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of Justice

Mediation Information and Assessment Meetings (MIAMs) and mediation in private family law disputes

Qualitative research findings

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TNS BMRB**

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1. Summary

In summer 2013, the Ministry of Justice (MoJ) commissioned TNS BMRB to conduct a broad programme of research focused on the Mediation Information and Assessment Meetings (MIAMs) and mediation. It comprised a range of research methodologies including qualitative interviews, a survey and a case file review. This report summarises the qualitative findings from this multi-staged programme, which was conducted by TNS BMRB and academic partners. This research explores the extent to which MIAMs are encouraging publicly and privately funded clients to attend mediation, and which resolution methods clients who attend MIAMs choose to resolve their family disputes. The experiences, decisions and actions of clients were examined through qualitative interviews with practitioners and clients. The fieldwork for this research involved 20 mediator practitioner depth interviews, 36 depth interviews with MIAM clients and 24 with court parties, all carried out between September and November 2013. Conclusions drawn in this report are on the basis of this small sample of qualitative interviews, all of which took place shortly after the implementation of the Legal Aid Sentencing and Punishment of Offenders (LASPO) Act 2012. This analysis will be developed as the broader programme of research progresses.

Policy context

Family mediation has been available for many years as an alternative to court for families wishing to resolve family law disputes through consensual agreement. The LASPO Act 2012, implemented in April 2013, restricted the availability of public funding for court-based resolution of family law cases, and consequently the number of clients who qualify for financial support to take their cases to court. This change in policy led the Government to anticipate an increase in the numbers of legally aided clients looking instead to resolve their private family law disputes through family mediation.

Referral routes to MIAMs and mediation

Prior to the introduction of LASPO in April 2013, mediators recalled relying on MIAM referrals from solicitors for both publicly and privately funded clients, in addition to other less common routes. Solicitors referred the clients they believed could benefit from mediation, and those required to attend the MIAM either as a prerequisite to receiving legal aid funding for representation or taking their dispute to court. For those clients that might benefit from mediation, the referral both set clients' expectations of the MIAM and filtered out some private clients who solicitors thought were unsuited to mediation. Since the introduction of LASPO, the mediators interviewed in this study have observed a substantial fall in the number of solicitor referrals to MIAMs, which they attributed to solicitors' loss of incentive to

refer publicly funded clients given that, for the majority of cases, they would no longer receive Legal Aid for representing them in court proceedings. Mediators had increased their external marketing activities to compensate, which they found had resulted in a stream of clients who were less knowledgeable about MIAMs and mediation and less 'screened' for suitability.

Before the MIAM

Clients had a range of motivations for attending a MIAM, which were strongly linked to their assumptions or knowledge about what mediation could do for them and their expectations of the MIAM itself. This report segments clients into four groups:

- those who were **engaged** with mediation and chose it on its own merits
- those who felt **compelled** to mediate due to lack of finances to access other options
- those who had given little thought to resolution and were **unclear** about what to do
- those whose motivations for attending a MIAM and/or mediation were more **strategic** and who were seeking resolution outside of mediation.

Mediators suggested that clients went through different stages of grief and/or emotion, and underwent a practical journey to resolve their issue. The emotional and practical point at which they arrived at the MIAM influenced the potential effectiveness of mediation – seen too early, clients were not emotionally ready, but if left too late they may be less willing to cooperate. Mediators interviewed in this study reflected that pre-LASPO, solicitors referred clients who were ready to consider their options. Post-LASPO, mediators found more clients arriving who were not prepared for resolution, and as a result mediators had to adapt their approaches. Our research identified three 'types' of mediator: the more 'purist', who were reluctant to take on clients they deemed more challenging; 'realists', who took on clients they considered more challenging because they believed clients lacked alternative options; and 'optimists', who considered the broadest range of clients to be suitable for mediation, and believed they could meet their needs.

At the MIAM

Mediators and clients agreed that the MIAM has two key functions: conveying information to clients so that they can decide whether mediation is for them; and assessing clients' suitability on the basis of what they disclose. For the MIAM to fulfil both functions, mediators said they needed to create rapport and trust with clients, enabling clients to talk openly, and giving them confidence to make their own decision. For both clients and mediators, 'success'

in being informed and assessed meant clients having clear expectations of the mediation process and the estimated cost. Mediators found time constraints to be the most limiting factor in the MIAM. The length of time required to fulfil all aspects (including assessing eligibility for Legal Aid) varied depending on the client's situation and nature, and was often longer than the standard 45 minutes, but not all mediators were able or prepared to extend the meetings.

Mediators' varied approaches to the MIAM and mediation resulted in different 'offers' to clients, with some mediation approaches being better matched to some clients' needs than others. At the MIAM, the combination of mediator and client type, alongside the constraints of the meeting itself, had a strong impact on how the MIAM was conducted, and whether the case converted to mediation. However, no clients were aware of approaches other than the one they were presented with, so the quality of the fit between mediator and client was somewhat 'luck of the draw'.

After the MIAM

Most clients in the sample proceeded to mediation, unless one partner did not cooperate. For those who did continue, the original drivers for mediation and the effect of the 'stages of grief' were often borne out through the mediation process, influencing the outcomes clients achieved.

Conclusions and policy implications

This research suggests that the landscape within which MIAMs and mediation operate has changed substantially since the introduction of LASPO and that the variation in mediator approach that predated LASPO may have an increasing impact on client experience and outcomes. Fewer clients are presenting at MIAMs and those who do are more diverse, exhibiting a wider variety of circumstances and posing more challenging propositions for mediators. Although mediators vary in their willingness to take these cases on, and in their approaches to cases, clients are not aware of this range in practice. This has the following important implications for communications about MIAMs and mediation, and for what MIAMs need to achieve if they are to maximise conversion to effective mediation:

- **Increasing throughput** to MIAMs: higher awareness of mediation is required. Public-facing communications that reach their audience early in the process of deciding how to resolve a dispute, and communications targeted to professional organisations that could signpost clients to MIAMs, would help achieve this.

- **Addressing diversity** in clients' situations and expectations of the MIAM: clearer upfront communication is needed to set mediation in context; mediators may also need to be encouraged to respond by adapting their skills to varying client needs.
- **Acknowledging variation** in mediators' approach and offer: this needs to be clearer for clients, so they know that other options are available.
- **Assessing clients effectively:** this may require clearer guidance to mediators and emphasis of the importance of allowing time to conduct full assessments.

2. Context

Policy background

The Government's focus on the use of mediation in private family law disputes has increased in recent years, as part of an emphasis on diverting appropriate cases away from court.

Mediation is seen to offer a flexible, speedy and cost effective way to resolve disputes. It is a confidential process that enables both parties to explain and then discuss what their needs and concerns are to each other in the presence of an independent third party – the mediator – so that they reach an agreement between themselves.

Since 1997, clients who have sought Legal Aid to fund a private family law dispute have had to attend Mediation Information and Assessment Meetings (MIAMs). The MIAM is to ensure that they understand mediation and are aware that it is available to them locally, and to receive advice as to whether it is an appropriate avenue for them to use to resolve their dispute. In 2012/13, some 31,000 couples where one or both parties were publicly funded attended MIAMs, with around half progressing to mediation (Ministry of Justice, 2013, Figure 12).

Since April 2011 there has also been an 'expectation', set out in the Pre-Application Protocol (PAP), that all parties in relevant private family law cases (including those who expect to fund their case privately) will attend a MIAM to learn about mediation as a potential alternative to court. Exceptions to the requirement to attend a MIAM are made in specified circumstances in which mediation would clearly not be appropriate.¹ Furthermore, when parties attend a MIAM, the mediator may determine that the case is not suitable for mediation due, for example, to a risk of domestic violence or other imbalance between the two parties.

The Legal Aid Sentencing and Punishment of Offenders Act (LASPO) 2012, implemented in April 2013, restricted the availability of public funding for court-based resolution of family law cases to those involving evidence of domestic violence or child protection issues, with all other clients no longer receiving financial support to take their cases to court. Clients who are eligible for public funding still have access to publicly funded family mediation (and associated legal advice). This led the Government to anticipate an increase in numbers of legally aided clients looking to resolve their private family law dispute through family mediation.

¹ This includes cases involving domestic violence, bankruptcy and urgent cases (or where otherwise the mediator deems mediation inappropriate).

The Family Justice Review in 2011 recommended that the use of mediation to resolve private family law disputes should be encouraged further. The Government accepted this recommendation and set out proposals to legislate for changing the ‘expectation’ for all prospective applicants seeking an order in children and financial remedy cases to first attend a MIAM to a ‘requirement’, unless exemptions apply (Ministry of Justice and Department for Education, 2012). Prospective respondents will continue to be ‘expected’ to attend MIAMs. These changes are currently set out in Clause 10 of the Children and Families Bill progressing through Parliament, and are also expected to increase attendance at MIAMs and mediation use.

In response to and in anticipation of these factors, the Ministry of Justice has commissioned a broad programme of research focused on MIAMs and mediation with three key aims.

Aim 1 – *To examine the extent to which MIAMs are encouraging publicly and privately funded parties² to mediate, and to explore the choices of resolution methods that parties who are expected to attend MIAMs make to resolve their private family law dispute.* The experiences, decisions and actions of clients were explored through the qualitative interviews with practitioners and parties.

