Mediation and Cultural Change

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Abstract

In this article I describe the most significant legislative developments in England and Wales in relation to mediation over the last 25 years. Similar patterns emerge from a number of consultations and reforms across several different sectors of mediation provision. One of the most notable is the perception of mediation as a means by which to achieve a culture change in the way that disputes are handled. Recent legislation affecting several fields of delivery has attempted to position mediation as the default process which encourages informality and individual responsibility, with adjudication as the exception when all else fails. At the same time, these efforts cannot be divorced from the clear motivation to reduce time, costs and pressure generally on the civil justice system. In either case, these aspirations have not been fully realized. The take-up of mediation has been relatively low and has led to recurring debates about whether it should be mandatory. Conflicting interests and expectations have led to a lack of clarity and have resulted in a struggle to establish a mediation provision which meets the needs of individuals in dispute as well as those of the civil justice system, public sector funders and the Government. This raises considerable challenges for the mediation community.

Keywords: mediation; voluntariness; culture change; mandatory mediation; civil justice; legislation.

> What we are ultimately aiming for is a shift from a culture where we look to the law to resolve conflicts to one where we take more responsibility for addressing them ourselves in the first instance (MOJ 2011: 6).

[A] THE INFLUENCE OF LEGISLATION

Ironically, while recent policy developments call on mediation as a means by which to achieve culture change, the process itself has deep historical roots that pre-date the justice system. Roebuck's extensive work demonstrates the use of mediation and arbitration as two conceptually distinct but often related processes with which people have been very familiar from Ancient Greece to the present day. His study of Greek dispute resolution concludes:

> Everywhere and at all times, disputing parties considered mediation-arbitration to be a natural, perhaps the most natural, method of resolving the differences they could not settle themselves, though they sometimes resorted to litigation … when they did not get their own way (Roebuck 2000: 308).

It might therefore be more accurate to describe the efforts detailed in this article as an attempt to return to more traditional ways of resolving differences to the mutual benefit and satisfaction of parties in disagreement. However, it would be simplistic to assume that the aspiration for culture change exists in isolation without other drivers at work, many of which have an impact on some of the key principles of mediation practice. While usage has been low and lack of awareness high, the arguments for compulsion have had an immediate appeal for policy-makers. Concerns about reducing cost and saving time are prevalent in many fields of mediation delivery, often carrying a risk that these become prioritized over mediation's more ideological aims of conflict resolution, relationship repair and informal justice (Allport 2016). However, the most powerful barrier to culture change is the lack of awareness and understanding of the process among potential users of and referrers to the court system alike. Despite its ubiquity, mediation is not a process with which the public is familiar. Nor is it commonly considered as an automatic first step when disputes arise.

Family mediation has been heavily influenced by several major pieces of legislation over the last three decades resulting in rapid change in this sector. The Family Law Act 1996 proposed to dispense with the idea of fault-based divorce and encouraged parties to use mediation in order to reduce acrimony and encourage collaborative decision-making before reaching court. The first part of the Act was never implemented and, 18

years later, the Children and Families Act 2014 repealed the 'no-fault' divorce. However, turning full circle, the introduction of the Divorce, Dissolution and Separation Act in 2020 removed the need to establish fault once and for all, allowing joint divorce applications to be made. The place of mediation within that remains clear and has been encouraged throughout.

Despite the demise of the Family Law Act, the encouragement to use mediation was transported to the Access to Justice Act 1999, which also established the Legal Services Commission (LSC) and introduced legal aid to cover the costs of mediation.

It was at this time that the first element of compulsion appeared within the family context, whereby people eligible for public funding were required at least to attend an information meeting with a mediator to find out about the process before they could access funding for legal representation. On the positive side, mediation providers expected an increase in uptake. However, while a contractual relationship with the LSC promised a steady income, it also brought the expectation of settlement within time limitations and fixed case fees. This had an inevitable impact on practice, both in terms of the voluntary engagement of parties and the introduction of new pressures on mediators to reach settlement.

However, uptake was disappointing and for several reasons: the route into mediation for those who were publicly funded effectively placed legal representatives in a gatekeeping role. Yet a report published by the National Audit Office in 2007, reflecting figures for the period 2004-2006 showed over 50% of applicants going straight to court with no involvement from a mediator. Surveys suggest that one-third had not been advised that mediation was an option. In addition, judges responded inconsistently to applicants who had not considered mediation, often preferring to move the process on rather than delay further. Parties themselves were reluctant to mediate, whether because of the intensity of the issues, the late referral into the process or a general resistance to quasi-compulsion. Mediators found that they were having to 'sell' the process rather than working with people who had themselves initiated an approach, and this did not sit well with the principle of voluntariness.

