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## Reframing the Mediation Debate in Irish All-Issues Divorce Disputes: From Mediation vs. Litigation to Mediation and Litigation

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**RESEARCH ARTICLE**

**Reframing the mediation debate in Irish all-issues divorce disputes: from  
mediation vs. litigation to mediation and litigation**

Deirdre McGowan

## Abstract

Mediation currently plays a minor role in the Irish family justice system, yet a policy consensus exists that more couples should be encouraged to mediate and that increased rates of mediation will reduce the numbers seeking redress through the courts. The recently published Mediation Act 2017 adopts this position, assuming that the provision of information on mediation will increase uptake and that mediation offers an alternative to litigation for most civil disputes. This article reviews attempts in Ireland, England and Wales to encourage family disputants to mediate, identifying weaknesses in the information strategy. It also examines the legal framework governing all-issues divorce and dissolution in Ireland, pointing to the limited potential for mediation to act as an alternative to litigation. It concludes by arguing that policy focus must shift away from encouraging mediation as an alternative to litigation toward a more nuanced understanding of mediation as a support to court based dispute resolution.

Keywords: Mediation, Ireland, Divorce

## Introduction

Mediation has formed part of the legal framework governing all-issues separation and divorce in Ireland since 1989 and family mediation services have been provided free of charge by the state since 1986 (Conneely, 2002, p.1). Nonetheless, uptake of mediation among family law disputants remains low. Just over 1,500 couples attended first mediation appointments with the state-funded Family Mediation Service in 2015 (Legal Aid Board, 2015, p. 34). A further 1,603 individuals attended a court based mediation session (Legal Aid Board, 2015, p. 34). To put these statistics in perspective, the Courts Service Annual report

for 2015 records a total of 5,852 marriage law applications, and 29,582 additional general family law applications, excluding those relating to domestic violence (Courts Service, 2016, pp. 44-46). There are no available statistics for private family mediation and in the absence of specific Irish research mapping pathways through the family justice system the extent to which couples engage with mediation outside state provision is unclear, but it seems likely that, as in other jurisdictions where mediation is optional, it is a relatively small part of the family dispute resolution process (Barlow, Hunter, Smithson & Ewing, 2014, p. 6; Bastard, 2010, p. 139).

This limited engagement with mediation is seen as problematic by policymakers and commentators who conceptualise mediation as an alternative dispute resolution process with the capacity to direct potential litigants away from lawyers and the courts (Coulter, 2009, p. 119; Conneely, 2002, p. 87). Introducing a Mediation Bill, which applies to most Civil Disputes, to the Dáil in 2017, the Minister for Justice and Equality identified its objective as the promotion of mediation as ‘a viable, effective and efficient alternative to court proceedings.’<sup>1</sup> The presumed advantages of mediation in family disputes are well documented, but as noted by Hazel Genn, these benefits are generally expressed in opposition to the disadvantages of litigation (Genn, 2010, p. 196) giving rise to the now entrenched policy assumption that mediation is an *alternative* to lawyers and litigation. For example, the Law Reform Commission in its 2008 *Consultation Paper on Alternative Dispute Resolution* refers to mediation fostering co-operation, autonomy, cost savings, durable agreements and privacy in contrast to the legal process which creates friction, professional control, higher costs, less durable solutions and less privacy (Law Reform Commission, 2008, pp. 175-176).

