) *Modern Law Review* 537
- *Order and Dispute: An Introduction to Legal Anthropology* (2nd edn, Quid Pro Books 2013)
- Rothman J, ‘The Reflexive Mediator’ (2014) 30(4) *Negotiation Journal* 441
- Rushcliffe Committee, *Report of the Committee on Legal Aid and Legal Advice in England and Wales* (Cmd 6641, 1945)
- Sandefur R L, ‘Access to What?’ (2019) 148(1) *Daedalus: The Journal of the American Academy of Arts and Sciences* 49
- Sarat A and Felstiner W L F, *Divorce Lawyers and Their Clients: Power & Meaning in the Legal Process* (Oxford University Press 1995)
- Semple N, ‘Mandatory Family Mediation and the Settlement Mission: A Feminist Critique’ (2012) 24(1) *Canadian Journal of Women and the Law* 207
- Seneviratne M, ‘Researching Ombudsmen’ in Banakar R and Travers M (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005)
- Sims A, ‘Exploring the Scope of Family Mediation in England and Wales’ in Roberts M and Moscati M F (eds), *Family Mediation: Contemporary Issues* (Bloomsbury Professional 2020)
- Skinner C, ‘One lawyer acting for two clients: implications arising from an experimental practice model ‘Family Matters’’ (2019) 41(3) *Journal of Social Welfare and Family Law* 265
- and Foster I, *Guiding Parents Through Separation: Family Matters – an innovative support service from Resolution* (Resolution 2016)
- Smith I, ‘Explaining the Growth of Divorce in Great Britain’ (1997) 44(5) *Scottish Journal of Political Economy* 519
- Smith L, Hitchings E and Sefton M, *A study of fee-charging McKenzie Friends and their work in private family law cases* (Cardiff University 2017)
- and Trinder L, ‘Mind the gap: parent education programmes and the family justice system’ (2012) 24(4) *Child and Family Law Quarterly* 428
- Smithson J and others, ‘The ‘Child’s Best Interests’ as an Argumentative Resource in Family Mediation Sessions’ (2015) 17(5) *Discourse Studies* 609
- and others, ‘The Moral Order in Family Mediation: Negotiating Competing Values’ (2017) 35(2) *Conflict Resolution Quarterly* 173
- Smoron K, ‘Conflicting Roles in Child Custody Mediation: Impartiality/Neutrality and the Best Interests of the Child’ (1998) 36(2) *Family and Conciliation Courts Review* 258
- Solicitors Regulation Authority, ‘Question of ethics: August 2015’ (SRA August 2015) <<https://web.archive.org/web/20170709174548/www.sra.org.uk/solicitors/code-of-conduct/guidance/questionofethics/August-2015.page#>> accessed 11 August 2020

- Sommerlad H, 'Some reflections on the relationship between access to justice and the reform of legal aid' (2004) 31(3) *Journal of Law & Society* 345
- 'Reflections on the Reconfiguration of Access to Justice' (2008) 15(3) *International Journal of the Legal Profession* 179
- Stylianou K, 'Teaching Family Mediation in Higher Education – What an Academic Family Mediation Course could look like' in Roberts M and Moscati M F (eds), *Family Mediation: Contemporary Issues* (Bloomsbury Professional 2020)
- Susskind R and Susskind D, *The Future of the Professions* (Oxford University Press 2015)
- Thompson S, *Prenuptial Agreements and the Presumption of Free Choice* (Hart Publishing 2015)
- 'Feminist Relational Contract Theory: A New Model for Family Property Agreements' (2018) 45(4) *Journal of Law and Society* 617
- and Sandberg R, 'Common defects of the Divorce Bill and Arbitration and mediation Services (Equality) Bill 2016-2017' (2017) 47(4) *Family Law* 425
- Travers M, 'Evaluation Research and Legal Services' in Banakar R and Travers M (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005)
- Trinder L and others, *Making contact happen or making contact work? The process and outcomes of in-court conciliation* (Department for Constitutional Affairs Research Series 3/06, 2006)
- and others, *Enforcing contact orders: problem-solving or punishment?* (University of Exeter 2013)
- and others, *Litigants in person in private family law cases* (Ministry of Justice 2014)
- UK College of Family Mediators, *UK College of Family Mediators: Directory & Handbook 1997/98* (Sweet & Maxwell 1997)
- *UK College of Family Mediators: Directory & Handbook 1998/99* (Sweet & Maxwell 1998)
- Walker J, 'Conciliation Research' in Fisher T (ed), *Family Conciliation within the UK: Policy and Practice* (2nd edn, Family Law 1992)
- 'Is There a Future for Lawyers in Divorce?' (1996) 10 *International Journal of Law, Policy and the Family* 52
- 'Building a better future for separating families: the search for humanity?' (2016) 46(3) *Family Law* 387
- McCarthy P and Timms N, *Mediation: The Making and Remaking of Co-operative Relationships: An evaluation of the effectiveness of comprehensive mediation* (Relate Centre for Family Studies 1994)
- Wang J, 'Neutral, Biased, or Both? Discursive Construction of a Mediator's Dual Role' (2015) 31(1) *Negotiation Journal* 47