Over the next decade, various adjustments were put in place to address these issues until a review of the family justice system pointed to a series of problems in terms of delay, cost, overlapping processes and a lack of cohesion. The Norgrove Report recommended the establishment of a Family Justice Service with a single family court, stating that '[t]he emphasis throughout should be on enabling people to resolve their

disputes safely outside court whenever possible'. (Norgrove 2011: para 4.6). The aim was that '[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' (para 115).

New recommendations included the attendance of all parties, whether privately paying or publicly funded, at a meeting with a mediator to be known as a mediation, information and assessment meeting (MIAM). In 2014 the Children and Families Act made this meeting mandatory for anybody making an application to court, though this compulsion did not extend to the respondent. This provides a clear example of a contradiction in priorities whereby one perceived method by which to achieve culture change (ie introducing quasi-compulsion so that it becomes the norm) compromised the fundamental principle of voluntariness. Furthermore, a lack of publicity or clear information did nothing to contribute to public awareness.

Yet, while these reforms anticipated an increase in the use of mediation as a first option, the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) had quite the opposite effect. The Act withdrew legally aided representation for all but the most exceptional cases. While public funding for mediation itself remained in place, the changes overlooked the gatekeeping role of the family lawyer, now the major source of referral for most mediation providers. Previously, lawyers could not access public funding to represent their clients without certification from a mediator. With the removal of public funding, the incentive to refer disappeared, often to be replaced with offers to settle through negotiation at competitive rates.

Ironically, though the NAO had anticipated a significant rise in publicly funded mediation, the withdrawal of legal aid was seriously misjudged and resulted in a 'precipitous decline in numbers' (Kneale & Ors 2014) and a dramatic fall of 56% in those attending MIAM meetings (MOJ 2014: 4-8). Today legal aid statistics still show usage at less than 50% of the peak in 2012.[1] In reality, the implementation of LASPO saw a massive rise of 39 per cent in cases where neither party was represented, lengthened the time taken to process cases and reduced any savings introduced by the reforms (*New Law Journal* 2014). It raised concerns about access to justice for vulnerable members of society and resulted in lower settlement rates, more orders being made and additional work for judges and court staff.

[1] See National Statistics: Legal Aid Statistics: January to March 2022.

The Norgrove Report had also highlighted the need for self-regulation and, in response, the Family Mediation Council (FMC) appointed Professor John McEldowney to formulate proposals for reform (McEldowney 2012) and Stan Lester to implement them (Lester 2014a; 2014b; 2014c).

The reforms pushed some sectors of family mediation provision into crisis, particularly those that were dependent on funding from legal aid contracts. With a real risk that the provision of family mediation was about to fall apart, the Government established a Family Mediation Task Force in 2014 to investigate these trends and develop a more innovative approach. Drawing on their study of practices in other jurisdictions, Barlow and Walker (2014), members of the Task Force, noted that an important influence in achieving culture change had been an increase in the level of co-operation between lawyers and mediators, a factor they highlighted as a barrier in the United Kingdom (UK) which had never been specifically addressed. This, despite the fact that it has been characterized by tension, competition and conflict of interest for a considerable time (Webley 2010). Far from increasing co-operation, the effect of LASPO was to aggravate this unresolved relationship even further.

In both Canada and Australia an 'implementation gap' had been identified and was eventually plugged with good provision of information, one-to-one support, a change in the use of language and better planning and decision-making. In Australia, Family Relationship Centres provide a point of entry within the community and offer free mediation. The motivation to mediate out of court is therefore strong and results in a significant decrease in the number of court applications for children and property matters.

The Task Force introduced incentives such as funding MIAMs and a first joint meeting where at least one party is publicly funded. However, despite these and greater promotion from Government to the public, uptake remained low.

Today, the campaign to move family disputes out of court rages on and the same questions concerning the use of mandatory mediation continue to be raised. The introduction of a voucher scheme in March 2021 met with a great deal of success. Before the political turmoil within the UK Government in autumn 2022 the Ministry of Justice (MOJ) had intended to launch a consultation proposing mandatory family mediation, following the direction of other mediation sectors (see below). This may yet be initiated. The President of the Family Division, Andrew McFarlane, spoke recently of the continued commitment of the family courts to 'provide information and support for parents so that they may move away from a