Aim 2 – *To estimate the national use of MIAMs and mediation by privately funded parties over a given time period, to provide a baseline against which to assess future changes in uptake.* This will be achieved through a national survey of mediation practitioners.

Aim 3 – *To examine the proportions of publicly and privately funded parties using MIAMs and mediation before applying to court to resolve their private family law disputes.* This will be achieved through a case file review with findings triangulated with the survey of practitioners.

This report summarises the qualitative findings pertaining to Aim 1, in which the experiences, decisions and actions of parties were explored through qualitative interviews with mediator practitioners, clients and parties to court proceedings. It is one of two reports for this project. The second report will summarise the findings pertaining to Aims 2 and 3 and draw on this work as appropriate to triangulate the findings.

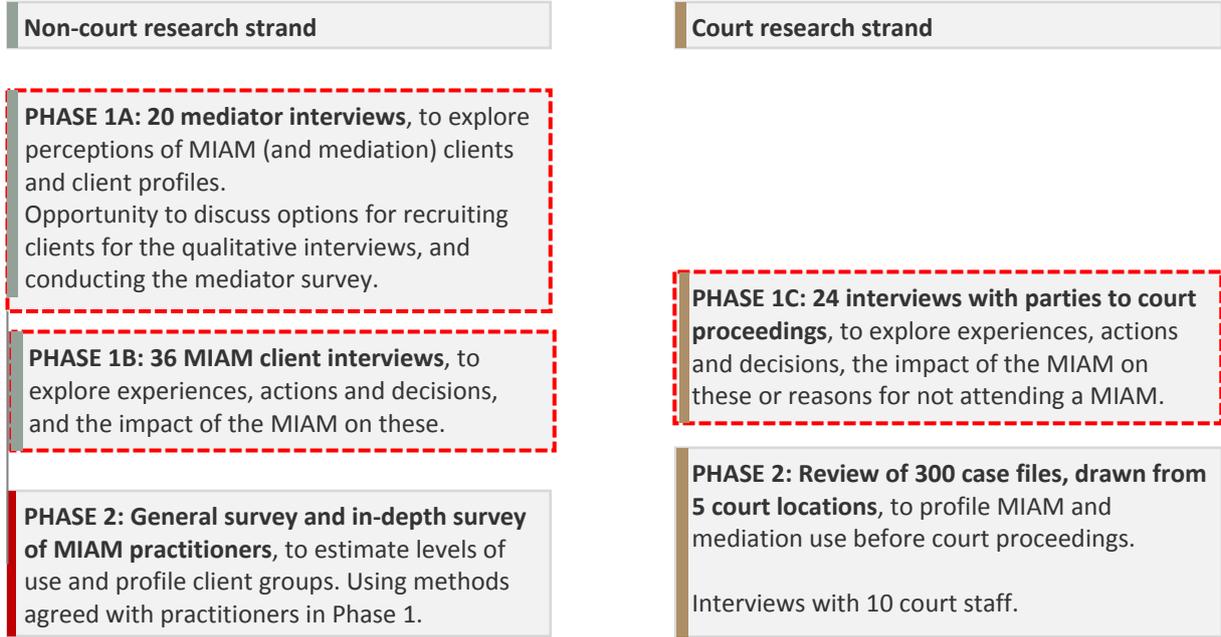
² Use of ‘parties’ in this report refers to parties aiming to resolve a family dispute.

3. Approach

Overall design

The research design comprises two strands: one focusing on MIAM clients, mediator practitioners and data relating to resolution outside court, and the other focusing on parties and data relating to court proceedings. As previously mentioned, this report deals only with the qualitative elements of the research programme. These are captured at phases 1A to 1C and have a dashed red border in Figure 3.1, which summarises the overall design.

Figure 3.1: Overall research design



Qualitative strands

Non-court strand

This strand of the qualitative research focused only on MIAM clients and practitioners engaged in resolution outside of court.

1A: Qualitative interviews with mediation practitioners

This initial component of the research played two roles. First, the interviews explored mediators’ perceptions of their MIAM and mediation clients – the types of people they are; the ways in which they use and engage with MIAMs; the subsequent actions they take and so on. Mediators appraised the effectiveness of MIAMs in encouraging different types of client to attend mediation, the effectiveness and impact of the existing Pre-Action Protocol (PAP), and other related issues. Second, these interviews had a vital ‘scoping’ role, to finalise the approach to the rest of the strand by giving contextual insight into the needs and

circumstances of MIAM clients, which informed the approach to interviews with these participants. They also provided an opportunity to discuss the most effective and appropriate way to recruit MIAM clients, and to engage those practitioners to help with this.

1B: Qualitative interviews with MIAM clients

This strand involved clients who had attended MIAMs and then gone on to use mediation, and clients who had attended MIAMs and chosen not to use mediation. Regardless of whether they used mediation, no clients in this strand had embarked on contested court proceedings (see 1C below). The interviews involved customer journey mapping to gain a detailed understanding of the role of MIAMs in their decisions, and to gather profiling information on themselves and their case. Clients also reflected on how they felt the MIAM might be improved. Journey mapping entailed exploring the actions and decisions taken by the client to progress their case, the influences on this, and their awareness of alternatives.

Court strand

This strand of the qualitative research focused only on parties seeking resolution through the courts.

1C: Qualitative interviews with parties to court proceedings

Parties in this strand were recruited in the courts while they were attending hearings, and were therefore in the process of litigation. The interviews explored their journeys to court – whether they attended a MIAM and/or mediation, their views on these processes or reasons for choosing not to use them, and their reasons for progressing to court.

Sample

To ensure coverage across the key variables of interest, quotas were set which covered the various types of mediator and client involved in mediation. The aim of this approach is not to create a statistically representative sample but to ensure representation of a range of potential variables of interest. In consultation with the Ministry of Justice, key variables were selected. For MIAM clients these were: case type (children or financial issues); geographical location; type of mediation practice; and whether clients were publicly or privately funded. For parties to court proceedings, the variables included whether they were represented or litigants in person and whether they were applicants or respondents.

A sampling grid was created and individuals recruited to reflect combinations of the key variables. These are illustrated in tables 3.1 to 3.3.

Mediation practitioners

Twenty practitioners were interviewed from a range of geographical locations and mediation practices, including for-profit and not-for-profit organisations, and solicitor-mediators alongside those with other professional backgrounds. The geographical spread reflects the locations of the courts involved in phase 2 of the study. It was particularly important to interview a varied range of practitioners. Different types of mediators saw different types of client, and as they were asked to recruit their clients to the study, the breadth of client sample depended on the breadth of the mediator sample.

Table 3.1: Face-to-face interviews with practitioners by area and type of mediation practice

UK area	Not-for-profit practice	For-profit practice	Total
South West	0	3	3
North West	0	3	3
Wales	1	3	4
North East	1	4	5
South East	4	1	5
Total	6	14	20

MIAM clients

In this strand, 36 individual clients who attended a MIAM were interviewed. Quotas were set to ensure inclusion of a range of variables: whether clients were publicly or privately funded; whether the focus of the MIAM or mediation was children or financial issues or both; and whether or not they progressed to mediation. Clients were spread geographically across England and Wales.

Table 3.2: Telephone interviews with MIAM clients: funding source by type of issue

Type of issue	Participant publicly funded	Participant privately funded	Total
Children	6 male, 5 female	5 male, 3 female	19
Finance	0 male, 2 female	5 male, 2 female	9
Both issues	1 male, 2 female	2 male, 3 female	8
Total	16	20	36

Parties to court proceedings

Following the implementation of LASPO in April 2013, the only parties with publicly funded private family law cases were those who obtained Legal Aid before 1 April, and/or whose situations meet certain threshold criteria in respect of domestic violence or child abuse issues. The population for this strand of interviews was therefore very heavily weighted towards parties with privately funded representation and litigants in person (LiPs). These 24 interviews were spread across the five court locations involved.

Table 3.3: Telephone interviews with parties to court proceedings: action taken by case issue, legal representation and applicant/ respondent

	Case type	Applicant/ Respondent	Represented/ LiP	Gender	Total
MIAM, then court	2 Financial; 4 Children	5 Applicants; 1 Respondent	4 Represented; 2 LiP	2 male, 4 female	6
MIAM, mediation, then court	5 Financial; 4 Children	6 Applicants; 3 Respondents	6 Represented; 3 LiP	4 male, 5 female	9
To court without MIAM or mediation	4 Financial; 5 Children	3 Applicants; 6 Respondents	4 Represented; 5 LiP	6 male, 3 female	9
Total	24	24	24	24	24

Recruitment

Recruitment was managed by TNS BMRB’s in-house team of qualitative recruitment specialists. To recruit the mediator practitioner sample TNS BMRB initially approached heads of national mediation bodies via email to introduce the research and asked them to disseminate recruitment emails to the mediators in their membership. The emails explained the nature of the research and TNS BMRB’s status as an independent, impartial research company working on behalf of the Ministry of Justice. When mediators responded to these emails, telephone contact was made to confirm interest in the research and to set a date and time for interview. Initial recruitment took place in August, and many mediators were not working during this time. To make up for the shortfall in numbers, therefore, recruiters also used ‘free-find’ telephone recruitment to contact a number of mediation practices, and ‘snowballing’ – whereby participants were asked if they knew anyone who might be eligible to take part in the research.