Webley L C, *Adversarialism and Consensus? The Professions' Construction of Solicitor and Family Mediator Identity and Role* (Quid Pro 2010)

— 'Legal Professional De(Re)Regulation, Equality, and Inclusion, and the Contested Space of Professionalism within the Legal Market in England and Wales' (2015) 83(5) *Fordham Law Review* 2349

Welsh N A, 'The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalisation?' (2001) 6 *Harvard Negotiation Law Review* 1

Whatling T, 'Domestic Abuse and Family Mediation: What can an Experienced Mediator Tell Us?' in Roberts M and Moscati M F (eds), *Family Mediation: Contemporary Issues* (Bloomsbury Professional 2020)

Wiggan J, 'Telling stories of 21st century welfare: The UK Coalition government and the neo-liberal discourse of worklessness and dependency' (2012) 32(3) *Critical Social Policy* 383

Woolf H, *Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales* (HMSO 1996)

Wright K, 'The Role of Solicitors in Divorce: A Note of Caution' (2007) 19(4) *Child and Family Law Quarterly* 481

Appendix One: Mediator sample information

No.	Pseudonym	Location	Background	Mediator Experience	Provides Legal Aid?	Member Organisation
01	<i>Jessica</i>	South Wales	Therapeutic	05-10	Yes	FMA
02	<i>Amy</i>	SW England	Lawyer	25-30	No post-LASPO	Law Society
03	<i>Rebecca</i>	London	Lawyer	20-25	Yes	Law Society
04	<i>Judith</i>	London	Lawyer with therapeutic training	25-30	No	Resolution
05	<i>Emma</i>	SW England	Lawyer	20-25	No post-LASPO	Law Society
06	<i>Jane</i>	South Wales	Therapeutic	10-15	Yes	College of Mediators
07	<i>Megan</i>	South Wales	Therapeutic	00-05	Yes	College of Mediators
08	<i>Lauren</i>	SW England	Therapeutic	30+	No post-LASPO	FMA
09	<i>Mary</i>	London	Lawyer with therapeutic training	20-25	No	Resolution
10	<i>Michael</i>	SW England	Lawyer	25-30	No post-LASPO	Law Society
11	<i>Harley</i>	South Wales	Therapeutic	20-25	Yes	College of Mediators
12	<i>Charlotte</i>	South Wales	Therapeutic	05-10	Yes	College of Mediators
13	<i>Kate</i>	SW England	Lawyer with therapeutic training	15-20	No post-LASPO	Resolution
14	<i>David</i>	SW England	Lawyer with therapeutic training	25-30	Yes	FMA
15	<i>Rosie</i>	London	Lawyer	20-25	No	Law Society
16	<i>Lydia</i>	London	Therapeutic	05-10	Yes	FMA
17	<i>Victoria</i>	South Wales	Lawyer with therapeutic training	05-10	Yes	FMA

Appendix Two: Participant Information Sheet



Title of research: The conceptualisation of family mediation

Researcher: Rachael Blakey

Contact Details: Cardiff School of Law and Politics

Cardiff University

Law Building

Museum Avenue

Cardiff CF10 3AX



Who is doing the research?