"justice" based response to parental fallout towards cooperative separated parenting, where child welfare (rather than playing out parental conflict) is the central and overriding factor' (McFarlane 2022). This emphasis on improved parental discourse with a strong child focus is central in other recent initiatives such as the Family Solutions Group report 'What about Me?' (2021) which argues for 'the need to restore the child to the centre in systems which currently operate for parents'. Citing the case of *K v K* (2022), Sir Andrew also identified the need to address the apparent ease with which it is possible to make use of exemptions to avoid attending a MIAM and his concern 'that a culture has developed in the Family Court which accepts that the MIAM requirement is honoured more in the breach than the observance'. In addition, he called for a reconsideration of the notion that a MIAM should be mandatory for the respondent as well as the applicant, an idea which would in all likelihood be welcomed by family mediators, while still falling short of mandating mediation itself. The publication of a report on 'Improving Access to Justice for Separating Families' (JUSTICE 2022) continues the theme of a more holistic and integrated provision of services out of court. It argues for the giving of information and early legal advice, and the co-ordination of legal and non-legal services that are accessible in the local community through the use of hubs, alliances and networks. Meanwhile, the FMC continues to strengthen its role in setting professional standards and assurances processes for mediators listed on its register: for example, the recent publication of standards and guidance for the delivery of MIAMs (FMC 2022a; 2022b).

While legislative changes in the civil, commercial and workplace sectors have not been so rapid or so revolutionary, mediation has nevertheless been consistently encouraged. There are some striking parallels across mediation contexts, and it is notable that many similar issues have been raised as a consequence of new legal requirements, in particular the question of compulsion. Significantly, one outcome has been the requirement to attend a MIAM (or its equivalent) in many settings. The principle of voluntary engagement in mediation itself is therefore protected in theory, though in practice it is 'already heavily compromised' (Clark 2022).

The Children and Families Act 2014 also had relevance for disputes concerning provision for children with special educational needs and disability (SEND). The Act strengthened a precedent, established in the SEN Code of Practice 2001, which stated that local authorities had a responsibility to appoint independent facilitators to try to resolve disagreements between authorities, parents and schools and therefore

prevent cases going to SEND tribunal. The purpose was 'not to apportion blame but to achieve a solution to a difference of views in the best interest of the child' (Department for Education and Skills 2001: 581).

The legislation distinguished between disagreement resolution (used at any stage and voluntary for all concerned) and mediation (used as a direct alternative to a tribunal) (Children and Families Act 2014, part 3, paras 51-57). In this context the availability of mediation was one element of a cultural change in which parents and young people were being strongly encouraged to take control of their own budgeting and resources, as well as handling disputes at an early stage. The provisions of the Act introduced an element of compulsion similar to the family context in that parents were required to have a conversation with a mediator and obtain a certificate before filing a claim with the tribunal. Parents were under an obligation to find out about mediation, but retained the choice as to whether or not to use it. By contrast the local authority was required to engage if a parent wished to proceed.

These requirements continue to the present day but may well change in the near future. In March 2022 the Department for Education issued a green paper (2022) outlining proposals to reform SEND provision including the adoption of mandatory mediation. For the most part mediators themselves have welcomed a stronger encouragement to use mediation while preferring to stop short of compulsion. The joint written response of the College of Mediators (COM) and Civil Mediation Council (CMC) suggested that mandatory mediation would be 'a step too far', going against the fundamental principle of voluntary attendance and removing choice from parents and young people. This choice goes some way towards addressing an inherent power imbalance that exists between parents and the local authority. The response points out that though mediation is effective in most circumstances there can be good reasons for not going ahead: sometimes lengthy discussions will already have taken place; and some parents may not have the emotional energy to participate. Instead, the recommendation was for an 'opt-out' approach whereby the default expectation would be participation in mediation, with the opportunity to withdraw if desired.

In the workplace context, the current requirement to explore conciliation as an option represents the conclusion of a process that has gone full circle. The Employment Act 2002 was informed by the findings of a significant consultation (Department of Trade and Industry 2001) which set out to improve dispute resolution processes within the workplace and reduce the number of cases heard by employment tribunals. The

Dispute Resolution Regulations came into effect in 2004 and, in a bold move, implemented a compulsory three-step disciplinary and grievance procedure for both employers and employees, the purpose of which was to exhaust alternative means of dispute resolution before formal proceedings were initiated. The Gibbons Review (2007), conducted some three years later, found that, though sound in principle, the changes largely had a negative effect. Disputes had become formalized, time-consuming and stressful, and the new procedures created an unintended perception that disputes would end in an employment tribunal claim (Davey & Dix 2011).

With a marked similarity between the family and commercial sectors, Gibbons argued strongly for culture change and the early, informal resolution of disputes through mediation and conciliation (Gibbons 2007: 38). The Regulations were repealed in the Employment Act 2008 and the Advisory, Conciliation and Arbitration Service (ACAS) published a statutory Code of Practice on discipline and grievance. A helpline administered by ACAS was put in place and pre-claim conciliation was introduced as an option where litigation was likely. An explicit benefit, aside from reducing disruption to business and time and costs spent, was the opportunity to achieve 'outcomes not available through the tribunal system, for example an apology, or changes in behaviour' (Davey & Dix 2011: 3). The aim of preserving relationships was therefore more clearly stated in this context than elsewhere.

