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Family mediation in England and Wales - some lessons for Australia

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contents

VOLUME 4 NUMBER 5

Family mediation in England and Wales — some lessons for Australia 61

Recent developments in ADR 68

Promoting Australian ADR abroad 70

Mediation for the information technology industry 72

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ADR developments abroad

Family mediation in England and Wales — some lessons for Australia

Sue Gribben

The passing of the UK *Family Law Act 1996* began a five year period of major change and experimentation in the area of family law and practice in Britain. This included the introduction of publicly funded family mediation, and the provision of compulsory information and assessment sessions about mediation for family law clients claiming legal aid. This was implemented via a rolling program of pilot contracts with mediation suppliers and was accompanied by considerable government regulation, with a view to ensuring adequate service quality assurance. It also involved major independent research and evaluation as to the effectiveness of the programs.

The final research reports have now been published[1] and in January 2001 the Government announced the repeal of Pt 11 of the *Family Law Act* and further changes in relation to providing legal aid clients with information and referral to mediation. The research seems to have raised as many questions as it answered and there remains a lot of uncertainty about future directions for mediation, with more pilot projects in the pipeline.

Investigating and reflecting on the British experience has led me to reconsider the place of mediation in family dispute resolution in Australia and the regulation of ADR in general. We have many of the same issues here and are currently concerned with debates about finding pathways through the family law system; criteria for suitability for mediation; compulsory referral to mediation; the need for regulation of ADR; and the respective roles of government and professional associations or peak bodies regarding any such regulation.

This article briefly describes the British experience: the pilot projects; the main research findings; the questions which have emerged; and ideas for the future role and direction of family mediation. Some of the implications for family mediation in Australia are also discussed. A second article will describe and reflect on the development and implementation of the regulatory framework for family mediation in England and what we can learn from it as we revisit the issue in Australia.

The UK experiment

For a number of years Britain has been at the forefront of the trend in the western world towards fewer people marrying and, of those who do, an increasing percentage divorcing. These trends have caused considerable social concern and they motivated the Conservative Government in 1995 to put forward proposals for major divorce reform ➢

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➢ aiming to do more to support marriages in trouble, minimise the distress of divorce by promoting a conciliatory approach, reinforce the importance of continuity in parenting and provide protection from violence and abuse.

'No fault' divorce was introduced for the first time, but it was surrounded by a number of measures which, it was hoped, would ensure that saveable marriages were saved and that divorcing parties would be given constructive assistance with their divorce decision-making by being offered, where appropriate, the choice of mediation. These measures included the requirements that:

- before *anyone* could commence legal proceedings for divorce, they had to attend an information meeting about the implications of divorce and the divorcing process, *and* be offered a meeting with a marriage counsellor; and
- all applicants for legal aid for legal representation in divorce proceedings had to attend a meeting with a mediator to assess their suitability for mediation.

It was expected — somewhat naively — by both the Government and mediators that the majority of divorcing people would, if given information about mediation, avail themselves of this service, rather than legal representation, for their divorce settlement.

Given British reluctance to intervene in what is seen as the private realm of family life, and concerns about the compulsory nature of these provisions, it was decided that full implementation of no fault divorce would be postponed until both the divorce information meeting and the mediation information and assessment meeting had been extensively piloted.

It fell to the incoming Labour Government to design and conduct the pilot projects and research. The situation was confused by there being two different information meetings, with different goals, which were piloted completely independently of each other by separate research teams.

Divorce information meetings pilots

The pilot projects to provide and research information meetings for divorcing people were commissioned by the Lord Chancellor's Department and were designed with the principal aim of saving marriages. The first assumption of the project was that divorcing parties who had information about what divorce involved (particularly for their children) might think twice about their decision. The second assumption was that the lack of information about where people could get help with their relationship difficulties and with resolving their disputes was a major barrier to their accessing such help. Underlying this assumption was another; that if divorcing parties got such help, their marriage had a better chance of being saved or their relationship would be more positive during and post divorce.

Pilot projects were set up in England and Wales to test the 'who, what, where, when and how' of providing information meetings and to find a suitable format for the meeting with a marriage counsellor, rather than to establish whether such meetings could actually assist to save marriages.[2]

A number of models were tried, but:

> the Lord Chancellor's Department made it clear that the information meeting was not counselling, not mediation, and not advice. Pilot personnel were given no leeway in developing or modifying any of the models, all of which were structured and scripted centrally. Strict attention was given to the quality and nature of the information to be conveyed. It was to be pure information, unsullied by any hint of the preferable options. The aim was to promote informed choice for as a large a proportion of the population as possible.[3]

Models tested included:

- one on one meetings of varying lengths;
- information packs (received in person or by mail);
- group meetings;
- a CD ROM;
- meetings with a marriage counsellor; and
- a parenting plan.

