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The ADR Bulletin

ADR lessons from abroad

Regulating family mediation — lessons from the UK

Sue Gribben

'With the passing of the *Family Law Act 1996*, Britain embarked on a period of major change and experimentation in the area of family law and practice. Family mediation was publicly funded for the first time and its introduction was supported by compulsory information and assessment sessions in relation to mediation for family law clients claiming legal aid.'

This is the second of two articles reflecting on British initiatives since 1996 in the provision and regulation of family mediation services. For the first article, see 2001 4(5) ADR.[1]

With the passing of the *Family Law Act 1996*, Britain embarked on a period of major change and experimentation in the area of family law and practice. Family mediation was publicly funded for the first time and its introduction was supported by compulsory information and assessment sessions in relation to mediation for family law clients claiming legal aid. Services were delivered via a rolling program of pilot contracts with mediation suppliers throughout the country, and accompanied by considerable government regulation and major independent research and evaluation as to effectiveness of the programs.[2]

A visit to England for the first half of 2001 enabled me to research[3] and reflect on the British experience and to think about its possible lessons for us in Australia, where we are currently considering similar issues, such as:

- improved pathways for those wanting to divorce;
- criteria for suitability for family mediation;
- compulsory referral to mediation; and
- ongoing regulation of family mediation and the respective roles of government and professional associations or peak bodies in relation to such regulation.

In the first article I outlined the British experience of implementing and evaluating publicly funded family mediation — the pilot projects, the main research findings, the questions which have emerged, and their ideas for the future role and direction of family mediation — and discussed some of the implications for Australia.

This article gives a brief account of the development and implementation of the regulatory framework for family mediation in the UK, comments on its strengths and weaknesses, and suggests what we can learn from the UK experience, particularly as we consider the recent NADRAC report and recommendations on the development of standards for ADR in Australia[4] and the Federal Government's *Quality Framework* consultation paper.[5]

The British experience

Background

By 1996 family mediation in the UK had developed in several distinct ways. A number of not-for-profit organisations had been providing mediation services throughout England and Wales and had formed the National Family Mediation (NFM) network. These services operated with very limited resources, mostly from local government and/or Probation Service grants and charitable or trust donations. Most of them were separately established — that is, not co-located with, or auspiced by, other family or relationship support services. Their mediators were largely trained by NFM and came from a range of backgrounds, including some family lawyers. However, most services provided mediation for children's issues only, with only a few services providing 'all issues' mediation, (using co-mediators combining legal and social welfare backgrounds). A similar organisation, Family Mediation Scotland, had been formed to cover services north of the border.

In addition, there were family lawyers offering mediation for profit (primarily in property and financial matters), some of whom were members of the Solicitors Family Law Association (SFLA). Many of these were trained by, and members of, the Family Mediators Association (FMA), a national association of family mediators (only half of ➢

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➢ whom are lawyers) who provide all issues mediation.

At the start of the pilot projects, the bulk of publicly funded family mediation was conducted by the non-profit organisations, but increasing numbers of legal firms have since contracted to do legal aid mediation and they are now doing about half of all the work. The term 'pilot projects' was something of a misnomer because by the end of the three year period, mediation services had been established throughout England and Wales, providing 98 per cent coverage.

The UK College of Family Mediators was formed by a number of family mediation organisations in 1996 in anticipation of the legislation, with a view to providing one professional body for all family mediators in England, Scotland, Wales and Northern Ireland.

However, by the time the Act was enacted, the College was still embryonic, focused on trying to resolve various issues between the diverse family mediation organisations, and had not yet developed a common set of standards and accreditation process.

The Legal Services Commission (LSC — then the Legal Aid Board) was therefore faced with the problem of having to establish publicly funded mediation services nationwide and pilot a compulsory mediation information and assessment service, in the absence of any common infrastructure and in the context of ongoing internecine warfare between different groups of mediators. They also had serious concerns about uniformity of quality of service and lack of professionalism among existing providers around the country, particularly in the non-profit sector. They felt themselves obliged to undertake the regulatory role, although this was widely seen as problematic by both government and the family mediation sector as a whole.