The theme of culture change and the potential of mediation to 'lead to a major dramatic shift' in employment relations was picked up again in yet another consultation conducted by the Department of Business Innovation and Skills in 2011 (2011: 13). The government response introduced the idea of early conciliation (implemented in 2014) as an alternative to litigation. This requires that prospective claimants submit their details to ACAS which, in parallel with other contexts, offers conciliation as a first option. If either party rejects conciliation or there is no agreement, a claim can subsequently be filed at the tribunal.[2]

Research in this area suggests that mediation does have an impact. Saundry and colleagues (2014) argued that mediation can improve working relationships, avoid litigation, prevent long-term sickness and bring about savings in money and staff time (Latrielle 2011; Saundry & Ors 2014). The ACAS Code of Practice led to the simplification of policies and procedures and a greater emphasis on informal resolution. Disputes have, it seems, been dealt with more efficiently, effectively and creatively,

[2] The ACAS definition of conciliation is similar to that of mediation generally. See ACAS 'Early Conciliation'.

particularly where in-house mediation schemes have been established (Saundry & Ors 2014: 6 and 30ff). However, other evidence implies that these benefits may be short-term. Saundry and colleagues identified a risk that 'mediation could be used to shift the responsibility for conflict from the organisation to the individual by reinterpreting unfair treatment as a personal issue' (Saundry & Ors 2014: 9). Overall findings from the research series broadly recognized the benefits of mediation, particularly regarding individual empowerment, but suggested that the government aspiration for it to achieve transformational culture change is too ambitious unless other measures are in place to support it. These should include the pursuit of more innovative approaches to conflict resolution, the development of good employment relations, the upskilling of line managers and an effective use of structures that give employees voice and representation. They highlight the importance of recognizing workplace conflict not simply as a transactional occurrence but as a strategic issue which, when effectively addressed, underpins 'workplace justice, trust and employee engagement, and ultimately organisational performance' (Saundry & Ors 2014: 13-14).

These findings have significance for other sectors too. The implication is that, while mediation can influence specific situations positively, the wider benefit of achieving culture change can only be realized when all the stakeholders have shared priorities, are agreed on approaches to conflict and have similar perceptions of what justice (in the broadest sense) means and how it can be met. Similarly, public engagement depends on clear information from professional mediators about the role that they perform alongside other services that support dispute resolution. Research indicates that a number of different processes must be available to meet different needs. I would argue, therefore, that, in order to go beyond individual empowerment, it is necessary to put in place strategic interventions which foster the generation of community norms and universally understood approaches to conflict.

In the civil and commercial mediation arena the publication of the Woolf Reports (1995; 1996) effectively sparked a revolution in the civil justice system leading to the prioritization of settlement over adjudication. The Access to Justice Act 1999 had a huge impact on this sector. The legislation provided public funding for mediation in non-family civil disputes and indicated that disputants should try alternative dispute resolution (ADR) options before accessing legal aid for representation—or risk their funding application being turned down. In the following years, the LSC published various Funding Codes re-emphasizing the

benefits of mediation both as a problem-solving tool and as a means by which to promote a collaborative future. Lord Jackson's Review of Civil Litigation Costs endorsed mediation even further, describing it as 'the most important form of ADR' among a number of other alternatives including lawyer negotiations, joint settlement meetings and early neutral evaluation (Jackson 2010: ch 36, para 1.2).

One of the main issues facing the civil and commercial sector, as in other contexts, has been the lack of awareness of mediation as an option among the general public, court users, lawyers, businesses and the judiciary as well as a lack of consistency in its referral and use. Lord Jackson saw that mediation could be more widely attempted at the pre-litigation stage, but stopped short of compulsion. He echoed the Government's ambitions for the use of mediation in the workplace, calling to the 'need for culture change, not rule change', and suggested raising awareness through campaigns, the provision of proper information for judges and lawyers and a handbook for mediators. The theme was picked up in the government consultation the following year which stated its aim to 'equip people with the knowledge and tools required to enable them to resolve their own disputes … to be better able to craft durable solutions that avoid further conflict' (MOJ 2011: 'Foreword' 6).

The outcome was to encourage automatic referral to mediation for small claims. However, a mandatory requirement to go ahead with mediation was not implemented. *Halsey* (2004) had established that courts should not insist litigants use mediation against their will, arguing that to do so would be counter-productive in terms of both costs and access to justice. However, there was a significant stipulation to say that litigants who won their case without attempting mediation might still be subject to costs where it was considered that it might have been used successfully. A series of factors that could justify these costs were identified, known as the 'Halsey Guidelines', but the case clearly highlighted the role of mediation in settling disputes. This balance between encouragement and compulsion is one that the court continues to struggle with. Meggitt (2014) pointed out that the courts appeared to be pushing people toward using mediation without being explicit and argued that, following other jurisdictions, it would be better to dispense with ambiguity and make a clear statement if mediation was to become compulsory.