To recruit the MIAM client sample, practitioners who were interviewed were asked to approach their clients to ascertain if they were interested in taking part in the research. Clients who gave consent had their contact details forwarded to TNS BMRB, who arranged the interview date and time. Additionally, to make up for a shortfall in the number of clients recruited via this route, recruiters also used ‘free-find’ telephone recruitment to contact a number of other mediation practices and ask them to approach clients for interviews.

Parties to court proceedings were approached by a member of the research team while they were attending court for hearings. Clients were screened for suitability by the researcher, in such a way that they were not distracted from their hearing, and their contact details were sent to TNS BMRB to follow up and book the interview.

Participant eligibility was determined via a short screening questionnaire and quotas were set for each category of participant to ensure the sample was distributed across key variables

(see tables 3.1 to 3.3). Introduction materials and screening questionnaires were approved by the Ministry of Justice prior to use.

MIAM and court client respondents were offered an incentive conditional on taking part in the study. This was to try and ensure that a sufficient number and range of participants took part to provide robust qualitative data. Incentives were not offered to practitioners.

Fieldwork

Mediator interviews were conducted face to face at their place of their work, and lasted for around one hour. MIAM and court client interviews lasted 30–45 minutes and were conducted over the phone. All qualitative fieldwork took place between mid-August and November 2013, some 4–5 months post-LASPO implementation. MIAMs and mediation client interviews took place typically 2–4 weeks after the MIAM, and longer in the case of court clients.

Analysis

TNS-BMRB's qualitative analytical approach is inductive – building upwards from the views of participants – and drawing on researcher observation, in-session notes, audio recordings of research sessions, and interview transcripts. Interviewers initially reviewed transcripts for key themes and patterns. Ideas and hypotheses were then tabled and debated by the qualitative project team at an internal analysis workshop. The data were then synthesised into a series of thematic charts. Researchers then interrogated the data using a content analysis approach called 'Matrix Mapping', which allows researchers to map the data and draw out key themes and patterns.

4. Referral routes to MIAMs and mediation

This section outlines mediators' views of how the implementation of LASPO has affected the routes through which clients access MIAMs, and the effect this has had on their practices. It describes the referral routes to MIAMs pre-LASPO, and outlines perceptions of how these routes have changed. It then discusses how different 'types' of mediator have responded to this changed landscape in different ways.

Referral routes to MIAMs pre-LASPO

Mediators from both not-for-profit and for-profit practices recalled that prior to the introduction of LASPO in April 2013, there was a reliance on MIAM referrals from solicitors for both publicly and privately funded clients, in addition to a range of other less common routes.

I am a lawyer mediator so I focused on getting the solicitor referrals and selling myself to them on a one-to-one basis or going to see them and saying ... I am a mediator, you can trust me. (Practitioner, East, for-profit)

Up until I would say this year the main source of referrals has been solicitors and also the local Citizens Advice Bureau, which points enquiries about family matters to us. (Practitioner, South West, for-profit)

Mediators described three key groups referred by solicitors: those clients whom solicitors believed could benefit from mediation, clients who were required to attend the MIAM as a prerequisite for receiving legal aid funding certificate for court representation, and – from 2011 – clients who required an FM1 form signed by a mediator in order to commence court proceedings to fulfil the requirements of the Pre-Application Protocol (PAP). For the two latter groups, this type of MIAM served as a 'hurdle' to pass before court proceedings could start and not as a serious opportunity to consider alternatives to court.

There was a perception that referrals from solicitors of clients whom they believed could benefit from mediation had a dual benefit for mediators: they set clients' expectations of the MIAM, as solicitors explained how mediation worked; and since solicitors did not refer privately funded clients who they thought unsuitable for mediation, these clients were effectively 'filtered out'.

I think there's still a lack of knowledge ... from the general public as to what are the other options [to court]. So it was solicitors who did tell them more and that

there was mediation if they thought it was a good idea. (Practitioner, North West, for-profit)

Mediators found clients arrived at MIAMs through a number of other routes too:

- Third sector organisations including Citizen's Advice Bureaux (CABx), Women's Aid and Families Need Fathers. This was a more common route among not-for-profit mediators, and these clients also tended to have some knowledge of mediation prior to the MIAM (and in some cases may have been filtered for suitability by their referee).
- Court referrals where the case had been adjourned and the court had invited or directed one or both parties involved in litigation to attend a MIAM.
- Word of mouth recommendations and other self-referrals, mostly from clients who had either been through court proceedings previously and wanted to try mediation, or clients who had previously been through mediation and found it effective.

Referral routes to MIAMs post-LASPO

The introduction of LASPO has altered the referral landscape, with mediators across the not-for-profit and for-profit sectors in this sample observing a substantial fall in the number of solicitor referrals to MIAMs. Mediators attributed this drop to what they perceived as the loss of an incentive for solicitors to refer publicly funded clients to MIAMs, given they would no longer (except in a small proportion of cases) receive Legal Aid for representing them in court proceedings. This drop, mediators believed, therefore reflected the loss of clients on low incomes who, since LASPO, were no longer accessing legally aided support, either because they were unaware this was available for mediation or because they no longer came within the threshold for eligibility. Mediators believed these clients were being turned away from solicitors' firms without being able to speak with a solicitor and without being informed about publicly funded mediation as an alternative option to litigation. In some cases, solicitors' secretaries were said to have read a script which mentioned mediation to clients who asked for Legal Aid representation, but mediators did not feel this has the same effect as a 'warm' MIAM referral from a solicitor who had spent time talking a client through the mediation process.

I think people still think their first port of call is a solicitor if they've got a problem. Their solicitor then says I'm sorry I can't do anything for you, you're not eligible for Legal Aid and you can't afford it. Well they walk away thinking they can't afford it and nobody's mentioned mediation. (Practitioner, East, not-for-profit)

Mediators also recalled that prior to LASPO implementation the numbers of privately funded clients who attended a MIAM to receive an FM1 form had been falling, which mediators attributed to a lack of enforcement of the PAP in some courts or by solicitors' neglect of it.³

In this study, the drop in solicitor referrals was felt most acutely by not-for-profit mediators, whose organisations relied heavily on publicly funded clients. For-profit and solicitor-mediators who saw more privately funded clients and benefited from strong links to their own solicitors' firms experienced less of a drop in the number of clients seen.

I am being supported by a big firm, and that's how I'm managing to still do this without going bankrupt, because everyone who's mainly doing this – and even trying to do it without making a profit – has gone bankrupt. [because of changes to Legal Aid] (Practitioner, North West, for-profit)

So we [the solicitor's practice] are directing [low-income families that no longer have access to Legal Aid] into our mediation because they are ringing us for legal advice and they can't afford to pay us. (Practitioner, North West, for-profit)

Mediators described increasing their marketing activity to bolster their business, in response to the fall in solicitor referrals. Practices spent resources on marketing both to the general public and to other professional organisations (which could act as a signpost) such as health centres, CABx and other third sector organisations including women's refuges and men's family charities. They promoted the message that mediation could help resolve private family disputes and that Legal Aid (when fulfilling certain criteria) was still available for it.

Some mediators had been using social media sites such as Twitter; some had redesigned their websites to be more public facing, rather than geared towards solicitors and other professionals. Mediators also used the internet as a means to market themselves to clients who may not have considered mediation in resolving their dispute, or even been aware of it.

³ In addition, there is an obligation on solicitors via the Law Society's Family Law Protocol to refer clients to mediation if appropriate that we expect would have influenced solicitors' behaviour.

For example, some paid for adverts on Google and added search tags on their website, such as 'legal aid', 'family dispute' and 'children contact'. In addition to the internet, mediators also mentioned placing advertisements in the local press, in directories and on radio stations.

Post-LASPO, mediators had increased their marketing efforts towards professional organisations they believed could act as a signpost to their services; this included speaking directly with professionals, and contacting more third sector organisations, GP surgeries and schools. They informed professionals about their practice, and left marketing posters and leaflets to distribute around their buildings.

We have got a Twitter [account] now and the website. We have done quite a lot more promotion with solicitors saying did you know [that there is still legal aid for mediation] and trying to educate them. We put our brochures out wherever we can ... it is quite difficult to advertise because we just don't have the funds.
(Practitioner, South West, not-for-profit)

We've done a roadshow for our whole region. We've done training events at [local CABx], Families Need Fathers, Women's Aid, five local authorities and ... we've made links with the primary healthcare trusts ... Because a lot of people go to their doctor when they split up as well, and the doctor obviously can deal with the medical aspects, but they're looking for some practical assistance too.
(Practitioner, North East, for-profit)

For some mediators, these marketing efforts had yielded an increase in MIAM appointments to recover the reduction in solicitor referrals. However, it had also resulted in a greater variety of clients attending a MIAM, and in particular clients who were less knowledgeable about MIAMs and mediation, and/or who had not been 'screened' for suitability for the mediation process, for example to determine whether there were power imbalances in the relationship which might make mediation inappropriate. This shift from solicitor referrals to self-referrals made MIAMs more important to informing and filtering clients, although solicitors were still expected to refer those who were still eligible for Legal Aid for both mediation and/ or court proceedings.