Regulatory framework

The regulatory scheme for publicly funded family mediation was developed by the Legal Aid Board, now the LSC, with considerable consultation with the various stakeholders, and it is still evolving.

It involves a number of mandatory quality requirements for suppliers of services under contract with the LSC. The standard sets out obligations for both service provider organisations and their individual practitioners, including:

- compliance with the code of practice for family mediators;
- that only mediators who have successfully completed the LSC's competence assessment process may conduct intake assessments and mediations;
- detailed requirements for written procedures covering the conduct of mediation at all stages;
- a written complaints procedure which complies with the requirements of their representative body or as approved by the LSC;
- compliance with requirements for buying in the services of, or for referral to, other professionals, for example legal consultants, financial advisors, other experts;
- requirement for effective procedures designed to screen for domestic violence and for ensuring safety, and written child protection procedures (with all mediators trained to recognise child protection issues) and compulsory rules for direct consultation with children when violence occurs;
- that supervision of all casework be provided (not less than one hour per quarter and two observed mediations per year) by a supervisor, who has the stipulated qualifications and experience, and regular documented review of mediator files conducted; and
- detailed requirements for the administration of the organisation and the management of its people.

Many of the above factors have their equivalents in the service contracts entered into by the Australian Federal Government with organisations providing publicly funded mediation services. However, the competency standards and assessment process have no parallel in Australia.

In Britain national standards in mediation had already been developed and signed off by most industry bodies under the auspices of the National Training Organisation for Employment (NTOE)[6] and to underpin its assessment process, the LSC selected and adapted four of NTOE's six mandatory units as follows.

Unit 1. Prepare and set up mediation:

- element 1.1 — establish the appropriateness of the mediation process with each party; and
- element 1.2 — agree the conditions and boundaries of the mediation with the parties.

Unit 2. Stages of the mediation process:

- element 2.1 — establish the issues for each party;
- element 2.2: explore concerns with the parties;
- element 2.3 — assist in the identification and evaluation of potential options; and
- element 2.4 — build and secure agreements between parties.

Unit 3. Manage the process of mediation:

- element 3.1 — facilitate exchanges between the parties; and
- element 3.2 — manage conflict and address power imbalances.

Unit 4. Evaluate and develop own work:

- element 4.1 — evaluate own practice;
- element 4.2 — ensure continuing professional development; and
- element 4.3 — operate within an agreed ethical code of practice.

Each element has a number of performance criteria. For example:

Element 1.1 Establish the appropriateness of the mediation process with each party:

a) clearly explain the role and function of the mediation process, at a pace and using language which is appropriate to the parties;
b) make the principles of mediation explicit and apply them throughout the process;
c) explain the potential and limitations of mediation, realistically and objectively;
d) periodically check each party's understanding and, where necessary, clarify information to assist their full understanding;
e) treat parties in an impartial and non-directive manner, which promotes co-operation and the positive use of mediation;
f) encourage parties to ask questions and seek clarification in order to assist ➢

'It is by no means clear to me … that regulation has in fact resulted in greater consistency and improved quality of service around the country, and the cost of regulation is high. Settlement rates for those proceeding with mediation are low — 45 per cent reached agreement in children's matters and only 34 per cent in financial matters.'

➢ them to decide on the appropriateness of mediation for their situation;

g) invite parties to express their feelings and concerns about continuing with the mediation process;

h) establish each party's commitment to the mediation process; and

i) consider alternative options in situations where mediation or you as the mediator are inappropriate.

The assessment process consists of:

- the preparation of a personal portfolio showing how the mediator meets each of the performance criteria for each element of competency, illustrated by five completed mediation cases and supported by a supervisor's report; and
- attendance at a three hour assessment workshop with four other mediators, involving a 30 minute discussion with a mediator assessor and a standards consultant (who will examine the portfolio and ask questions based on the information provided), leading a group discussion on a chosen topic and participating in group discussion led by other mediators.