Despite considerable debate since *Halsey*, such clarity has not been achieved. Several subsequent cases have contributed to the argument (Koo 2014). Two are notable for the fact that they extended the understanding of 'unreasonable refusal' to mediate to include a lack of intention to settle

(*Carleton v Strutt & Parker* 2008) and a lack of response to an invitation to mediate (*PGF vs OMFS* 2013).

Koo (2014; 2015) subsequently examined the question of unreasonableness at some length and argued that it was important to maintain voluntariness on the grounds that it strengthens the role of civil justice in upholding social norms and ensures that mediation does not become a substitute for judicial decision-making. He pointed out that the growth of mediation and other settlement methods extends the role of the courts to the case management of ADR options and to narrowing down those issues that cannot be decided other than by judgment. Koo called for further review of the Halsey Guidelines stressing the importance of a principled approach and arguing that, while they bring flexibility, there is a risk that the reasons for imposing costs can be infinitely extended and can themselves lead to further argument, thereby exacerbating the dispute.

While these government initiatives state their aim to achieve culture change, it is clear from other reforms that this has not been the only motivation and that reducing the expense of the civil justice system and increasing its income is also of primary importance. In the political context of austerity measures imposed on public services, increasing court fees was inevitable. In 2015, the Government raised the cost of filing a claim, emphasizing the drive for efficiency (MOJ 2015). Critics were inevitably concerned about affordability for some claimants and the possibility therefore of undermining access to justice.

While theoretically this might have led to an increase in the uptake of mediation, the experience of family mediation had already demonstrated that this was by no means guaranteed. As it was, County Court claims continued to generally increase from 2015, reaching a peak in 2017. In conclusion, despite the requirements, powers and incentives that the MOJ has put in place, the evidence is that uptake of mediation has remained limited, particularly for small claims valued at under £10,000. The recent consultation on mediation (MOJ 2022), for example, states that in only 21% of small claims do both parties agree to attend a mediation session with the Small Claims Mediation Service (SCMS) offered by HM Courts and Tribunal Service.

Once again, the latest proposals suggest automatic referral to mediation. The document speaks less of culture change and more of 'embedding mediation as an integral step in the court process' (MOJ 2022: 4) while still referring to the benefits of a consensual outcome for disputants. All parties (ie both the 'claimant' and 'defendant') to a defended small claim

for under £10,000 would be required to attempt to resolve the dispute using one hour of free mediation provided by the SCMS, conducted by telephone, before their case can progress to a hearing. The Government is also considering whether this should be extended to claims above £10,000 using external mediators.

The response of the CMC to the consultation indicates that civil mediators broadly welcome the proposal for automatic referral to mediation with some modifications: that consideration is given as to how this is conveyed to parties (emphasizing opportunity and benefits rather than compulsion, which can encourage negativity); that the one-hour timeframe has potential to be extended when required and funded through a voucher scheme; and that a choice of process is offered including the opportunity to exchange directly with each other, something which the current proposal does not allow for (CMC 2022).

It is clear that legislative changes across several contexts have set out to encourage the use of mediation to resolve disputes rather than resort to more formal, adjudicative processes. Where, then, do these developments leave the professional mediation community in terms of a sense of shared purpose and identity?

[B] THE MEDIATION COMMUNITY

In England and Wales, mediation has developed independently within the various contexts that I have been examining, with little cross-over between sectors, considerable perceptions of difference in practice and a strange reluctance to engage in dialogue. The three hallmarks of professional status, outlined by Marian Roberts (2005: 516) as 'a recognized and distinct body of knowledge; mechanisms for transmitting that body of knowledge; and means for self-regulation and evaluation' are evident, to some degree, in all of the settings described above. The professional membership bodies approve training programmes and providers largely adopt an approach that is predominately skills-based, offering courses that are not dissimilar in length and content. In each sector there is some level of regulation from these bodies which require members to have complaints procedures in place and to be adequately insured. However, there is no one professional body that unifies the mediation community with the consequence that standards of practice, policies and guidelines vary widely. Saunders (2020) describes in detail the development of a regulatory framework in the family field, influenced by 'increasing pressure from government and the courts for the industry to have a comprehensive and well managed professional framework for

public protection' (2020: 34). The development of family mediation was therefore strengthened with the introduction of the Mediation Quality Mark and contractual arrangements with the LSC. Norgrove had called for further, more consistent regulation, which resulted in the creation of the Family Mediation Standards Board, the publication of a self-regulatory Standards Framework (FMC 2014) and the creation of an Accreditation Board in order to streamline training, assessment, accreditation and professional development of family mediation within the private and not-for-profit sectors. More recently, the FMC has taken steps to support consistency within the profession by assuming responsibility for aspects such as the approval of training providers across its various membership organizations (in 2016) and handling complaints (in 2022).