Rachael Blakey is a postgraduate research student at Cardiff University, studying for a PhD in Law. Her research looks at family mediation and is funded by the Economic and Social Research Council (ESRC).

What is the purpose of the research?

The aim of Rachael's research is to explore how mediators understand their role in family mediation. This involves:

- Assessing the Codes of Practice currently available to family mediators in England and Wales;
- Understanding what mediators think about topics, such as mediator neutrality and power imbalances, that shape their approach, and whether this is influenced by their professional background.
- Considering if mediator practice has changed over time, particularly following the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

The project received ethical approval from Cardiff University Law School in June 2018 and is supervised by Dr Leanne Smith and Dr Sharon Thompson.

Who is being invited to participate?

Rachael is looking for family mediators currently practising in England and Wales. Mediators can come from any professional background (e.g. legal, social work). They can also be from any service, including a not-for-profit or law firm.

Mediators will mainly be contacted by email, but also by telephone if required.

What does participation involve?

If you agree to participate, Rachael will interview you at a time and place that is convenient for you. The interview will last approximately 45 minutes to an hour. You will be asked about your views around Codes of Practice, the objectives of family mediation and the role of mediators.

With your consent, Rachael will record the interview. The audio recording will then be transcribed. Following this, the original recording will be deleted.

Findings will help us to understand how family mediation operates in England and Wales following recent reforms to the family justice system. This will be of interest to mediators themselves, different regulatory bodies and policymakers.

What happens if a participant wishes to withdraw?

A participant can withdraw at any time, including after the interview. If they choose to withdraw, all relevant data will be deleted.

Confidentiality and privacy: what will happen to the data?

Data will only be used for research purposes. No personal characteristics of participants will be collected because it is unrelated to the purpose of the research. The names and locations of all mediators will be anonymised immediately upon data collection.

Pseudonyms will be used when discussing the research.

All data will be securely stored on Cardiff University's password-protected electronic storage system. Results will be discussed in Rachael's PhD thesis. Rachael also intends to present and publish the results at conferences and in academic outputs.

Additional Contact Information	
Researcher's Supervisor	<p>Dr Leanne Smith Cardiff School of Law and Politics Cardiff University Law Building Museum Avenue Cardiff CF10 3AX Email: [REDACTED]</p>
Cardiff School of Law and Politics Research Ethics Committee (SREC)	<p><i>This project has received ethical approval from the Cardiff School of Law and Politics Research Ethics Committee (SREC) on 05/06/2018 (Internal Reference: SREC/050618/10). The Cardiff School of Law and Politics Research Ethics Committee (SREC) can be contacted at:</i></p> <p>School Research Officer Cardiff School of Law and Politics Cardiff University Law Building Museum Avenue Cardiff CF10 3AX Email: [REDACTED]</p>

Appendix Three: Consent Form



Title of research: The conceptualisation of family mediation

Researcher: Rachael Blakey

Contact Details: Cardiff School of Law and Politics

Cardiff University

Law Building

Museum Avenue

Cardiff CF10 3AX



Research Overview

This project will consider how mediators perceive their role in family mediation. Rachael Blakey has studied the development of family mediation Codes of Practice in England and Wales. She is now looking to interview mediators about their experiences. Participants will be asked about their role as a mediator, the objectives of family mediation and how they shape their practices. Questions will also cover the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Involvement in Research

Data will only be used for research purposes. The information and insights you share will be recorded. If you agree, interviews will be recorded via a digital recording device and later transcribed. This will be stored on a registered Cardiff University computer that is password controlled. All information will be completely anonymised, including your name, service and location.

Rachael Blakey intends to present and publish the results from this research in their thesis, academic outputs and at conferences. This research is part of her PhD, funded by the Economic and Social Research Council.

Interview Consent Form

I understand that my participation in this project will involve an interview about family mediation and the role of the mediator.

I understand that participation in this study is entirely voluntary and that I can withdraw from the study at any time without giving a reason.