An increasing [number of] people are coming who are unsuitable and I think that's one of the most important purposes of MIAMs is to screen for suitability. I see that as the fundamental purpose to also inform people about it, to enable them to make an informed decision but also for the mediator ... there are definitely cases that are not suitable. (Practitioner, East, not-for-profit)

Mediators' approaches to MIAMs and mediation post LASPO

Mediators seem to operate in the post-LASPO environment in various ways, linked to their views on what mediation can achieve, what clients need, and the pressures on their business resulting from the reduction in solicitor referrals. Broadly, there appeared to be three key 'types' of mediator in the sample for this research, characterised in this report as 'purists', 'realists' and 'optimists'.⁴ The fact that mediators varied in their practices, views of whom they think mediation is appropriate for, and beliefs about what it can achieve, also meant that their clients' experiences varied considerably. This will be explored in depth in chapter 5.

'Purist' mediators had the highest threshold for accepting clients for mediation after a MIAM. This group were most reluctant to manage power imbalances or situations where the parties were not in the appropriate emotional frame of mind to mediate. In the post-LASPO environment where clients on low incomes had fewer options for resolving their disputes, and a greater variety of clients were attending MIAMs, the purist mediators were the most unlikely to take a case on unless they were completely satisfied that mediation was appropriate.

The later the client comes [to the MIAM in their dispute resolution process] the mediations are made more difficult. There is a chance that I may turn round and say 'this is not a case that we can mediate' because couples are reaching mediation too late in the process and are closer to court. (Practitioner, North West, for-profit)

'Realist' mediators were more likely to take on these more 'marginal' types of cases, though they were acknowledged to be more challenging. Their view was that, post-LASPO, many clients were not in a position to pay for representation, or to represent themselves, and therefore had no practical access to any alternatives to mediation for resolving their issue; these mediators were therefore prepared to accommodate these clients' specific needs. This group was the most prevalent among the mediators interviewed.

⁴ It is possible these typologies align with different schools within mediation, though this was not specifically explored in interviews.

We see an awful lot of people for mediation who just really don't want to have to go to a solicitor at all, if they can possibly avoid it. They see mediation as an alternative, a cheaper alternative. (Practitioner, South West, for-profit)

'Optimist' mediators were the most likely to take on 'marginal' clients: they believed that almost all clients who are willing to try mediation are appropriate for it, and that they had the ability to mediate effectively in most cases. This group of mediators also tended to be the most likely to try to persuade clients who demonstrated signs of uncertainty about mediation. Their attitudes may have been influenced by business pressures due to the reduction in solicitor referrals post LASPO.

It is up to them [the clients to decide if they want to go onto mediation], because it is voluntary, mediation is always voluntary, so in a very rare occasion I might think there is no way I will mediate ... but that's only if I don't feel personally safe in the room. (Practitioner, South West, not-for-profit)

5. Before the MIAM

This chapter explores clients' different motivations for attending a MIAM, the influence this had on their assumptions and expectations about the MIAM and mediation more generally, and the emotional and practical context to their journeys.

Motivations for attending a MIAM

Clients had a range of motivations for attending a MIAM, which were strongly linked to their assumptions or knowledge about what mediation could do for them and their expectations of the MIAM itself. This analysis segments clients into four groups:

- those who were **engaged** with mediation and chose it on its own merits
- those who felt **compelled** to mediate due to lack of finances and thus access to other options
- those who had given little thought to resolving their issue and were **unclear** about what to do; and
- those whose motivations for attending a MIAM and/or mediation were more **strategic** and who were seeking resolution outside of mediation.

Clients in each of these segments held common assumptions about the purpose and usefulness of mediation. Their needs from the MIAM stemmed from their levels of knowledge about and commitment to mediation, and thus differed across these four segments.

All parties had been aware of the MIAM's purpose before attending, though in some cases it was assumed also to be the first mediation session. Most expected to be given basic information about how mediation would work and to be assessed for Legal Aid eligibility.

In spite of some shared views and characteristics, even within these groups, clients' motivations varied, reflecting their emotional states, their cost considerations, and their actions to try to resolve their issue prior to attending the MIAM.

'Engaged' clients tended to expect and want to progress from the MIAM to mediation: they had considered their options and chosen this resolution route based on its own merits; and their desire to mediate had often been driven by the belief that mediation would allow them to settle their issue amicably. Their confidence in mediation was often based on recommendations from family or friends, other organisations e.g. Relate, Families Need

Fathers, CABx, solicitor referral, online research or other sources; or by their own positive experience of family or workplace mediation.

Mr A wanted regular contact arrangements with his young daughter – estranged since a relationship breakdown 2 years ago. He went on the internet to find out how to initiate a supervised discussion outside of court. He was relieved to learn that family mediation could be a consensual and non-aggressive approach. He made an appointment for a MIAM, believing mediation would be the best way to get his ex-partner into a constructive discussion around contact.

'This approach seemed to be more suitable to getting my ex to play ball ... rather than being told by a judge that this is what you have to do.' (MIAM client, children, privately funded)

'Compelled' clients were sceptical about mediation, although often they did not know a great deal about it; but had felt compelled to consider it, typically for one of two reasons; relating to either financial constraints or emotional pressure. Firstly, some did not have the funds to instruct a solicitor, did not fit the eligibility criteria for publicly funded court representation and/or lacked the confidence to act as a Litigant in Person (LiP) as they believed the court process would be emotionally overwhelming or too complicated to navigate and may become a financial burden. Mediation was therefore seen as the only publicly funded resolution method open to them. Others had been pressured to attend by their partners or primarily wanted to avoid court as they believed that this would only escalate their dispute. They typically sought someone to validate and support their 'side', as a solicitor would.

Ms A wanted to set clear contact terms between her daughter and ex-partner, despite a few years of erratic contact – where her ex-partner would take daughter and not return, or not come at all. Police and social workers were involved. She went to her local CAB office to seek help and was advised to try mediation before taking the matter to court. She is sceptical that the mediation process will work but feels she lacks other options due to financial constraints.

'I feel I will try anything to get this sorted out for my daughter, but I know my ex will just lie to the mediator. So it's just a case of waiting for it to break down again before I can go to court to get it all written down.' (MIAM client, children, publicly funded)

'Unclear' clients tended to have given little prior consideration to how to resolve their issue. They were usually uninformed about the family dispute resolution options available to them, and saw the MIAM either as source of general assistance and advice on how to deal with their problems, or, for some who had learned a little about mediation from a third sector organisation or broad internet searches, as a way to find out more about it. These clients tended to be unsure about their likely eligibility for Legal Aid; several were attending at the request of their ex-partner.

Mr B is in the process of getting a divorce and is suffering from depression. Consequently his soon to be ex-wife has initiated the legal proceedings for the division of their financial assets. Mr B had never heard of family mediation when he was invited to attend a MIAM initiated by the mediator. He decided to attend because he thought it was what he had to do in order to obtain a divorce so wanted to find out more.

'I wanted to understand the mediation process as the first letter didn't really give a lot of information ... it was just a case of, "well, as part of the process of the divorce, you've got to come as it's expected by the courts".' (MIAM client, finance, privately funded)

'Strategic' clients had varied reasons for attending a MIAM, but they typically wished to achieve resolution outside of mediation. It should be noted that it was common for clients in the sample to ascribe the actions and attitudes of this segment to their ex-partners rather than to themselves, so to some extent 'strategic' MIAM use reflects clients' (possibly inaccurate) concerns about the other party's motives as well as their own. However, there was a degree of consistency to clients' reports that gives credence to conclusions about this type of MIAM use.

One 'strategic' motive described for attending a MIAM was that appearing willing to mediate demonstrated 'moral high ground' that could be used as evidence or leverage in court. Another was to use mediation as a means to delay proceedings if the party in question was less willing to resolve the issue or was pessimistic about the likely outcome. Where only one of the parties qualified for Legal Aid, the paying client could feel the other party held a powerful position, as they felt no financial burdens and may 'drag' proceedings. Finally, clients may have attended a MIAM as part of the requirements of the PAP but were seeking an FM1 with the aim to resolve their dispute in court.

Ms B has been trying for several years to gain more contact with her son. She was recommended by her solicitor to attempt mediation with her ex-partner as it could lead to an agreement which was more positive for her and her son. She decided to attend the MIAM because she felt her ex-partner would never agree to mediation and she believed her attempt to negotiate would support her case in court.

'When we go to court we can say that we've tried mediation and it didn't work, so that's why I did it that way.' (Party to court proceedings, children, publicly funded)

Expectations of mediation and the role of the MIAM

'Engaged' clients had the highest expectations of mediation, and the strongest prior knowledge of it. They typically expected impartiality from the mediator and that their side of their 'story' would be heard. These clients often presumed mediation would be an effective means of resolving their issue more quickly and cheaply than court proceedings or solicitor

negotiation. In some cases, these clients erroneously believed that the mediation process itself could compel parties to accept a legally binding agreement.