By contrast, the community, civil, commercial and workplace sectors have been slower to consider these developments and, in some arenas, the imposition of even light-touch regulation has met with resistance. The issue of qualification is one example. The family sector requires a post-training accreditation for which applicants must evidence their skills and knowledge based on an amount of mediation practice; the community field recognizes this as an option; while the civil, commercial and workplace settings have yet to introduce the concept. The CMC has recently introduced a tiered membership system based on levels of experience. While the family and community sectors accept supervision for their mediation practice, the civil/commercial and workplace sectors have been less amenable to this though more recently are exploring the benefits of mentoring support.

One factor that may go some way to explaining these inconsistencies is the extent to which mediation is viewed as a vocational career in its own right or as an additional skillset that supplements another profession, such as law or human resources. The family sector has presented the clearest opportunities for primary employment as a mediator. In the community sector, it is rare for mediators to be paid, while in the civil and commercial sector there is a small minority of well-established mediators who undertake the vast majority of the work.[3] Even the family arena presents a mixed picture with increasing numbers of family lawyers training to be mediators as a secondary part of their mainstream role, and a widening gap between those who are or are not qualified to undertake publicly funded work.

[3] For a profile of civil and commercial cases going to mediation and those conducting them, see the annual audit conducted by the Centre for Effective Dispute Resolution (2021).

It seems clear that vocational mediators of the future will have to be prepared to develop the skills and knowledge to work across sectors. At one time, thinking seemed to be moving in this direction. In the early 1990s, following the development of the National Vocational Qualification, representatives from a range of mediation contexts including family, community, commercial, industrial and environment came together, with the Law Society, to develop generic mediation practice standards and an evidence base for their application in these areas (CAMPAG 1998). While this occupational standard was adopted and still forms the basis of training and assessment today in many areas of delivery, the idea of a generic foundation to which it is possible to add specialisms that are context-specific seems to have been lost.

Most importantly, there is no one voice that represents the mediation community as a whole. Over time, there has been very little discussion or collaboration across sectors. Instead, there has been distrust and competition. These factors, in my view, have added to the confusion experienced by users and referrers alike.

[C] MEDIATION WARS

At a rare interdisciplinary conference of mediation trainers held some years ago, Sir Alan Ward, chair of the CMC at the time, pointed out that 'the greatest difficulty for the mediation community is their great failure to mediate their own disputes' (Ward 2015). Addressing conflict constructively is challenging even, it appears, for those who encounter it on a professional basis every day. Earlier attempts to work collaboratively across delivery areas have been largely unsuccessful: for example, the merger of National Family Mediation and Mediation UK in 2003, which attempted to provide an umbrella body for both family and community mediators, but which collapsed acrimoniously within months.

Even within sectors, finding ways to cater for conflicting professional motivations has proved to be difficult. In 1996 the UK College of Family Mediators (UKCFM), incorporating the three main providers in the UK at the time,[4] was set up as a single professional body intended to perform a regulatory function for all family mediators, whether their background was law, social work or counselling. The UKCFM sanctioned 'approved bodies' authorized to carry out the recruitment, selection, training and supervision of their own members. This meant that objective standard-setting and monitoring could be kept separate from selection, training and provision.

[4] National Family Mediation, the Family Mediators Association and Family Mediation Scotland.

The establishment of the UKCFM 'marked the formal arrival in the UK of family mediation as a new profession' (Roberts 2005: 516) but sadly not its unity as such. Broadly speaking, its formation had brought together practitioners from the private sector who were acting as lawyer mediators and those from the voluntary, not-for profit sectors who were more likely to have come from the caring professions. From the outset there were differences in professional approach. Competing interests soon surfaced and 2006 saw the beginning of a period of 'turbulence, transition and transformation' (Saunders 2020). Expectations concerning standard-setting varied, and there were differences of view as to the feasibility of combining a regulatory function (objective setting and monitoring of standards) with that of service provision (income generation). At the same time individual members who saw mediation as an addition to their primary career had no wish to meet two sets of professional requirements. In 2007 the UKCFM split apart and the FMC[5] was formed with a lighter-touch regulatory function. The COM retained the original standards and expanded to cater for a wider membership including community, workplace and potentially members from other sectors. Since then, the FMC has become recognized as the representative voice of family mediation and therefore acted in dialogue with the MOJ during the recent legislative changes of the last decade. Paradoxically, the calls for greater self-regulation outlined in the Norgrove Report were therefore directed to this body.