Information provided in the various pilots around the country varied as to how comprehensive and detailed it was, and as to its focus (for example, family law, legal process, legal aid, effects of separation on children, violence, and support services such as counselling, mediation, refuges). Attendance at meetings was voluntary (although it was to become compulsory ➢

upon full implementation of the Act) and usually only one party attended, although the meeting with the marriage counsellor could be with both.

More than 7000 people attended information meetings. Information presenters were trained to provide the information to the particular model's script. People were invited to apply to attend a meeting via a range of methods which meant that they were at very different stages of relationship difficulty, separation or divorce. The study took three years to execute and involved collecting data from over 10,000 people. Not surprisingly, the researchers encountered huge methodological problems and their findings were somewhat tentative and inconclusive.

Key findings were that more than 90 per cent of people attending information meetings valued them, but for a range of different reasons (arising to some extent from their differing expectations). Most attendees were more satisfied with individual presentations than group ones; most wanted an information pack in addition to verbal information; and most were frustrated by the rigidity of the meeting — they would have liked it to be less basic and general and more tailored to their individual needs.

In addition, the timing of the session with the marriage counsellor was found to be too late for most to be of any use in saving the marriage — 4811 of the attendees at an information session (of whom 4281 had *not* commenced divorce proceedings) also received an invitation to attend a meeting with a marriage counsellor, but only 9.5 per cent of them did so and, of these, only a quarter were accompanied by their spouse.

Problems were also encountered in catering for the considerable ethnic diversity of England and Wales and in dealing with the issue of violence. The standardised text was completely inappropriate when the attendee was identified as the violent partner and some attendees had problems with attending a group meeting where men and women might both attend. Information packs could be a problem to take home.

No single model of providing information was found to be satisfactory and the recommendation for the future was for persons contemplating divorce to attend a more flexible meeting with a person with good links to all related services — ideally a preliminary interview at a 'one stop shop' providing legal advice and representation, family mediation, individual and relationship counselling, and post-separation parenting courses.

Although the pilots were not set up specifically to divert people into mediation, the researchers took account of the fact that 'there were clearly expectations that the delivery of information would encourage greater numbers of people to use it' but that 'while a degree of emphasis was to be given to mediation, and it was to be considered more appropriate than taking court proceedings, it was to remain a voluntary process, a matter of choice and appropriateness…'.[4] With this in mind, the researchers followed up with information session attendees to ascertain whether they had used mediation and why.

Attendees were contacted between one and two years after their having attended an information meeting and it was found that some 10 per cent had been to mediation, and agreements had been reached in 37 per cent of these cases. For most of these people mediation was in addition to using a solicitor. These figures are to be compared with 73 per cent of attendees having consulted a solicitor two years after attending the meeting.

Attendees who did not go to mediation said:

- it was unnecessary — there were no issues in dispute;
- it was too soon to make arrangements for the future;
- solicitors and mediators were seen as either / or options;
- issues had been settled already;
- partners were unwilling to attend;
- there was lack of trust of the partner, or fear of intimidation by the partner;
- mediation services were not accessible;
- it was perceived as being too expensive; and
- there was uncertainty about what mediation is and does.

Those who went to mediation reasoned that:

- they wished to negotiate settlements but were unable to do so by themselves;
- they saw the mediator as someone who could defuse and manage emotionally charged situations; and
- they saw it as fair.

The research indicated that mediation is unlikely to be used if:

- the service is not well understood and / or is confused with counselling or reconciliation (although such factors may attract people for the wrong reasons);
- there is nothing to mediate about / couple not in disagreement about children or finances;
- parties feel able to communicate and negotiate directly with each other;
- parties are unable to communicate or negotiate directly with each other, even if a third party is present;
- parties do not trust each other at all or in relation to matters which are still unresolved;
- one of the parties is unwilling to consider mediation as an option;
- at least one of the parties is so concerned with protecting their own interests and rights that they feel an overwhelming need for legal representation; or
- the divorce is complicated by issues which require a high level of legal knowledge in order for resolution to be reached.