(Note — there is no observation of the mediator's work either live or on tape but the supervisor is required to report on this.)

The possible outcomes of the assessment process are that the mediators is:

- assessed as competent, their portfolio is signed off and they are certified;
- provisionally assessed as competent, their portfolio is completed within a set time frame and then signed off, with certification; or
- not yet recognised as competent and action plan is sent to supervisor — can be subsequently reassessed.

Outcomes of regulation

It would appear that service providers desperate for funding (both individual mediators and organisations) and professional associations were forced to agree to and participate in this regulatory framework. The process of assessing mediators and franchising of organisations is now nearly complete. Although the regime was imposed — initially in the face of considerable opposition — there has been remarkably little complaint about the huge amount of work the implementation has involved. Both mediators and organisations have welcomed the legitimation and security which certification and funding have provided. Substantial government regulation is accepted as essential to ensure consistent quality of service around the country, particularly when there is public funding and a degree of government compulsion or persuasion about the service.

It is by no means clear to me, however, that regulation has in fact resulted in greater consistency and improved quality of service around the country, and the cost of regulation is high. Settlement rates for those proceeding with mediation are low — 45 per cent reached agreement in children's matters and only 34 per cent in financial matters. Although the LSC requires comprehensive case statistics to be collected by service providers and forwarded to the LSC, the processing of these statistics has proved a massive and probably impossible task and no reports are yet available or likely to be so. So it is not possible for organisations to benchmark their performance — a depressingly familiar story. Also, it seemed to me as an outsider that so much of their limited resources has gone into compliance and survival that the sector is exhausted and generally lacks creativity and energy for identifying and addressing the big issues concerning the future of mediation, as identified by the researchers.[7]

The LSC's Chief Assessor has noted that most mediators:

- are white, middle aged, middle class and 'conservative' and are uncomfortable dealing with a diversity of clients;
- are reluctant in the information sessions to sell mediation or themselves as mediator (overemphasising the client's need to make a free and informed choice) and there is a lack of marketing awareness among service providers generally;
- often fail to take charge of or to control the process; and
- offer little in the way of out of business hours service.

These views are shared by a TV documentary maker who sat in on hundreds of mediations around the country when making a film about mediation. He observed:

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- an enormous variation in how intake is treated — sessions may be individual or joint, mediation is not often 'sold' to the client, and choice is overemphasised;
- very different attitudes to domestic violence and screening for same;
- the lack of understanding by parties of mediation process continues well into the process, especially the relationship of mediation to the legal system;
- the date of the first mediation session is often much later than parties want;
- parties are seeking (and not getting from mediation) a sense of direction — some tried and tested options; and
- mediators are overtrained in etiquette and undertrained in providing useful information.

The detailed standards for family mediation and the assessment criteria for certification as a mediator seem to have led to a rigid view of what mediation is and how it should be delivered, which is not customer focused or based on market research. There seems to be little or no willingness or capacity to tailor the service to meet particular needs.

It is true, however, that given the low base from which it started, it has been no small achievement for the government to have managed to supply family mediation services nationwide and to establish a minimum standard of service — a number of individual practitioners have dropped out either of their own accord or because they failed to meet the standard, and gaps in expertise (for example, screening for violence, working with children and dealing with financial and property matters) for particular mediators have been addressed to some extent.

But further improvements will be problematic. Non-profit suppliers are generally small standalone services, substantially under-resourced and poorly managed compared with Australian services. They appear to lack the capacity to identify and address the key strategic issues — to 'see the wood for the trees'. It seems unreasonable to expect that they will be able to do much to raise standards further.

All of this led me to wonder whether the same or a better result would have been achieved by simply having franchising requirements for suppliers which included a requirement to ensure certain levels of training and ongoing professional development for mediators, but not prescribing a particular assessment process for mediator competence. This would have left much greater flexibility about how the standards were achieved and room for innovation. The resources put into assessment could have been spent on funding for empirical research, improved statistical data collection and reporting and training, professional development and national conferences. Yet this idea was not seen as appropriate by anyone I spoke to in the sector or government. It seemed to leave too much to trust.