Policy efforts to increase the uptake of mediation in family disputes have focused on the targeted provision of information on mediation and its advantages to potential litigants. The Law Reform Commission In its 2010 report on Alternative Dispute resolution, noting that mediation is 'underutilised in this jurisdiction in resolving appropriate family law disputes' (Law Reform Commission, 2010, p. 106), recommended mandatory mediation information sessions for intending family law litigants as a way to increase participation (Law Reform Commission, 2010, p. 108). Reflecting this recommendation, the Minister for Justice and Equality announced in 2016 that a forthcoming Mediation Bill would require parties wishing to initiate legal proceedings in family law matters to attend a meeting where they would be provided with information on mediation and its advantages.<sup>2</sup> The Mediation Act 2017 rows back from this commitment, instead making reference, at section 23, to a scheme for delivery of (non-mandatory) sessions to family law disputants which may include provision for information on 'the benefits of mediation over court-based resolutions in respect of the relevant dispute.' In addition, section 14 provides that a solicitors acting for the applicant in a civil dispute must 'advise the client to consider mediation as a means of attempting to resolve the dispute' and provide them with information about the 'advantages of resolving the dispute otherwise than by way of the proposed proceedings.' Some family disputes were removed from the application of this section at Committee stage in favour of an amendment to similar, less directive, obligations imposed on advising solicitors by the Judicial Separation and Family Law Reform Act 1989, the Family Law (Divorce) Act 1996 and the Guardianship of Infants Act 1965. These provisions require solicitors acting in the taking or defending of proceedings under those Acts to discuss with their client the possibility of engaging in mediation to resolve their dispute. The committee stage amendment to the 2017 Act will also require solicitors to provide information in

relation to the confidentiality of mediation, the enforceability of agreements and to complete a statutory declaration confirming the information was provided. Section 14 of the 2017 Act, however, remains applicable to child and spousal maintenance disputes. Information meetings may have been largely abandoned, but the obligation on solicitors to promote mediation has been re-enforced.

The rationale for the dilution of the mandatory information proposals in the 2017 Act is not clear, but it seems likely that considerations around the cost and practicalities of delivering information sessions to more than 35,000 family law applicants per year were significant factors (Courts Service, 2016, pp. 43-48). There are currently no court fees for family law applications and it would be politically difficult to introduce a charge for a mandatory element of the family justice system. The full cost of mandatory mediation would therefore fall on the state. Further, there are just 202 available and registered family mediators in Ireland, many of whom are already employed by, or contracted to, the Family Mediation Service.<sup>3</sup> A significant increase in the number of trained family mediators would be necessary to meet demand for mandatory sessions. Nonetheless, the 2017 Act demonstrates the extent to which government policy continues to conceptualise mediation as an alternative to litigation and information provision prior to the issue of court proceedings as an effective way to divert more litigants away from the courts and into mediation. The Legal Aid Board, the largest provider of family legal services in the state, has a more nuanced understanding of the relationship between mediation and litigation, referring to mediation as an alternative to 'contested court cases' and to the potential for 'synergising' the board's legal and mediation services (Legal Aid Board, 2016, p.13). Nonetheless, little has been done to articulate this understanding in practice and the Board, like the government, continues to pursue a policy of increasing participation in mediation

outside the framework of litigation and legal advice through the provision of information on the advantages of mediation.

This article aims, in the context of Irish all-issues divorce disputes,<sup>4</sup> to challenge the proposition that provision of information on mediation will encourage more people to mediate and the assumption that mediation can provide an alternative to litigation. First, it reviews experiences with information provision in Ireland, England and Wales which demonstrate that providing information on mediation to family disputants does not lead to a meaningful increase in uptake. Second, it outlines how the shape of Irish divorce law makes it almost impossible for mediation to act as a substitute for lawyers and litigation, even where spouses are willing to both mediate and to reach agreement. In conclusion, it suggests that policymakers need to adopt a more nuanced and realistic understanding of the potential role of mediation in supporting dispute resolution for all-issues divorce cases.