I understand that I am free to ask any questions at any time. If for any reason I experience discomfort during participation in this project, I am free to withdraw.

I understand that the information I provide will be held confidentially, such that only the interviewer can trace this information back to me individually. Data will be stored in accordance with GDPR.

Please indicate whether you agree with the following statements:

	Initials
I have read and understood all the information provided, and have received adequate time to consider all the documentation.	
I have been given adequate opportunity to ask questions about the research.	
I am aware of, and consent to the written and/or digital recording of my discussion with the researcher.	
I consent to the information and opinions I provide being used in the research.	

Interviewee Declaration

I consent to participate in the study conducted by Rachael Blakey, Cardiff School of Law and Politics.

Signature: _____

Print Name: _____

Date: _____

Additional Contact Information	
Researcher's Supervisor	<p>Dr Leanne Smith Cardiff School of Law and Politics Cardiff University Law Building Museum Avenue Cardiff CF10 3AX Email: [REDACTED]</p>
Cardiff School of Law and Politics Research Ethics Committee (SREC)	<p><i>This project has received ethical approval from the Cardiff School of Law and Politics Research Ethics Committee (SREC) on 05/06/2018 (Internal Reference: SREC/050618/10). The Cardiff School of Law and Politics Research Ethics Committee (SREC) can be contacted at:</i></p> <p>School Research Officer Cardiff School of Law and Politics Cardiff University Law Building Museum Avenue Cardiff CF10 3AX Email: [REDACTED]</p>

Appendix Four: Interview Schedule

The following interview schedule was designed in June 2019 prior to data collection, with some modifications to questions after several interviews in July. As the researcher was conducting semi-structured interviews, the participants guided discussions. The researcher would then ask additional questions based on participants' responses.

A. Introduction

- Provide an outline of 'Participant Information Sheet'
- Mediator provides signature on 'Consent Form'

B. Background – Understanding Family Mediation

I want to start with some questions about your background

1. What Member Organisation are you registered with?
2. Do you provide legal aid work?
3. How long have you been a family mediator?
4. What was your career before mediation?
 - What motivated you to become a mediator?
5. To you, what does mediation aim to achieve?
 - Prompt: Improving conflict and communication – how do you promote this?
 - Prompt: Obtaining settlement – what are some ways in which you encourage agreement?
6. I am really interested in Codes of Practice as I looked at them for the first part of my research. Is the FMC Code of Practice something you refer to when carrying out a mediation?
 - If M is a member of Resolution or the College of Mediators – You also mentioned that you're a member of [organisation]. Am I right in thinking they have their own Code Practice? What do you think about it?
 - What do you think about the FMC Code of Practice?
 - What is your perception of the FMC?

C. Mediator Functions

Now that we have gone over your interpretation of mediation itself, I want to move onto how you conduct mediation and your role as a mediator.

7. Can you describe the role of a mediator in three words?
8. Prompt: **Helper**, referee, guide, neutral facilitator – what do you mean by this?
 - What do you think it means to be neutral?
 - Do you think it's ever acceptable to go beyond your neutrality?
 - How does this neutrality work when there is a power imbalance?
9. Prompt: **Referrer**, legal advice, use of lawyers – roughly what proportion of your clients have legal support?
 - What difficulties are there if a party cannot access legal support?
 - Do you refer parties to legal advice or other support?
 - When do you refer parties to legal advice?

- What is your typical response if you refer parties to legal advice, but they do not obtain it?
10. Prompt: **Assessor**, screening, gatekeeper
 11. Prompt: **Intervenor** – what steps do you take to redress power imbalances?

D. LASPO and Access to Justice

We're coming to the end of the interview, so we'll just spend the last few minutes on the mediation's wider context. Mediation has been increasingly promoted over the last few decades and now holds quite an important place in the family justice system.

12. How would you define access to justice?
 - How does mediation fit into this?
13. What impact did LASPO have on your work as a mediator?
 - Do you feel that your practices and approach to mediation has changed or stayed the same?
14. What changes have you seen in the role of the mediator?
15. How would you like to see mediation changed in the future?
 - What do you think will be happen?
16. Is there anything else you'd like to raise before we conclude the interview?