One further point: I could not discover any university course available on ADR, mediation or family mediation, and the university bookshops I visited were remarkably lacking in almost any academic literature on the topic. It is therefore not surprising that the practice of family mediation in the UK seems to be isolated from other professional and academic disciplines or ADR practice, and to be uninformed by theoretical analysis, empirical research or an understanding of the range of ADR services — the bigger picture. The family mediation training offered by the various providers appears to be focused on the NTOE competency standards and while this is laudable, it is not sufficient.

Further initiatives

It appears to be highly likely that the assessment requirements will soon be adopted by the Law Society, and not just for their family lawyer mediators because the LSC is extending its quality mark to other legal aid areas. The LSC has espoused a view that mediation is not a separate professional role, but rather a set of skills which can be used in a range of settings by a number of professionals. This is a blow to those mediators who, for the first time, are beginning to work full time as professional mediators and were hoping to see some consolidation of the view of the mediator's position as a separate professional activity.

The LSC is also preparing to hand over the conduct of Family Mediator Assessments to the UK College of Family Mediators, while retaining the right to approve any changes to the standards and protocol.

The predictable response by government to the issue of low take up of family mediation services was to spend approximately $750,000 in early 2001 on a national advertising campaign: 'Ken and Barbie go to mediation'. And, just as we found in Australia, it was a waste of money. Such a sum does not buy enough advertising time and space to be noticeable, let alone to effect major cultural change. It is also difficult to design a campaign to appeal to more than a small section of the target group and mediation professionals impose unrealistic requirements on how and where advertising should be conducted.

UK College of family mediators

The College was formed to be a peak body which would bring the diverse professional interests in the field together to identify common ground and deal in a united way with government. Its stated aims are to promote family mediation, ensure high standards of family mediation practice, and register and support family mediators.

The founders were seven organisations (including NFM, FMA, and SFLA), whose practitioner and organisation members were providing family mediation services and/or professional development and training in family mediation. These organisations continued to exist independently, but were designated UK College 'approved bodies' and were represented on the UK College board of governors, which also included representatives elected by mediators who joined the organisation as individuals.

I was very interested to learn more about this development, given the difficulties we have had in Australia in forming any national organisation acceptable to the ADR sector as a whole.

From the beginning, the College experienced tensions between the expectations and needs of government, the approved bodies and its individual members. Its principal funding (80 per cent) is from government and the expectation is that it will co-ordinate organisation of the regulation of family mediation. This primary responsibility is not always compatible with meeting the very different agendas of the various approved bodies (some of which are peak bodies themselves like NFM), let alone

➢ those of the 1000 plus individual members. The latter are also often members of other professional bodies and many do not see themselves getting value for money from membership of the UK College (although it has to be said that the £40 annual membership fee does not pay for much).

Given these tensions, it is impressive how much the College has been able to achieve, which includes:

- a Code of Practice for family mediators, together with associated standards for practitioners and for the organisations which offer qualifying training services;
- collaboration with the Legal Aid Board to implement procedures for the assessment of practice competence;
- implementation of a scheme for the continuing professional development of family mediators;
- publication of a professional journal for family mediators;
- maintenance of a register of family mediators;
- production of a periodic handbook on family mediation, and a directory of family mediators;
- provision of an information service — answering telephone enquiries about family mediation, producing pamphlets, maintaining a website; and
- promotion of public awareness of family mediation.

I do not believe, however, that any of this would have been possible without the impetus of both government funding and regulation, the UK population size and geography which makes it easier than in Australia to get representatives together, and the general acceptance in the field of the need for major regulation.