Challenges for the future include the following.

- To choose mediation, people need to know about it and to understand what it does and does not deliver.
- There needs to be greater clarity about the inter-relationship between mediators and solicitors and about how both professions can be accessed and used effectively.
- Many people seemed to be looking for a hybrid service: a cross between lawyers and mediators. They would welcome a service which offers high quality legal advice, suggests what is a fair settlement for both parties, and facilitates communication and negotiation without promoting acrimony.

Publicly funded family mediation pilots

The Legal Services Commission (LSC) undertook the

➢ family mediation pilot and implemented a rolling program of pilot contracts with mediation suppliers over a three year period, using both non-profit and profit making suppliers. It must be remembered that mediation was only publicly funded for those individuals who were applying for legal aid, although the threshold for such aid was lower than for legal representation.

The Act required that a person could not be granted legal aid for representation in relation to family law proceedings unless they had attended a meeting with a mediator, which would:

- determine whether mediation appeared suitable to the dispute and the parties (in particular, whether mediation could take place without either party being influenced by fear of violence or other harm); and, if so,
- help the person applying for representation to decide whether instead to apply for mediation.

There were some exceptions. Proceedings under Pt IV of the Act (Family Homes and Domestic Violence) and under Pts IV and V of the *Children Act 1989* were exempt from this requirement.

In addition, an exemption could be claimed if there was no mediator available in the area, or the applicant's partner lived more than two hours away from a service, or a disability prevented attendance.

In practice, people with family law issues went to see a solicitor and were told they had to attend a meeting with a mediator before anything else could happen. As a result, for the first time mediation services had to deal with large numbers of people who knew nothing about mediation and who were, in fact, wanting legal advice and representation — few of whom had been given a favourable impression of mediation by their solicitor.

Furthermore, the statutorily referred group were also more ethnically diverse and more likely to have had a history of domestic violence or abuse. Most mediators lacked the capacity and willingness to deal with these client groups. The process was further complicated by the fact that if a person was assessed as suitable and decided to try mediation, their former spouse / partner had then to be approached and come to the same decision.

For the next three years, existing services expanded and new services, particularly lawyer mediators, were franchised around the country to meet the expected increased demand for mediation — by the end of the period there was 98 per cent coverage of England and Wales.

Government expectations were that at least 40 per cent of those divorcing would use mediation successfully without resort to the legal system, but they were doomed to disappointment. Although there was a significant increase in referrals to mediation, there was only a modest increase in mediation starts and the principal work for many organisations became the conduct of information / assessment / intake meetings, rather than the provision of mediation. The figures varied but overall not more than a third of cases referred under the Act proceeded to mediation.

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Settlement rates were also low. Of all clients proceeding to mediation, however referred, 45 per cent reached agreement in children's matters and 34 per cent in financial matters. These and other results reinforced the findings from the information meetings pilot research.

There was a positive response to their mediator by a majority of those who proceeded to try mediation, but they had an even more positive response to their solicitor. They valued the *individual* advice and support they received from their solicitor over a considerable period. The researchers noted that mediation was, by contrast, couple focused and time limited intervention.

Other key findings by the researchers were that:

- the majority of people separate and resolve their issues without any professional help;
- of those who do seek help, a majority choose lawyers to assist them and demand persists for legal help of the traditional kind;
- most parties expressed considerable distrust of the other party;
- there was a huge variation in cost per case / investment per case (which ➢

➢ resulted from trying to cover the whole country quickly) and some massive wastage;

- there was no discernable impact on saving costs of divorce;
- there was no discernable impact on the rate of applications for legal aid (which was declining anyway); and
- there were considerable differences around the country in the way in which assessments and mediations were conducted, particularly in relation to the issue of violence.

The researchers found that mediation was a valuable service to those who can use it, but that the statutory system of referral was fundamentally flawed.

They speculated that the reasons for low usage of mediation were that:

- mediation is not embedded in our culture;
- it is demanding of clients; and
- mediation is sold as the 'beautiful idea' of amicable joint decision-making, and as truncating the legal process / saving costs and time, but it is unrealistic to expect *both* parties to respond to this sales pitch.

They raised a number of questions and issues.

- Is mediation of children's issues in practice the same service / product as mediation of financial and property issues? It appears to be a very different experience.
- We need to understand better what lawyers are actually offering and providing to their clients and how it differs from mediation.
- Is mediation really an alternative route to the same end as legal representation or to some quite different end?
- Can we really say that people should choose one route rather than another — should we be committed to persuading more and more people to use mediation?