Appendix Five: Ethical Approval

Student project (*Complete Sections A and B*)

Staff project (*Complete Section A only*)

Section A:

Title of Project:	The conceptualisation of family mediation
Project Start Date:	01/10/2017
Project End Date:	30/09/2020
Name of Applicant:	Rachael Blakey
Applicant's Email Address:	[REDACTED]
Name of any additional members of Cardiff University associated with this project:	N/A

Section B:

Student Number:	1320449
Degree Programme:	Doctor of Philosophy (Law)
Name of Supervisor:	Dr Leanne Smith
Supervisor Approval:	As the supervisor for this student project, I confirm that I believe that all research ethical issues have been dealt with in accordance with University policy and the research ethics guidelines of the relevant professional organisation. I also

		confirm that I have read and understand the University Ethical Guidelines in my role as a supervisor. ██████████	
	Research Ethics Training:	I have received appropriate Research Ethics Training. I have appended documentation to demonstrate my understanding. ██████████	

Recruitment Procedures

		Yes	No	N/A
1	Does your project include participants belonging to a vulnerable group (as defined by the Cardiff University Safeguarding Children and Vulnerable Adults Policy 2010)?		✗	
	(a) If so, do you have an up-to-date Disclosure and Barring Service (DBS) check (previously Criminal Records Bureau check, CRB)?			•
	(b) If so, have you read and understood the University's guidance for researchers working with children and young people which forms part of the Safeguarding Children and Vulnerable Adults policy?			•
2	Is your project likely to include people involved in illegal activities?		✗	
3	Does your project include people who are, or are likely to become your clients or clients of the department in which you work?		✗	
4	Does your project provide for people for whom English / Welsh is not their first language?		✗	

5	Does your project involve adults who do not have capacity to consent, or people in custody?		X	
	(a) If so, have you submitted your project to the Integrated Research Application System (IRAS)?			•
<p>If you have answered yes to any of the above questions, please provide details and explain how you intend to deal with recruitment procedures:</p> <p>N/A</p>				

Informed Consent Procedures

		Yes	No	N/A
6	Will you obtain written consent for participation?	✓		
7	Will you tell participants that their participation is voluntary?	✓		
8	If the research is observational, will you ask participants for their consent to being observed?			•
9	Will you tell participants that they may withdraw from the research at any time and for any reasons?	✓		
10	Will you give potential participants an appropriate period of time to consider participation?	✓		
<p>You must append a copy of all participant facing documents you intend to use, including consent forms, questionnaires, interview questions, list of potential interviewees, letters of invitation, information sheets etc.... The Committee strongly encourages applicants to use the standard consent form.</p>				

If you have answered yes or no to any of the above questions, please explain how you intend to deal with any ethical issues relating to the obtaining of participant consent:

Content Analysis of Codes of Practice

Consent will not be sought by the regulatory mediation bodies because the codes of conduct are public documents that are already available online.

Interviews with family mediators

Participants will either be contacted by the researcher or contact the researcher themselves after seeing an advertisement on social media. When the participant is contacted about the project, they will be sent a participant information form. This sets out the research, informs them that their participation is voluntary throughout the entire process and that they can withdraw from the research at any time – including after the interview. If the participant agrees to the research, a time and location for the interview will be organised. They will then be sent the consent form ahead of the interview to allow for an appropriate period of time to consider their participation. It is expected that the majority of interviews will be conducted over a month after I have originally contacted them; interviews will be scheduled at minimum two weeks after to allow ample time to provide informed consent. When potential participants have contacted the researcher, the same format will follow: they will be provided with a participant information form and then a consent form if they agree to participate which will be signed at the interview.

At the beginning of the interview, I will set out my role as the researcher, the objectives of the project, and how the data will be used. I will again clarify that their participation is voluntary and that they can withdraw at any time. The participant must explicitly state that they understand the project and sign the consent form before the interview can continue.