Some implications for family mediation in Australia

Regulation

In Australia service provision is regulated by the *Family Law Regulations* and government contracts with service providers, but as yet we have no formal or general system of accreditation of family mediators, no generally accepted family mediation standards or Code of Conduct and no professional association or regulatory body. Attempts to establish a national, or even a state association of family mediators, covering all in the field, have yet to be successful.

'In Australia … we have no formal or general system of accreditation of family mediators, no generally accepted family mediation standards or Code of Conduct and no professional association or regulatory body. Attempts to establish a national, or even a state association of family mediators, covering all in the field, have yet to be successful.'

NADRAC in its recent standards report emphasised that before developing any regulatory scheme, it is essential to focus on the goal of regulation — preventing harm and improving quality of service — and to ensure that the steps taken, and their costs, are commensurate with the risks to be managed or the benefits to be achieved, and are based on evidence. They have cautiously, and in my view wisely, recommended that the industry be self-regulating and that the first step should be the development and implementation of a Code of Conduct.[8]

The British experience has demonstrated to me (if not to the British) that regulation can stifle creativity, does not necessarily produce higher standards and its costs may outweigh any potential benefits. As a family mediator, I was also struck by the inherent conflict between the insistence in England on emphasising the voluntary and empowering aspects of the mediation process and the rigid government requirements as to how mediators deliver the service. It seemed to me that family mediators had been disempowered from learning and developing their service to meet their clients' needs better — all in the name of service uniformity and minimum quality — and that this must, in turn, affect mediators' capacity to empower parents effectively to address their own needs and those of their children.

I am, therefore, more than ever persuaded that, before implementing any further regulatory strategies for family mediation, we need to be sure that they will improve the range and quality of services being offered to separating and divorcing individuals and couples, that they are flexible and not prescriptive of one service model, and that government's role is one primarily of support and encouragement, both financial and otherwise.

The quality framework outlined in the consultation paper[9] proposes a scheme for government approval of a wide range of organisations, including professional associations, to provide family primary dispute resolution services under the legislative protection of the *Family Law Act*, but it does not propose a scheme for the accreditation of individual practitioners. This seems to me ➢

➢ a sensible approach. Unlike the British scheme it will bring most family mediators under a general framework (not just those providing publicly funded mediation) but will not be prescriptive about detailed standards of practice.

The framework is designed to encourage existing professional associations to develop, inter alia, standards with respect to: appropriate practising membership qualifications; a code of conduct for their family PDR practitioner members (not just mediators) and requirements regarding compliance; a complaints process for clients; and provision for ongoing professional development of members. Hopefully, they will do so in consultation with others; I am encouraged by conversations already taking place around the country. However, it needs to be remembered that it is pointless to put in the huge amount of consultation and work which is required to develop a generally accepted code of practice if plans are not made in advance for ensuring that it will be formally adopted by all relevant organisations for their members, together with a scheme for ensuring compliance.

The government has indicated that the approval requirements for service provider organisations will need to be modified to suit professional organisations. This will require careful consideration and further work by government, with participation by individual practitioners and professional associations.

Marketing and research

The traditional route of legal advice and representation in negotiations is well established and understood, by both the public and professionals, and legal service is fairly consistently delivered. By contrast the public understanding of mediation has been shown to be poor, both in the UK and in Australia, and there remain competing understandings of mediation and considerable variations in the delivery of service, particularly mediation of financial/property issues compared with mediation or conciliation relating to children's issues.

The English experience, however, has added to my existing doubts about whether lack of awareness is the main barrier to people accessing mediation. There is limited understanding by mediators, particularly in the UK, of the huge demands the standard family mediation process places on the parties at a very difficult time in their lives and the difficulties of providing, let alone selling, mediation as a supportive decision-making process at this time. A separating or divorcing person can feel threatened by contact with the other party, which may undermine their decision to separate or divorce. They can feel frightened of their own or the other party's feelings — of being overwhelmed or vulnerable. They can perceive the other as strong and themselves as weak. They can feel overwhelmed by the complexity of their financial situation and the various options facing them.