### **Providing Information on mediation – Ireland, England and Wales**

The Irish Legal Aid Board provides publically subsidised legal advice and assistance on a means tested basis, principally through its national network of directly employed solicitors, and is the largest provider of family law services in Ireland. It currently operates pilot schemes at some of its centres requiring those seeking legal assistance in certain family law matters to attend a mediation information meeting before being issued with a legal aid certificate. Potential clients presenting themselves at law centres are sent to an information session with a mediator and must return with a certificate of attendance in order to progress their case. The pilots have had limited success in diverting clients to mediation. For example in Cork, 176 information sessions were held in 2015 but just 42 first joint mediation sessions were attended with 33 agreements reached (Legal Aid Board, 2016, pp, 38-39). No

detailed analysis of the pilots has been undertaken with no available information, for example, on the nature of the disputes referred to a mediator or whether those who begin, or indeed complete, mediation following information meetings later re-enter the legal aid system. With such limited data, it is difficult to draw any conclusions regarding the efficacy or otherwise of information provision in encouraging attendance at mediation or directing individual clients away from the courts. The rate of agreements reached at mediation is high; 78% of the Cork group who attended mediation reached an agreement. Undoubtedly mediation is an effective dispute resolution process for some disputes, however as the experience in England and Wales demonstrates providing information to all disputants is an inefficient way to identify suitable disputes and, as discussed further below, reaching agreement at mediation does not necessarily mean that litigation has been avoided.

More comprehensive, and better resourced, pilots of information sessions and publically funded mediation were undertaken in England and Wales following the enactment of the Family Law Act 1996. This legislation committed public funds to family mediation services and the relevant sections were piloted prior to full implementation. Section 29 of the Act required applicants for legal aid in a family law related matter, with limited exceptions for cases involving domestic violence or child welfare, to attend a mediation information meeting before being granted a legal aid certificate. The objective of s 29 was to encourage more people to use mediation and consequently reduce dispute resolution costs (Bevan, 1999, p., 411). Whilst the s 29 requirement did have an impact on the number of cases referred to mediation, in his evaluation of the pilots, Gwynn Davis noted that there had been no corresponding fall in the number of legal aid certificates issued (Davis, 2001, p. 371). By way of explanation, Bevan and Davis suggest that the availability of publically funded mediation may have 'sucked in' cases not otherwise

requiring significant legal input (Davis & Bevan, 2002, p. 177). As there is a large demand for family legal services, the system will continue to process cases to its full capacity. The numbers redirected to mediation would need to be substantial to have any impact upon this demand. In addition, for cases where mediation was used and a legal aid certificate subsequently issued 'the impact of mediation on legal costs was not significantly different from zero' (Davis, 2001, p. 14). Davis also found that those compelled to attend a meeting were less enthusiastic about mediation than those who attended voluntarily, that many of those who attended meetings remained unclear about what was being offered, and that as a general proposition mandatory referral to mediation at the point of seeking legal help is not an effective means of securing a legal settlement (Davis, 2001, p.19).

Questions regarding the efficacy of information provision were also raised by pilots of section 8 of the Family Law 1996 Act. As enacted (the section has since been repealed), section 8 required applicants to attend an information meeting during the three months prior to petitioning for divorce. A respondent seeking ancillary orders in relation to finance or children was also required to attend a meeting. The information to be provided was specified in the Act and included the availability of counselling, the importance of children's welfare, and availability of legal advice, legal aid and 'mediation' (section 8(9)). Part of the pilot's objective was to determine the most effective way to deliver the necessary information and it was not conducted with a view to 'selling' any particular approach to dispute resolution (Walker, 2001, p. 413). Nonetheless, success in directing attendees at information meetings to mediation became one of the measures by which the success of the pilot project was measured. In 1,800 follow-up telephone interviews with information meeting attendees five to seven months after attendance just seven percent had used a mediation service since attending the meeting, and a portion of these had only

attended one mediation session. One in three indicated that they might attend mediation in the future, but the majority of those interviewed indicated that they had no intention of going to mediation (Walker, 2001, p. 414). The reasons people gave for not trying mediation were varied, but generally very practical, such as a spouse's refusal to attend, fear of intimidation or that it was just not necessary. The report concluded that '[c]learly, information meetings did not divert people into mediation in any major way.' (Walker, 2001, p. 431).