It's common sense to at least try mediation before court with an unbiased referee. (MIAM client, children, publicly funded)

Mediation is more like going to the doctor's, court is like going to A&E. (MIAM client, children, privately funded)

Their expectations of the MIAM were already fairly optimistic, supported by a belief that mediation was an appropriate dispute resolution method for their case. In some instances, clients wanted to launch directly into the case at the MIAM.

It's a chance to speak, explain and get information ... to tell the history, then how it works, how it's paid for ... I wanted a chat to find out the best way of moving forward ... to look for easier options before things got heavy. (MIAM client, children, publicly funded)

'Compelled' clients were often sceptical that mediation could help them, tending to assume that legal representation was the preferable route for them. While they felt compelled to try mediation, which they perceived as their only option, they were not engaged with it as an effective means to reach a lasting resolution. These views were typically based on little knowledge of how mediation worked. Clients often hoped that the mediator could support them with their decision making and advise on how to put forward their side of the conflict, in lieu of a legal representative, rather than as an impartial party. This was driven by a desire for mediation to contain the financial and emotional toll of the conflict. Additionally, these clients were likely to voice some concerns that mediation attendance by parties was not legally enforceable.

As far as I could see, there weren't any options available for us that we would be able to afford anyway. (MIAM client, finance, privately funded)

Their scepticism that mediation could replace legal representation resulted in low expectations of the MIAM, and few questions for the mediator. Many were unsure whether it was for them to make a decision on whether they wanted to proceed with mediation, or if it was for the mediator to assess them for suitability. This group were also more likely to have concerns around their partner's willingness to cooperate with mediation. For mediation to

work, the MIAM therefore needed to persuade them that mediation was a viable, as opposed to cheaper, resolution method.

It lacked official-ness – I was worried there was nothing legally binding – nothing forcing him to go to the appointment. (MIAM client, financial, publicly funded)

There's a small but steady proportion coming through the website [who we see now for a MIAM] ... They go online, start looking for information and start looking for somebody. They are the angry group ... who want something done now but haven't been able to see a solicitor. (Practitioner, North West, for-profit)

'Unclear' clients held few assumptions about mediation. As with 'compelled' clients, they hoped mediation would support their decision making and offer emotional support in navigating the process of family dispute resolution.

I just did what my solicitor said, I had been having so many problems with seeing my kids that I was just looking forward to getting anything started that would help me see them again. (MIAM client, children, publicly funded)

They were unclear about the type of assessment that would take place at the MIAM and the importance of it to determine if the parties should proceed to mediation. They were fairly passive about the process and were typically seeking basic information about mediation and the role of the mediator.

I am just going to meet the mediator to find out why my ex has decided to try mediation. I think it's that she is trying to get money off me, so hopefully the mediator will tell me why I am there. (MIAM client, finance, privately funded)

'Strategic' clients' assumptions were largely around the legal element of mediation; that the agreements reached in mediation were not legally binding and that neither party is compelled by law to attend the sessions. There was also an assumption among some of these clients that mediation attendance served simply as a necessary hurdle before court proceedings could commence.

I'll give mediation a shot but it won't work like a court order will. But at least it will make me look good in court that I tried. (MIAM client, children, privately funded)

I am a realist, you just have to go the mediator to show that you at least tried but I know really that mediation doesn't work if you want to get things written down and enforced by law. (Party to court proceedings, finance, publicly funded)

They held the lowest expectations of what mediation could do for them, and were sceptical about the usefulness of the MIAM. Clients who believed the other party was using the MIAM dishonestly (did not intend to mediate) had concerns that the mediator would not pick up on this ulterior motive. In specific cases of acrimonious separation, parties could be intimidated or express discomfort with the notion of contact with the other party at mediation.

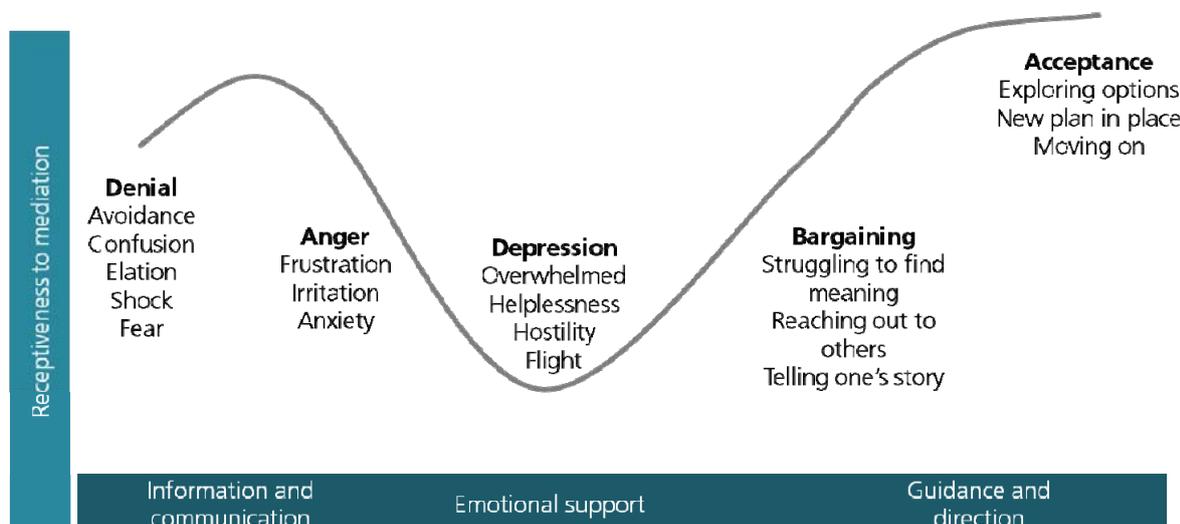
Other people have said it's a way to get money out of people. I was already paying for a solicitor...my partner was trying to slow it down. (MIAM client, finance, privately funded)

Context to clients' experiences

In addition to their position in the segmentation outlined above, clients were also at different points on their emotional and resolution 'journeys' when they arrived at the MIAM. Mediators considered this to be a significant influence on their readiness for mediation, and thus the potential effectiveness of mediation.

The 'emotional journey' was understood to be the 'five stages of grief' which parties experience after the breakdown of a relationship (see Figure 5.1) (Kübler-Ross, 2005). Mediators observed that clients were most receptive to mediation either early on in this journey or at a later point when they had accepted their situation.

Figure 5.1: Kübler-Ross 5 Stages of Grief Model



Mediators noted that the point at which a client arrived at the MIAM could impact on their decision-making process, and on the subsequent outcome of mediation. They acknowledged that it had always been the case that the two parties involved were often at a different stage in their grieving, which could complicate the shared experience of the MIAM and the 'readiness' of both individuals to cooperate. However, many reported that they had been seeing greater variations in clients' emotional stages at MIAMs since LASPO, and in particular a greater proportion of clients who were at less receptive stages, and were thus more challenging cases. They believed this may be because they were now seeing clients at earlier points on the journey when solicitors may have seen them pre-LASPO. These clients were particularly vulnerable immediately following relationship breakdowns, struggling to establish trust, and seeking somebody to support their point of view.

Practitioners felt clients' resolution journeys – their previous actions and attempts to resolve their issues – were also varying more since LASPO. At the point of attending a MIAM, some clients had already taken several actions to resolve the dispute, such as previous court appearances, mediation attempts, or extensive external involvement with social workers and/or the police. Other clients had had one other port of call such as a solicitor or another professional organisation such as a CAB before attending a MIAM. Finally, other clients had self-referred themselves to a MIAM after looking for assistance to resolve their dispute and coming across mediation from a personal recommendation or from their own search. As a result, mediators were seeing clients with a greater variety of experience, and therefore had to adopt a greater variety of approaches in response.

6. At the MIAM

This chapter outlines the MIAM's effectiveness in terms of its two key components: conveying information about family mediation and enabling assessment of suitability for mediation. It describes what conditions are required for the MIAM to fulfil these functions effectively and how mediators' approaches can diverge in their delivery of them. It then discusses the various outcomes of the MIAM when these approaches combine with clients' drivers to attend the MIAM.

The two functions of the MIAM: Information and Assessment

Mediators and clients agreed that the MIAM consists of two key functions: conveying information to clients about mediation so that they can decide whether mediation is for them; and assessing clients' suitability and eligibility for mediation on the basis of what they disclose.

More specifically, during the information element of the MIAM, clients needed to learn about the role of the mediator, the role of the parties in the mediation process and the mediator's approach to resolution, and to be able to use this information to decide whether they felt mediation was appropriate for them. The assessment component of the MIAM involved the mediator considering the financial evidence (e.g. bank statements, wage slips) and personal information that clients disclosed about their case, and using this evidence to determine if the client was entitled to Legal Aid and whether one/ both parties were suitable for mediation. MIAMs therefore needed to be a two-way process, with information and assessment taking place on both sides.

Discussions with mediators and clients highlighted that in order for the MIAM to fulfil both functions effectively, the following conditions had to be met:

- Both parties were open to considering mediation as a possible option for resolving their case.
- Both parties were at the right point in their 'grief' (as referred to in Chapter 5) to be either emotionally ready to consider a resolution or be able to take on board the information provided by the mediator, so that they could return when they were ready.
- The mediator had clearly explained circumstances when mediation could be inappropriate; for example, cases where a client suffered from a serious mental health condition, substance abuse or domestic violence.