Possible Harm to Participants

		Yes	No	N/A
11	Is there any realistic risk of any participants experiencing either physical or psychological distress or discomfort?		X	
12	Is there any realistic risk of any participants experiencing a detriment to their interests as a result of participation?		X	
13	If you have answered yes to either of the previous two questions, have you read and understood the University's Health and Safety Policy?			•
<p>If you have answered yes to question 11 or 12, please outline any risks to the participants which may be entailed in the proposed research and how you intend to minimise those risks. Include details about how you propose to disseminate results:</p> <p>N/A</p>				

Data Protection and Data Management

		Yes	No	N/A
14	Will any non-anonymised and/or personalised data be generated and/or stored?		X	
15	Will you have access to documents containing sensitive ⁸⁰⁴ data about living individuals?		X	
16	If you have answered yes to any of the above questions, have you read and understood the University's Data Protection Policy 2014?			•

⁸⁰⁴ Sensitive data are *inter alia* data that relates to racial or ethnic origin, political opinions, religious beliefs, trade union membership, physical or mental health, sexual life, actual and alleged offences

If you have answered yes to question 14 or 15, please explain how you intend to secure any personal data:

N/A

Researcher Safety

		Yes	No	N/A
17	If relevant to your research, have you taken into account the Cardiff University guidance on safety in fieldwork / for lone workers?	✓		
	(a) If so, have you read and understood the University's guidance on safety in fieldwork / for lone workers?	✓		
<p>If you have answered yes to the above question, please outline any risks to which you might be exposed while carrying out the proposed research and how you intend to minimise those risks:</p> <p>Interviews will be conducted face-to-face in mediators' office premises. Supervisors will be notified when I am travelling to conduct interviews, at what time and at what location. They will also be notified when the interview has been completed and additionally when I have returned to Cardiff.</p>				

Research Governance

		Yes	No	N/A
18	Does your study include the use of a drug? If so, you will need to contact Research Governance before submission		✗	
19	Does the study involve the collection or use of human tissue? If so, you will need to contact the Human Tissue Act team before submission		✗	

20	If relevant to your research, has due regard been given to the 'Prevent Duty' Guidance, in particular, to prevent anyone being drawn into terrorism?			•
----	--	--	--	---

If there are any other potential ethical issues that you think the Committee should consider please explain them on a separate sheet. It is your obligation to bring to the attention of the Committee any ethical issues not covered on this form.

N/A

Applicant's declaration

As the applicant conducting this project, I confirm that I have read and understand the University Ethical Guidelines. I also confirm that all research ethical issues have been dealt with in accordance with University policy and the research ethics guidelines of the relevant professional organisation.

Signature: [REDACTED]

Name: Rachael Blakey Date: 15/05/2018

Please submit your Ethical Approval Form at least TWO WEEKS before a School Research Ethics Committee (SREC) meeting to the School Research Officer at [REDACTED]

A. FULL PROJECT PROPOSAL

Nature of the Research

Thesis Title

The conceptualisation of family mediation

Main aims of the research

My project aims to assess how family mediation is conceptualised in relation to party autonomy and mediator power. I will analyse this through considering the approach adopted in currently enforced mediation codes of practices and also how mediators discuss their modern practice. Overall, the study aims to understand:

How is the role of the mediator conceptualised in family mediation?

Previous research shows that mediators struggle to balance party autonomy and mediator neutrality. In the traditional sense, a family mediator must remain neutral and impartial at all times – they lack the power to intervene in the decision-making. As a result, the parties hold complete autonomy, and subsequently power, to shape their own agreement. However, this traditional approach does not fully consider the wider, relational context of familial disputes, particularly the gendered dimensions. I will argue that the mediation framework should be changed in light of recent changes to family justice system that have provided mediation with a central position, specifically the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

My empirical research is premised on two research questions with multiple underpinning queries:

1. *What are the underlying concepts underpinning family mediation codes of practice?*
 - a. *How are mediator neutrality and party power approached in the codes?*
 - b. *To what extent are mediators given the ability, and power, to intervene in cases of power imbalances or abuse?*
2. *How do mediators conceptualise their role in family mediation?*
 - a. *How do they conceptualise mediator neutrality and party power, and balance the two concepts?*
 - b. *To what extent has their approach changed following LASPO?*
 - c. *To what extent do they follow the relevant codes of practice?*