On the other hand, those with little or no conflict and the ability to negotiate by themselves do not need a mediator.

So I am reluctantly forced to accept that there will probably only be a small percentage, perhaps only 10 per cent, of divorcing couples who have ongoing conflict, where both parties will be persuaded that a mediator may be able to help them, are willing to try mediation, are assessed by the mediator as suitable to participate, and go on to achieve the good outcomes mediation is promoted as delivering. Other interventions, including conciliation, 'shuttle mediation', chaired round table conferences with lawyers present, fact finding, evaluation, or some form of third party decision, will need to be considered for the remainder.

We therefore need to be careful about promoting mediation as a general service for all separating and divorcing couples. Plus, we need to learn more about those for whom it is suitable and for whom it is the best option, and how to target our promotion to them.

In addition, flexibility in service design and delivery, which is needed to accommodate the particular needs of the parties, militates against consistency and certainty, making it harder to provide accurate universal information about mediation. I do not think that this issue can be easily resolved and the imposition of a particular model, whether by government or anyone else, is not going to work. My impression is that we need to be developing more rather than fewer ADR service models and conducting research to determine which ones best suit which sections of the client group. ➢

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'… there are important lessons to be learned from the British experience before we proceed with any further expansion, regulation or promotion of family mediation or establishment of a national professional regulatory or peak body.'

➢ So where does that leave marketing? Who is best placed to undertake it? In Britain neither government nor the peak body (the College of Mediators) have been able to find sufficient resources to address the problem of general lack of awareness and I think it is unrealistic to expect that government or any peak body will be willing or able to do so in Australia. It seems to me that it is sensible to acknowledge that people usually only divorce once and it is when they are contemplating separation that they need information. So what separating people need are well advertised places to go for information about what help is available to them and where and how to access it. Our government has already made considerable progress in this regard with a helpline, website and kits and is working on improvements in response to the Pathways Report.[10]

Conclusion

I believe, in summary, that we can count ourselves lucky that family mediation has developed in this country with minimal regulation to date. We have managed to achieve higher professional standards, greater consistency and better outcomes for clients (supported by evaluation and research) than appears to be the case in Britain. This is probably due to the greater size, professionalism and resources of our non-profit organisations. However, as it is generally acknowledged that there is now a need to develop some uniform standards, there are important lessons to be learned from the British experience before we proceed with any further expansion, regulation or promotion of family mediation or establishment of a national professional regulatory or peak body.

In particular we must ensure that:

- resources spent on quality do in fact produce commensurate improvement;
- we do not stifle creativity in delivering flexible high quality service in the name of uniformity and professional credibility;
- we fund empirical research and theoretical reflection; and
- we do not develop family mediation in isolation from other family ADR or from ADR generally. ●

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 can be contacted at sgribben@ozemail.co.au.

Endnotes

1. Gribben S 'Family mediation in England and Wales — some lessons for Australia' 2001 4(5) *ADR Bulletin* 62-67.
2. 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.
3. I am indebted to a number of people who gave generously of their time and provided me with valuable material: Thelma Fisher and Hugh England (UK College of Family Mediators); Sarah White, Richard John and Adrian Wright (Legal Services Commission); Philip Dear (Lord Chancellor's Department); Marian Roberts and Barbara Wilson. My apologies to them for any inadvertent misrepresentations of the UK situation.
4. National Alternative Dispute Resolution Advisory Council *A Framework for ADR Standards* report to the Commonwealth Attorney General April 2001.
5. Attorney General's Department *Raising the Standard: A Quality Framework for Primary Dispute Resolution under the Family law Act 1975* consultation paper 2001.
6. The National Training Organisation for Employment *Standards in Mediation* 1998.
7. Davis et al above note 2.
8. Davis et al above note 2, chs 2 and 3.
9. Attorney General's Department above note 5.
10. Family Law Pathways Advisory Group *Out of the Maze: Pathways to the future of families experiencing separation* report to the Federal Attorney General and Minister for Family and Community Services, August 2001.

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