The CMC provides a level of regulation for civil and commercial providers. Traditionally, trained practitioners belonged to a panel of mediators accredited by the CMC whose responsibility was to ensure that their members were adequately trained and experienced. In 2009 membership was extended to providers of workplace mediation and, more recently, has moved away from panels to individual membership. The requirements for membership include evidence of training, casework and ongoing professional development. But standards in terms of practice guidelines, supervision and competence assessment are not yet in place. The CMC has traditionally maintained a powerful lobbying function, with a significant proportion of its membership belonging to the judiciary. In the past it has claimed to be the recognized authority in the country for all matters related to civil, commercial, workplace and other non-family mediation, but in doing so it maintained the divide between family and other types of mediation. There are some recent indicators, however, that the positions of these professional membership bodies are undergoing a change.

[5] The FMC comprises National Family Mediation, the Family Mediators Association, Resolution, the Law Society and the COM.

[D] FUTURE CHALLENGES FOR THE MEDIATION PROFESSION

The issues I have discussed hold three main challenges for the future of the mediation profession. The first concerns the whole concept of culture change and what this means in reality. Legislative changes since the publication of the Woolf Reports have persistently sought to challenge the idea that disputes should be disposed of through formal, adjudicative processes. Settlement and mediation have been encouraged as ways of resolving disputes. The motivations for this, however, are mixed. Speedy, cheap resolutions to disputes are very attractive to policy-makers and provide a primary incentive in many contexts. While the potential for mediation as a tool to achieve culture change has been recognized and promoted, research evidence suggests that it is unrealistic to assume that a process primarily geared towards individuals can achieve this in isolation. Culture change also requires the corporate commitment of the wider system (whether that be the workplace, the court system, a school, a local community or society at large) together with a variety of other measures in place if it is to be successful. It begs the question of a reappraisal of approaches to conflict and the public recognition of values such as the acceptance of personal responsibility and the willingness to address difference, or 'civility' (Folger & Bush 2012). These are not values that can be imposed but are arrived at through clear information, choice, inter-agency co-operation and the demarcation of professional roles. Peer mediation in schools provides an excellent example of how this can realistically be achieved. When a school provides peer mediation it requires a commitment at every level from headteacher and staff, to pupils, to other support staff, all of whom are part of the running of the school. All those within the school community learn about mediation and a selection of pupils will train as mediators in order to manage conflicts as they arise in the school day. The implementation of a project such as this recognizes conflict as an everyday occurrence which can be constructively dealt with. It provides clear information about how to approach disagreement and difference thereby creating community norms and expectations. Core skills from the training are utilized by the mediators and provide an all-round educative experience as they work through a process that, in its essence, follows the same steps that any adult mediator would recognize. When these elements are combined with successful outcomes based on tolerance, understanding and creative solutions,[6] it is possible to see how a culture change can occur, to which

[6] See CRESST for an example.

it is in everyone's interests to be committed. It is not difficult to see how organizations, workplaces and local community forums might mirror this kind of cultural development. It is more challenging to draw the parallel with the court system, in particular when the parties to the dispute are transitory players motivated by their own individual interests. While mandating mediation might have the effect of increasing settlement rates and changing people's expectations of the court process, it seems to run the same risk identified by Gibbons (2007): that mediation simply becomes more formalized as a step to complete before adjudication. Mediation, I believe, can achieve a change in culture, but can it do so while it is so closely linked to the court system?

The second issue, that of mandatory mediation, is linked. It is a prospect which, as this article shows, is looming in several different fields of delivery but which threatens core principles[7] of mediation practice. The first is that of voluntariness. Research evidence suggests that mediation works best when undertaken voluntarily (Genn 2007). While mediators welcome a stronger encouragement of the use of mediation, my own research (Allport 2016) demonstrated that they also know the value of an individual commitment to the process based on informed choice. Barlow and colleagues (2014) point out the significance of emotional readiness in order to be able to engage in mediation and note that attempts to mediate where this is not the case often break down. Though the focus of their research was on separating couples facing the loss of their relationship, the emotional aspects associated with other kinds of dispute cannot be ignored. An order to attend mediation risks closing down participants' willingness to be open to the process. As Clark (2022) points out, agreement cannot be mandated. One justification for the proposal for mandatory mediation is formed on the basis that it does not contravene a right to fair access to justice: participants are still able to take their claim to court and so the principle of party determination, in that sense at least, remains intact. However, both the confidentiality of the process and impartiality of the mediator might also be compromised if, as Clark suggests, there is any question that mediators might be called upon to comment on the conduct or approach of the parties to the mediation.