They also expressed the view that mediation may need to move from the 'beautiful idea' of voluntary, amicable, ongoing, shared decision-making to the more prosaic idea of 'dispute settlement' and, possibly, to compulsory court referral to mediation.

Next steps

As a result of the research findings from both projects, it has been decided by the Lord Chancellor that in the future information about divorce, children, violence, mediation, counselling and other resources will be delivered as a first step to all persons seeking legal advice or representation in family law matters, by a specially trained and franchised family lawyer (or perhaps paralegal), in a flexible manner and tailored to the particular needs of the person attending. A new pilot project to test this latest initiative will commence later in the year.

The requirement to attend a mediation assessment meeting has been modified by a 'willingness test': before requiring the party seeking legal aid for a family law matter to attend an assessment meeting, the mediator has to be satisfied that the *other* party would be prepared to consider mediation. The procedure for ascertaining 'willingness' is still being worked out, and I think it highly likely that once the revamped information session is running, this compulsory assessment meeting will be scrapped.

They are also still considering the idea of judicial referral, perhaps compulsory, to mediation once legal proceedings have commenced.

Family mediators have not welcomed these changes. They are concerned that lawyers who, in general, are not particularly supportive of mediation, will have the task of explaining it. They are also doubtful about lawyers' capacity to be effective case managers. And they are worried about losing work — many non-profit organisations have become dependent on LSC funding of compulsory information sessions for their survival.

However, this new approach recognises clients' needs at this early stage in the divorce process for a range of information (including legal) and that as the preferred first port of call for most clients is usually a lawyer, family lawyers are the logical 'case managers'. Many family lawyers have also expressed a desire to work in a more 'holistic' fashion and have shown a willingness to undertake the necessary training.

Implications for Australia

In Australia we have experienced similar pressures to encourage the use of mediation — particularly in relation to family law disputes — with the sometimes conflicting objectives to:

- minimise the distress and the emotional and financial cost of divorce for parties;
- reduce the Legal Aid bill;
- reduce the cost of the Family Court; and
- promote positive parenting after divorce.

Although we have generally acknowledged that mediation is not a universal panacea, it has been assumed that divorcing people need to be encouraged to be less adversarial, and that the best way of doing this is to keep them out of the hands of lawyers and courts and provide them with mediation as an alternative. Substantial government funding has gone into the promotion, establishment and development of voluntary family mediation services around the country, by non-profit organisations and by the Family Court, and services have also been set up by some organisations with either voluntary and compulsory referral to mediation or to settlement conferences.

But voluntary take-up of family mediation by clients has been disappointingly low. We have assumed that this is largely because of lack of public awareness. In my view, we need to ask (and research) whether this is really so, or whether there are other factors, including problems ➢

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➢ with the service itself, for many separating couples.

In Australia we have not undertaken large scale implementation of voluntary mediation nor conducted such extensive research as in Britain. We need to be cautious about assuming that divorcing Australians have the same attitudes and needs as the English. Nonetheless, some of their findings resonate loudly with my own knowledge and experience of mediating family law matters in Australia and with the research which has been conducted, and they have made me pause for thought.

The traditional mediation process can appear to be (and in practice, can turn out to be) very demanding of clients in several ways: cognitively, emotionally and financially. For mediation to be an attractive option, the likely benefits have to be very compelling. Mediation is particularly recommended at the early stages of the separating and divorcing process, but that is the time when one or both parties may feel least able to participate effectively in the process. The parties are often in crisis at this point and support and empowerment may come primarily from the provision of relevant information, advice and direction, rather than from participation in a mediation process.

It has become increasingly clear that the number of cases which need third party help, and where mediation is both suitable and acceptable, may be much smaller than we believed or hoped in the past. This does not mean that it is not a useful intervention for many.

It appears to be the case that separating and divorcing people need to be able to choose from a range of service interventions which include mediation and that there is a definite role in many cases for referral (both voluntary and compulsory) to a more advisory, rather than a facilitative, model of ADR, particularly once legal representation has been sought or legal proceedings instituted. It also does not seem appropriate for one method of dispute resolution such as mediation to be promoted as more likely to produce the best outcomes for all or most divorcing couples and their children.