- The mediator had conveyed their impartiality and used their empathy to draw out the full extent of clients' perspectives.
- The mediator had introduced and signposted clients to legal advice, counselling and other dispute resolution options, as an alternative or complement to mediation.

Format of the MIAM

The detailed format of the MIAM covered several key elements, usually in the following order:

- the opportunity for the client to tell their side of the story;
- the mediator provided information on how mediation works and set client expectations around potential outcomes;
- an assessment where the mediator screened clients for domestic violence and assessed their eligibility for Legal Aid.

Clients and mediators reported that the length of MIAMs varied greatly, from 30 to 90 minutes. Most clients considered the time they had had as being sufficient to cover the issues, and indeed where certain elements of the MIAM took longer than anticipated many mediators felt obliged to extend the session to achieve a thorough client assessment. This occurred where the Legal Aid assessment took longer than expected, where the client needed longer to tell their story, and/ or where the client took longer to absorb information.

However, not all mediators were prepared or able to extend the length of the MIAM, and in these cases both clients and mediators found that it was the assessment aspect of the MIAM (the discussion needed for the mediator to decide whether the clients are appropriate for mediation) that was compromised.

Creating the conditions for an effective MIAM

To create the conditions for an effective MIAM, mediators needed to build rapport and trust with clients, both to enable clients to share information on which to base the assessment, and to give them the confidence to reach a decision about whether mediation was right for them. Such conditions relied on mediators adopting an appropriate style and tone, and offering clients the option of dual or single attendance. These elements are explored in more detail below.

Style and tone

The mediator's style and tone was important in reassuring clients of their non-adversarial approach. In particular, the right tone encouraged clients who were seeking comfort, and who felt it provided a welcome contrast to the approach of some solicitors. Clients suggested the mediator's ability to demonstrate impartiality, warmth, empathy and trustworthiness in the MIAM impacted significantly on their ability to trust them and share information. For nervous clients, the lack of this tone could be decisive in their decision not to proceed on to mediation. Mediators often suggested that the use of these soft skills was necessary to manage high emotions during the MIAM, and could prevent discussions breaking down.

Dual or single attendance

The option for the MIAM to be carried out either jointly or individually was also found to impact on the MIAM's effectiveness in informing and assessing. Clients who attended a joint MIAM (with the other party) appreciated that this ensured they heard the same information. However, several felt having both parties present meant they were not given the space to tell their story, which could compromise the mediator's ability to assess their suitability for mediation.

Conversely, individually attended MIAMs allowed intimidated clients to gain confidence and establish trust with the mediator, and could then discuss personal feelings and ask questions. For intimidated clients, the mediator often offered to manage any settings where parties would interact outside of the mediation process, i.e. ensure they did not encounter each other in waiting rooms, and organising different arrival and departure times. However, despite their apparent advantages, single attendance or efforts to manage the mediation setting were not always offered to clients – either because the mediator had not considered this necessary for the client, or because it was not their usual practice. Rejection or early breakdown of mediation were often said to be most likely to arise where nervous clients attended dual-person MIAMs.

Approaches to carrying out the MIAM: Mediator variation

As outlined in chapter 4, mediators varied widely in their beliefs about what they could achieve through mediation and which clients they perceived to be appropriate for it. This resulted in differences in their 'offers' to clients. Clients were not aware of this variation, and even though some mediation approaches were better matched to some clients' needs than others, no clients considered alternative mediators. Thus the quality of the fit between mediator and client was somewhat 'luck of the draw'.

The most common area of variance in mediator approach was their views on the appropriate format of the MIAM and their willingness to manage different types of client needs.

Mr C went to a MIAM to find out more about how he could settle children issues with his ex-wife. As they were already in court proceedings over financial issues, he felt it would be more straightforward to explain the complicated nature of their dispute on his own to the mediator. He felt relieved and pleased that the mediator offered them the option of a separate MIAM.

'I just wanted to get my side of this story across, uninterrupted by my ex-wife. She can say what she wants to say to the mediator, and then we use mediation to talk about the difference in opinion surely?' (MIAM client, children, privately funded)

Ms C was asked to attend a MIAM by her ex-partner as he was asking to make arrangements to see their children after leaving her for another woman. When she received the request to attend a MIAM, she was under the impression that she was obliged to attend. She felt uncomfortable sitting in the MIAM with her ex and felt that she could not get her points across fully with him next to her. She believes that if she had an opportunity to discuss this alone with the mediator, she might have felt more comfortable with starting the process.

'I just sat there while he told her about what he wanted and she told us about mediation. But to be honest I couldn't contribute or say the truth about how betrayed I felt. I couldn't say while he was there that I did not want to do this mediation, I would have started another argument.' (MIAM client, children, publicly funded)

Mediators varied in their ability and/or willingness to manage power imbalances and emotional distress, with 'purist' mediators least inclined to work with clients deemed more challenging. Mediators also varied in the extent to which they used empathy, gave time to engage with those clients with higher support needs, and suggested legal support and counselling services as a supplement or alternative to mediation.

Information: factors influencing what clients absorb

At a MIAM, different 'types' of clients absorbed and acted on information in different ways, often according to their emotional state at the time. However, where key information was not understood, clients could risk making ill-informed judgements about how to proceed with their case. How the following information tended to be absorbed by clients is discussed below.

The impartiality of the mediator was superficially understood by all clients at the MIAM.

In particular, it was appreciated by clients choosing mediation instead of the legal process, those with confidence to debate with their ex-partner, and those who were expecting to reach a compromise agreement in mediation. However, the impartiality of the role was not always accepted or fully understood by the client, most commonly where they were still grieving the end of the relationship, felt uncomfortable to present their own position and/or were seeking someone to adjudicate in the dispute.

How the two parties could interact in mediation (through single or dual meetings and shuttle mediation⁵): When the mediator informed and prepared clients for either meeting format, most clients felt comfortable and clear about how the mediation would work. Where the option of shuttle mediation had not been offered, some clients reported feeling intimidated by the dual meeting and consequently chose not to proceed to mediation. Additionally, in mediation, the risk of unwanted contact with the ex-partner could arise where the arrivals and departures were not managed, which was off-putting for some.

The fact that **the mediator could not offer legal advice, and that the agreements reached at mediation were not legally binding**, tended to be understood but not absorbed by all clients at a MIAM. 'Compelled' and 'unclear' clients who were primarily seeking legal advice or further guidance at a MIAM, but tended to continue to mediation regardless, most often showed gaps in their understanding of mediation following the MIAM. Most importantly, clients who did not absorb this information and proceeded to mediation could become frustrated or disappointed when they realised that the agreements reached were not in themselves legally binding. It should be noted, however, that following agreement (and upon legal advice) agreements in relation to financial matters can be turned into orders by consent. Children arrangements, even if presented as agreed between the parties will still be scrutinised by the court with the focus being on the welfare needs of the child(ren).

Mediators' explanations that **both parties needed to voluntarily seek a resolution** in mediation were generally understood. Many clients found mediation's non-adversarial nature encouraging, though were not always clear that mediation could stop at any time if either party wanted. Clients described as 'strategic' were inclined to ignore this information, instead using their mediation attendance as part of an adversarial conflict. Further, 'compelled' clients tended to be most sceptical about the likelihood of success, even though they felt they had no other option.

Mr D went to a MIAM hoping to quickly resolve the financial issues surrounding his separation with his partner. Due to his distress about the separation, he felt that during the MIAM he lacked the emotional capacity to take in all the details about how mediation worked. He simply wanted to know when he and his ex-partner could start talking through the issues with the mediator.

⁵ Where neither party meets the other face to face; instead the mediator acts as a **'go-between'**, with the clients in separate rooms, but usually in the same building.

'When you have just separated from your wife of 14 years and you have two very young children and you have had to move out the house and you are missing your children everyday... you are not really remembering everything that the mediator is trying to talk to you about. All you care about is that the issue is going to be resolved.' (MIAM client, financial, privately funded)

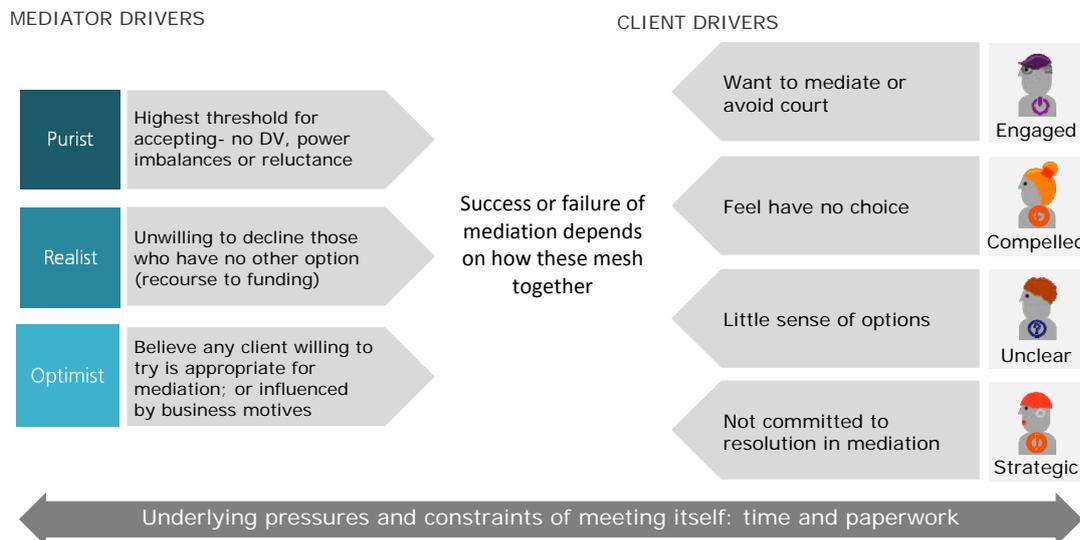
Mr E went to a MIAM having searched the internet for ways to settle contact arrangements for his daughter. After the MIAM he decided to persuade his ex to attend a MIAM as he believed that the neutral role of the mediator would be suitable for adjudicating a successful outcome for both himself and his ex-partner.