Importantly, the current proposals prioritize settlement over other mediation outcomes. Practitioner respondents in my research identified several different purposes to the process which I organized into themes. While 'resolving issues' and 'reaching settlement' formed two of these, the others had a much broader application and included 'empowering parties',

[7] My research of 2016 practitioners across all fields of mediation delivery identified confidentiality, voluntariness, impartiality and party determination as the core principles of practice (Allport 2016).

'ending the conflict', 'improving communication' and 'relationship repair' (Allport 2016). Under the proposals for automatic referral to mediation (small claims), the parties in dispute are allocated one hour to reach an agreement over the telephone, during which time there would be no opportunity to communicate directly with one another. It would be a mistake to assume that a claim that is considered small in financial terms does not have a significant impact emotionally, psychologically and socially (Bush & Folger 2005).[8] The higher aspirations for successful mediation would, in my view, be very difficult to achieve under these circumstances.

The third challenge concerns the development of a more cohesive approach within the mediation profession. I have argued that the encouragement of mediation across sectors has largely been driven by legislative change. Separate fields of practice have responded and developed, but historically there has been little to unite mediators across these different contexts. In recent years there have been some indicators of change. During 2017, in the first piece of collaborative work of its kind, the COM and the CMC jointly chaired a working group of SEND mediation providers. The group, supported by the Department for Education, drew up practice standards for the training and delivery of SEND mediation and created a shared register of qualified SEND mediators publicized on both their websites. The intention was that local authorities, parents and other stakeholders would be able to access appropriately qualified mediators for SEND disputes. Other collaborative initiatives include the National Mediation Awards organized by the COM, CMC and FMC, and a joint conference by the CMC and COM in 2021 titled 'Collaboration for the Future'. However, standards and guidelines vary and there are differences to overcome. This comes at a point where the Government and the justice system are looking to professional mediation bodies to provide consistency and the guarantee of quality provision to protect the public—now is the time to pull together. A question that is being asked of all sectors is about mediator capacity to meet increased demand. This raises further challenges about pooling of resources, routes into the profession as a whole (rather than segments of it) and the effective support of newly trained mediators. A major shift would be to put appropriate mechanisms in place to enable mediation as a 'first choice' profession: 'To be mediators, not just first and foremost, but just' (Saunders 2020: 49). This could include clearer career routes that place more emphasis on theoretical

[8] Bush & Folger describe the experience of conflict as a threat, both to individual autonomy and social connection. Mediation seeks to address this through the empowerment and recognition of the participants.

underpinning as well as skills development and allow people to move from training to gaining experience to qualification more smoothly. In other words, cohesion must come from within the mediation community of practice.

[E] CONCLUSION

While legislative reform has attempted to achieve a cultural shift in the way that disputes are resolved using mediation as a primary vehicle by which to do so, this aim remains unfulfilled. Although mediation is a process that could play a part in bringing about such change, this cannot be achieved without knowledge, understanding and commitment from all stakeholders as well as accessibility outside the justice system as much as within it. This calls for a fundamental reappraisal of approaches to conflict. It seems doubtful that mandating mediation as an isolated initiative can fulfil these aims.

It also seems clear that a lack of definition and cohesion within the mediation community has meant that those who control policy and funding have made decisions about mediation provision which have led to further confusion and a lack of enthusiasm among potential users. The challenges for mediators across the board are to consider how those aspirations of the process other than settlement are given full weight and how, while encouraging an increased uptake in usage, mediators can remain true to the core principles of practice rather than stray into other forms of dispute resolution. A good deal of this might be accomplished if different sectors of the mediation profession could work collaboratively together to provide a consistent voice and a clear sense of what mediation can achieve in establishing cultural norms for dealing with conflict.

About the author

Lesley A Allport *has had a long career in mediation, including mediation training (see www.ladr.net) and regulation. Working initially as a family mediator in the 1980s, she has been involved in developing new areas of practice including special educational needs and disability conciliation. She has an active commitment to the establishment of professional standards and gives public service on various boards and committees within the mediation sector. She mediates conflicts within families, education settings, workplaces and cross-border family disputes and specializes in child-inclusive mediation. In 2016 Dr Allport was successfully awarded her PhD at Birmingham University Law School, which involved empirically researching the comparative growth of mediation by looking at mediators*

working across a variety of contexts and identifying core aspects of mediation practice. Her publications include 'Square Pegs and Round Holes: The Divergent Roles of Lawyers and Mediators' in Maria Federica Moscati, Michael Palmer & Marian Roberts (eds) (2020) Comparative Dispute Resolution *London: Edward Elgar and 'The Voice of the Child in Family Mediation' in Marian Roberts & Maria Federica Moscati (eds) (2020)* Family Mediation: Contemporary Issues *London: Bloomsbury Professional.*

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