'It appears to be the case that separating and divorcing people need to be able to choose from a range of service interventions which include mediation and that there is a definite role in many cases for referral (both voluntary and compulsory) to a more advisory, rather than a facilitative, model of ADR …'

Most people, regardless of nationality, hate being shoved from pillar to post — having to get help from many different sources, for example an individual counsellor, relationship counsellor, financial advisor, family lawyer, child psychologist and so on. The Family Law Pathways Advisory Group's Report[5] has noted the urgent need for an integrated family law system: there are many different gatekeepers, and they all need to be providing consistent, appropriate and ongoing information, assessment and referral to those who knock on their doors. Of course this is highly desirable, but I wonder if it is practicable to expect that a sufficient screening can be undertaken by every professional or organisation which people access.

I am attracted to the idea of there being one well publicised, resourced, professional and accepted gateway for getting initial and ongoing information, general advice and referral about separation and divorce. This would not take away the responsibility of the specialist professional or service to be knowledgeable about the whole system, their place within it and the possible need to refer a client to other professionals / services or to send them back to the general advice service for a review of their overall situation and requirements. As to who should provide this service, I think it could be contracted out to a number of organisations or individuals all operating under the same name, just as problem gambling services are provided by a number of organisations under the name Break Even.

For a number of reasons there remains a lot of confusion about what mediation is in Australia, as in England. There are considerable variations in the services offered under 'mediation' and other names. The Family Court has, for many years, provided both voluntary and compulsory conciliation counselling for children's matters and conferences for financial and property matters. Much of the former is now also being conducted by non-profit organisations. The Court is a ➢

➢ major referrer / gateway to non-profit ADR services and has recently decided to use the term 'mediation' to cover all primary or alternative family dispute resolution, other than arbitration, thus creating problems and confusion for both clients and service providers.

In contrast to traditional mediation services, compulsory conciliation and conferences (both Family Court ordered and legal aid referred) have tended to be more advisory than facilitative in nature. Mediation seems not to be embedded in our culture either and it should be noted that those countries where it appears to be so, such as China, seem to use an advisory rather than a facilitative model.

My impression, after talking to non-profit service providers since my return to Australia, is that since non-profit organisations have taken on conciliation work, demand for traditional mediation has dropped rather than increased, despite considerable advertising. Family lawyers remain the first port of call for most people with family law disputes and lawyers seem to be negotiating and settling most of their cases, including those which they used to refer to mediation. This mirrors the English experience, where solicitors, over recent years, have developed additional negotiation and advisory skills in family matters which may have made the legal representation route more supportive and less frightening to some clients than in the past. In any case, for whatever reason, family lawyers remain reluctant referrers to non-court based services.

Conclusions

The English and Australian experiences have confirmed my view that it is impossible to find one early intervention which will be effective for large numbers of the divorcing population in promoting a conciliatory approach, good decision-making and early identification and settlement of any disputes, and that interventions to support and assist family members through separation and divorce have to be multiple and multi-staged.

The challenge for family mediators is to broaden their approach and identify the diversity of needs of separating and divorcing couples and their children for dispute resolution services. It seems less likely that in future we will need professionals who are solely engaged in family mediation, and more likely that we will need professionals and service providers who can design and deliver facilitative, advisory and hybrid ADR processes, which can be further tailored to meet the needs of each family member involved in a particular family dispute.

The service should include: ensuring access to (if not provision of) information about all aspects of separation and divorce, including all dispute resolution processes; adequate assessment of family members' needs, including children; and appropriate referral to individual and relationship education and counselling, and to legal and financial advice.

The implications of this for the regulation and marketing of family mediation will be explored in my next article. ●

Sue Gribben was formerly with Relationships Australia in Melbourne and was a member of NADRAC for five years. She is now a private mediator and consultant and can be contacted at sgribben@ozemail.co.au.

Endnotes

1. Walker J (research director) *Information meetings and associated provisions within the Family Law Act 1996 — summary of the Final Evaluation Report*, Research conducted by the Centre for Family Studies at the University of Newcastle upon Tyne 2001. Davis G et al *Monitoring publicly funded family mediation — report to the Legal Services Commission* University of Bristol, December 2000.
2. Walker above note 1 p 4.
3. Walker above note 1 p 7.
4. Walker above note 1 p 40.
5. Family Law Pathways Advisory Group *Out of the Maze: Pathways to the future for families experiencing separation* Report to the Federal Attorney General and Minister for Family and Community Services, August 2001: see Overview and Recommendations.

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