'The situation we have got into now cannot be handled by us alone, it needs mediation, someone impartial to help us. My ex and I can agree on this at least, since going to the MIAM.' (MIAM client, children, privately funded)

Assessment: the influence of client and mediator factors

As described in the sections above, mediators and clients both brought a variety of drivers to the MIAM, summarised in Figure 6.1. At the MIAM, the combination of mediator and client type, alongside the constraints of the meeting itself, had a strong impact on how the MIAM was conducted, and whether the case converted to mediation.

Figure 6.1: The influence of mediators' and clients' individual factors at a MIAM



For some combinations of client and mediator, the MIAM was more likely to be effective in informing and assessing than for others. Figure 6.2 shows how the various combinations of client and mediator drivers could come together. 'Purist' mediators were most likely to dissuade or reject clients described as 'compelled' and 'unclear', as they did not want to accommodate their needs or motivations. Conversely, 'optimist' mediators were most relaxed in their approach to assessing and informing clients, with possible negative outcomes.

Figure 6.2: How mediator and client drivers can play out in the MIAM

	 Engaged	 Compelled	 Unclear	 Strategic
 Purist	Few barriers, few concerns	Mediator may make few accommodations to prepare reluctant clients; may decide not to proceed.	Client assumes purpose of MIAM is to inform; may be put off by mediator's stringent assessment questions.	(Few examples in this sample): in theory would reject these cases
 Realist	Few barriers, few concerns	Client may accept mediation as a given; mediator wants to help and may relax assessment criteria.	Few barriers, few concerns	Mediator may be inclined to 'work with' the case, despite chances of leading to court or causing delays.
 Optimist	Few barriers, few concerns	Client may not be clear on limitations; mediator may not dig deep enough to expose potential issues.	Mediator may 'sell' without informing client of other non-mediation options. Client may not make the right choice.	Mediator may believe they can handle power dynamics and perverse motivations

'Optimist' mediator and 'compelled' client

'I think it might have been easier [to attend on my own] as there were some contentious things that he didn't want to answer in front of me and it seemed to be dragging things up that were either upsetting him or it was upsetting me. But we went ahead anyway because it was our only option.' (MIAM client, financial, publicly funded)

'Realist' mediator and 'engaged' client

'This seemed a more personal service; you could sit down in comfort and discuss things if you can still do that with your partner, then they would draw up all the paperwork to hand over to the solicitor for the final push. It just felt a more pleasant way of doing it, and it's already a very stressful time anyway ... it sounded a more relaxed way of doing it.' (MIAM client, financial, publicly funded)

'Purist' mediator and 'unclear' client

'At the start ... she looked like quite a harsh lady, but by the end I was convinced that she knew [what she was doing], she was nice, took notes and listened to me.' (MIAM client, children, publicly funded)

'Purist' mediator and 'compelled' client

'When you go to a solicitor the solicitor is on your side, I'm assuming you go to a mediator they are neutral ... I can't say they are neutral all I know is they weren't on my side ... it felt very cold, I'm very emotional in relation to my situation.' (MIAM client, financial, privately funded)

Outcomes from an effective MIAM

At the MIAM, success in fulfilling the information and assessment functions for both mediator and client led to a number of outcomes:

- The mediator set clients' expectations with caveats around the estimated cost and length of mediation.
- Clients understood and accepted the limitations of mediation before continuing, for example that outcomes were not legally binding unless a court makes an order in the terms of the mediated agreement.
- The power relationships between the two parties were fully explored and understood by the mediator in advance of mediation commencing.
- Conditions were managed to ensure all clients were confident and felt comfortable with the mediation arrangements, for example offering separate waiting rooms and shuttle mediation.
- A clear comprehension of the mediation process was achieved by both parties.
- Both parties believed they had the chance to have their side heard.
- All forms of mediation and other dispute resolution available were explained to the client, including those that may not be offered by that organisation such as collaborative law, other styles of mediation practice, and solicitor negotiation.

7. After the MIAM

This chapter describes the various client routes after a MIAM: mediation, court and other pathways. For those who proceeded on to mediation, it outlines their ensuing experiences and outcomes. For those who did not go on to mediation, the section explores the reasons underlying this. It then explores the various outcomes for clients who did not proceed to mediation – in particular, the motivators and drivers of court parties.

Client routes after a MIAM

Most clients in the sample who attended a MIAM proceeded to mediation. The main reason for not proceeding was non-cooperation by one person, or where a client was waiting for the other party to attend a MIAM.

The impact of the MIAM on clients' decisions about whether to proceed to mediation depended on the degree of information they required and their openness to mediation. The MIAM had very little influence on the decisions of those with pre-existing clear expectations and a clear desired outcome ('engaged' and 'strategic' groups). The MIAM had the greatest influence on the decision of those clients with less clarity on the decision that they wish to reach at the MIAM ('unclear' and 'compelled' groups). However, explaining mediation to the 'compelled' group who felt they had no choice but to mediate was uncomfortable for mediators who did not feel that this was the spirit in which they would classically expect to engage mediation clients. In this research, mediators observed greater proportions of 'compelled' and 'unclear' clients in their caseload when compared with the pre-LASPO experience.

The motivations of those who proceeded to mediation varied considerably. For 'engaged' clients already convinced of the value of mediation, the MIAM was simply the first stage for them in the mediation process. 'Compelled' clients decided to proceed with mediation because they felt that they did not have any other dispute resolution option.

Additionally, 'compelled' and 'unclear' clients often proceeded to mediation because the MIAM had increased their confidence in the usefulness of the process.

'Strategic' clients often decided to start with mediation after the MIAM, fully expecting that discussions would break down and they would end up in court proceedings. However, this applied to only a small number of individuals in the study.

Despite these clients' decision to continue to mediation, there were various constraints on their decision-making process. Those who were dissatisfied with the individual mediator did not consider consulting another mediator, despite the importance of the quality of this relationship to the later success of mediation. Although the MIAM covered what mediation could and could not do, some clients (and mediators) saw no other option than to deal with their dispute through mediation, so they proceeded regardless. This was of particular importance for clients on low incomes with no recourse to Legal Aid funding. More generally, this was not a rational decision-making process for many clients. Given the conflict between the individuals, many decisions were taken in reaction against an ex-partner's suggestions or wishes.

That was one thing me and my ex agreed on. The mediator was awfully patronising and made us feel so small. But we went ahead with it, as this was the only obvious way for us to get the house issue sorted out. We didn't want to go to court or anything like that. (MIAM client, finance, privately funded)

Clients' experiences and outcomes of mediation

The original drivers for mediation and the effect of the 'stages of grief' were often in evidence during the mediation process and influenced the outcomes that clients achieved. The typical outcomes for each client 'type' are described below.

'Engaged' clients tended to be most satisfied with their experience and reached mutually accepted outcomes through mediation. However, for those who had held expectations of rapid resolution, these were sometimes disappointed unless the mediator had set clear time and cost expectations from the outset. In addition, clients did not always anticipate what would unfold. Several 'engaged' clients described beginning mediation believing there was a small or discrete issue to address, but found discussions revealed additional complications with higher time and emotional costs than expected.

'Compelled' clients were typically satisfied with the mutual agreements reached in mediation. However, where clients did not reach agreements, they felt this vindicated their initial concerns about depending on cooperation of a partner, rather than an adversarial or litigated route to resolution. Additionally, if agreements made through mediation broke down, clients became frustrated at the lack of power to enforce them.

'Strategic' clients were more often recurrent returners to mediation. The agreements reached were more likely to break down due to one partner's lack of commitment to a lasting resolution.

'Unclear' clients tended to have their aims and needs clarified during mediation. However, confusion arose where clients believed there had been a lack of transparency in how decisions in mediation were made – in some cases, where they had not gained a full understanding of the mediation process through the MIAM.

Reasons why clients do not proceed with mediation

Non-attendance or rejection by one party was the principal reason for non-conversions from MIAMs to mediation. Typically, one party wanted to mediate and the other was deemed to refuse for a range of reasons, which could be one or a few of the following:

- They were not emotionally ready to start the dispute resolution process, most likely due to the different stages of grief they were at. In some cases, one party reacted against an ex-partner's request as they were unwilling to accept a suggestion from them.
- They did not believe that mediation was the right way to seek dispute resolution, sometimes due to the desire to commence court proceedings. Here, clients often felt they would lose ground (custody of children and/ or finances) by 'delaying' the process of resolution, perceiving court to be a faster route.
- One party was unwilling to pay for the mediation process, or one party had Legal Aid funding and the other did not, creating tensions. Establishing the best conditions to encourage cooperation was a key challenge to clients and mediators.