The project adopts a two-stage approach, both of which are qualitative. Firstly, I will assess the currently applicable codes of practice for family mediators in England and Wales, also comparing them to standards in Scotland, Australia and America. This will be conducted via qualitative content analysis in NVivo. Essentially, the objectives of phase one are to understand:

- How mediator neutrality and party autonomy are interpreted and balanced within codes of practice;
- What mediator strategies are promoted in codes of practice, particularly the facilitative and evaluative orientations;
- The generality of the guidance;
- If the codes of practice reflect how mediators approach their role in family mediation.

Secondly, I will interview family mediators to understand how they conceptualise their role in family mediation. The results of the first stage will inform these interviews. Similar to before, the primary objectives are to understand:

- How mediators interpret and balance mediator neutrality and party autonomy;
- How far mediator practice is informed by the codes of practice;
- What mediator strategies, particularly facilitative and evaluative, are adopted by mediators;
- When mediators consider family mediation to be a useful and appropriate procedure;
- How mediators' practices have changed their approach post-LASPO.

In general, the study aims to understand current mediation practice and how the framework can be modified to permit mediator intervention in cases of power imbalances or abuse. It will be considered whether mediation guidance, through content analysis of codes of practice, or mediation practice itself, through interviews with mediators, provide enough space for an adequate assessment of party dynamics and autonomy. It is hypothesised that both codes and mediators themselves primarily adopt an individualistic approach to autonomy and are apprehensive to allow mediator intervention. The study subsequently will consider how mediators feel their approach has changed, if at all, in light of recent reforms to the family justice system, notably LASPO. It is also hypothesised that mediators are under further pressure to create settlements, in order to alleviate the courts from its heavy caseload, and that this could lead to more interventionist, evaluative, approaches by mediators.

Participant Details

Recruitment of participants

The codes of practices to be assessed in the study have already been selected (*see section E*). Because the data is publicly available, no further time will be used for data collection. This provides a representative sample of the current codes of practice for family mediators in England and Wales, and a purposive sample of the Scottish, Australian and American standards to enable comparison.

The semi-structured interviews of family mediators are likely to provide a purposive sample. Potential participants will be primarily contacted via email (follow-up emails and telephones calls will also be carried out). I will use previously made connections with family mediation providers to advertise the study. The project will also be advertised on Twitter. I will furthermore adopt a snowballing technique to increase the sample size.

Methodology and Data Handling

Collection of data

A major advantage of content analysis is that it is unobtrusive – the codes of conduct have already been created and therefore are unaffected by the research.

In relation to the interview participants, I will contact mediators about the project. This will predominantly be via email. Interviews will be recorded on an electronic recording device and later transcribed into a written document.

Storage/dissemination of data

All data will be stored on Cardiff University's H: drive as soon as possible after the interview. Consent forms will be scanned, and the original version shredded. The original recording will be destroyed once the interview has been transcribed. These transcripts will be anonymised - participants will be given a pseudonym and any information that could potentially identify them or any other person will be removed.

The data will be disseminated through the completed PhD thesis – complete transcripts of the interview will not be attached to an annex for reasons of participant confidentiality and anonymisation. I aim to publish results of both phases of the study during or after the PhD: all data will remain anonymous.

Data Protection Issues and Consent

Compliance with the Data Protection Act 1998

Personal data, defined as 'data which relate to a living individual' under the Data Protection Act, will not be collected. All data will be anonymised, and pseudonyms provided.

Obtaining consent from participants

Because all codes of conducts assessed in this project are publicly available, consent from the regulatory mediation bodies will not be sought. However, all mediators being interviewed, in the second phase of the study, will consent to the research. I will notify participants of the use of data for research, and my role as a researcher and PhD student when originally contacting them about the research. An example of this through email is provided in the *Participant Recruitment Advertisement* (see section F). The *Participant Information Form* (section D) will also be attached. Participants will be sent the *Consent Form* (section C) and asked to sign it at the start of the interview. They will be reminded that all participation is voluntary and can be withdrawn at any time, for any reason.