I thought mediation could work, we could just sit in a room and talk it out. Get rid of all the hurt and the anger. But he didn't even respond to my solicitor's letter about it as there was no power or force in it. (Court client, children, publicly funded)

Court parties: motivators and drivers

Court clients reported variations among courts, court staff and judiciary in their attitudes towards mediation, which had some effect on clients' decisions. Clients at court varied a great deal in the time they had spent seeking to resolve their issue, and in their reasons for choosing the court route. Most felt sure that a court order was necessary for their case,

though in a few instances clients felt mediation would have been appropriate had they been offered it. Within this, an additional group were unaware of mediation, having not been offered information about it either in court or by their solicitor.

Parties whose cases went straight to court typically did so because they felt the issue was too complex to be dealt with elsewhere, for example in mediation or solicitor negotiations. These issues included cases where clients saw court orders as necessary to ensuring compliance, such as those requiring full financial disclosure or where there were child custody issues and police involvement.

Court had sometimes followed an unsuccessful MIAM, where one or both parties had refused to cooperate or mediation had been deemed inappropriate by the mediator. Examples included cases where there was a lack of trust between the two parties to proceed with mediation, or the mediator deemed the financial intricacies of the case too complex.

Finally, clients went to court proceedings following mediation, where discussions or the agreements reached had broken down. 'Strategic' court clients had seen this path as inevitable, having attended mediation with the intention of appearing in court. This analysis will be developed in phase 2 of this research, following a review of 300 court case files (see Figure 3.1).

Mediation broken down

Mr F went to mediation with his ex-wife to settle contact arrangements for their children. He was keen to settle the issue as he felt that he could not afford court and wanted to resolve the issue as amicably as possible. His wife walked out of mediation halfway through the session, leaving Paul with the mediator. He was disappointed that the mediator did not signpost him to any other form of assistance to settle the dispute. He soon became the respondent, representing himself in court to settle the issue.

'The mediator didn't give me any next steps or anything, just said I can't talk to you because she's not here now, and she walked out, and I was left there simply dumbfounded.'
(Court party, children, privately funded)

Would have liked a MIAM

Mr G paid reduced child maintenance for a number of years, with no formalised variation agreed; though he said he was not aware of this. He received a court order to pay £10,000 in arrears, first hearing of this when papers from the justice department came through. He had four days to prepare for appearance in court, which he found humiliating. He would have loved the chance to discuss the issue through mediation, though this was never mentioned. He felt his ex-wife would have been open to this if a MIAM was introduced and arranged through a solicitor, rather than coming from him.

'I would have liked to thrash things out and come to a compromise. I would have considered it, but events overtook me ... with hindsight it could have been far less stressful.'

(Court party, financial, privately funded)

Unsuccessful MIAM

Ms D was advised by her solicitor to try mediation first before taking her ex-partner to court to settle residency issues over the children. Her ex-partner had already taken her to court twice to get residency of the children, but was refused due to his alcohol problems. She found the mediator's advice on how to deal with the situation on an emotional level very helpful, but she was advised mediation would not be appropriate. Jane appreciated the mediator's advice but was regretful that mediation was inappropriate because she believed it would have been less distressing than court.

'They feel like you're attacking them because you're going through court, when you're just trying to do your best because there's no communication between us ... mediation would be talking more and trying to get your views across and get an understanding...' (Court party, children, publicly funded)

Straight to court

Mr H took his wife to court to get a court order for full financial disclosure and ensure that he got financial instalments from her to complete the building of a house they had started together. He had been advised by his solicitor that the judge would set a timetable for financial instalments from his ex-wife. Although they were in mediation over contact arrangements for their children, he believed that due to the complicated financial nature of the house and his and wife's positions on the matter, a court order would be appropriate.

'We have a half-finished house that has been built, so mediation just isn't going to fly as there are such large amounts of money involved. We are polar opposites about who is going to pay for the rest of the house, so we need the law to get involved.' (Court client, finance, privately funded)

8. Conclusions and policy implications

These qualitative research findings suggest that the landscape within which MIAMs and mediation operates has changed substantially since the introduction of LASPO, and that issues which may have predated LASPO may now be more pronounced. It is suggested that now:

- fewer clients are presenting at MIAMs;
- the clients who do present are more diverse, exhibiting a wider variety of circumstances;
- a greater proportion of clients are more challenging propositions for mediators;
- mediators vary more in their willingness to take on these 'more challenging' clients and offer different approaches; and
- clients are not aware of the increased variation in mediators' approach.

The mediators interviewed attributed this to the fall-off in solicitor referrals, and the fact that mediation is not top of mind as a family resolution approach. This has important implications for communications about MIAMs and mediation, and for what MIAMs need to achieve if they are to maximise conversion to effective mediation. These are summarised below.

Increasing throughput

Most clients' first thought when considering dispute resolution methods had been to go to a solicitor; mediation was not top of mind, or indeed something all clients were initially aware of. Pre-LASPO, this meant solicitors were the key referral route to mediation, playing both a signposting and filtering role as discussed above. Post-LASPO, clients need to be signposted to MIAMs in other ways, and MIAMs and mediation need to become more top of mind and accessible. Existing Ministry of Justice and mediation firms' communications plans should ensure that:

- early, public-facing communications inform people about mediation, accessed through a range of services and settings to reflect the range of routes taken by clients: for example, schools, GPs, CAB and other charities, local authorities and other government agencies such as Jobcentre Plus, and relevant internet searches
- communications to professionals elsewhere in the dispute resolution sector explain and represent mediation consistently, to increase these professionals' confidence in referring or signposting clients to mediation.

Addressing diversity

The impact of the MIAM in influencing clients' decisions on whether to proceed with mediation depended on how clear clients' expectations and/or understanding of mediation already were, and how open they were to considering mediation as an option. Clients' motivations for attending MIAMs varied widely. Some were engaged with and chose mediation; some felt compelled to attend in the absence of other options; some used the MIAM strategically as a gateway to other resolution methods; and some were unclear about their options, having given dispute resolution very little thought. Mediators' reports in this research suggested that 'unclear' and 'compelled' clients accounted for greater proportions of caseloads since LASPO. This places a greater onus on the MIAM to provide information that allows 'unclear' clients to decide whether mediation is for them, and 'compelled' clients to give mediation a fair hearing. Mediators could be assisted in this by upfront communications which explain what mediation is and can offer, as above. There is also likely to be value in considering:

- differentiating the MIAM from mediation (it is often conflated or confused with mediation in clients' minds) so that clients understand what it does, what it involves, and that it is not necessarily the first stage in mediation
- encouraging mediators to adapt their skills and approaches to delivering MIAMs to meet these different needs
- an endorsement from the Ministry of Justice of the MIAM as a recognised first port of call for individuals seeking to resolve their issues
- signposting to other supplementary or alternative services (such as legal advice and emotional support) which acknowledge clients' other needs during this time, so that they do not approach the MIAM expecting to receive these services.

Variation in mediator approaches

Mediators' perceptions of which clients are 'appropriate' for mediation varied widely, with some being more willing than others to take on challenging cases. Their approaches to mediation and MIAMs also varied. Both aspects of a mediator's 'offer' depended on their views of what clients need and/or their beliefs about their abilities to manage such cases. Clients of all types were typically unaware that these differences in mediators' 'offer' exist. As a result, their experience of MIAMs appeared to depend somewhat on the 'luck of the draw' – whether or not their particular situation and needs aligned with what the mediator they saw offered.

Variation in mediation approaches is not necessarily a problem in itself, but it does mean that:

- communications need to acknowledge this variation in practice and make clients aware of what their options are: most importantly, that certain mediators offer shuttle mediation and take on higher conflict relationships, that some mediators may be more suited to their needs than others, that they are free to choose other mediators if they wish to, and that in the event of failure it is worth trying again with a different mediator
- mediators need to state more clearly what their distinct offer is, in other words whether they offer single and/or dual meetings and/ or shuttle mediation and how this compares with other mediators, emphasise that agreements reached are not legally binding; to enable clients to learn about mediation and then make an informed choice.

Effective assessments

The MIAM serves two functions: to inform and to assess clients. As noted above, this research suggests that the MIAM is now more crucial in shaping clients' decisions, and needs to work hardest to inform and/or persuade clients who are 'unclear' or 'compelled'. This explanation takes longer in some MIAMs than others, as does the work the mediator needs to do to assess eligibility for Legal Aid. Where more time is needed, MIAMs are sometimes extended, but this does not always happen and in these cases it seems to be the assessment component that is most likely to be compromised. In conjunction with this, some mediators seem to assess more rigorously than others as a matter of course. It is important that 'adequate' assessment of clients takes place to ensure that clients receive the services to which they are entitled. This could perhaps be achieved by:

- emphasising to mediators the importance of taking time to properly assess clients
- reminding mediators about what constitutes a proper assessment, and their obligation to adhere to this.

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