Despite the results of these pilot schemes, section 29 of the 1996 Act was re-enacted in the Access to Justice Act 1999 and subsequently a 2011 Pre Application Protocol for Mediation Information and Assessment required all intending family law litigants to provide evidence of attendance at a MIAM before they could issue proceedings in a private family law dispute. In both circumstances, exemptions existed for certain types of disputes such as those involving domestic violence. Not satisfied with encouraging litigants to explore the possibility of mediating before embarking on a court process, the government, in a particularly harsh austerity measure, removed legal aid for legal advice and representation in all private family law matters from April 2013 (Legal Aid Sentencing and Punishment of Offenders Act 2012, LASPO). Despite the strong emphasis on mediation in the statutory framework, and withdrawal of legal aid for most private family law matters uptake of mediation among the separating and divorcing population in England and Wales remains relatively low. Indeed, attendance at MIAMs has declined by 50% since 2012, and despite being the only state-funded dispute resolution available to many, the number of couples attending initial mediation meetings is also significantly less than was the case pre-LASPO (Ministry of Justice, 2016, Table 7.1). A Family Mediation Task Force, reporting in 2014, blamed the low uptake of mediation following LASPO on a lack of awareness among the

general population of the advantages of mediation, a failure to appreciate that it was available on legal aid, and the inability of stressed, separating couples 'to make rational decisions' (Family Mediation Task Force, 2014, p. 12) They noted that most publically funded clients had previously been directed to an information meeting by a solicitor on foot of section 29 of the Family Law Act 1996. With the removal of state support for legal advice and assistance in family law matters, state funded clients did not meet with a solicitor who could provide a referral, and were not finding their own way to information meetings. The Task Force recommended more effective communication of information regarding the availability of meetings and mediation so that the divorcing public might make 'better decisions about how to separate' (Family Mediation Task Force, 2014 p. 13). The subsequent provision of additional information streams, telephone helplines and publicity since LASPO has not, however, reversed the decline in numbers attending mediation or information meetings. This should not have been a surprise; there is little evidence that mediation on its own can resolve private family law disputes, and as mentioned above, the 1990s pilot programmes demonstrated that mediation is not a generalizable substitute for court based processes. In the event, as predicted by mediators (Parkinson 2013) and suggested by previous experience (Davis 2011), LASPO did not encourage more mediation, rather it precipitated an increase in the number of cases before the courts in which parties do not have legal representation (Ministry of Justice 2016, p. 13) and in more applications for legal aid citing the presence of domestic violence or child abuse (Ministry of Justice 2016, p. 35). The former group are required to attend a MIAM in any event, the latter are not, and will receive publically funded legal assistance subject to compliance with relevant assessment rules. Thus, neither direct compulsion by the pre-application protocol (subsequently given statutory force by section 10 of the Children and Families Act 2014), nor indirect pressure

*via* LASPO has resulted in increased attendance at MIAMs or mediation (Hunter, 2017, p. 190; Barlow et al, 2017, p. 78).

Recent qualitative research by Barlow, Smithson, Hunter and Ewing endorses the view that the drop in information meeting attendance following LASPO was the result of legal aid cuts, noting that individuals in dispute with their former partner or spouse conceptualise their difficulty as a legal one and see solicitors as the appropriate professionals to consult (Barlow, et al, 2014, p. 5; Barlow et al, 2017, p. 78). Most respondents in this research did not distinguish between an information meeting and mediation and, as the Legal Service Commission statistics indicate, when legal assistance is not available, many do not see mediation as a viable alternative, instead finding other ways to resolve (or live with) their difficulties. The collapse in attendance at MIAMs following LASPO presents a challenge to the assumption that these meetings can act as a gateway to increased mediation: a significant proportion of the divorcing and separating population will not voluntarily attend a meeting, even when no alternative professional assistance with resolving their dispute is available. Whilst it is possible to dismiss non-attendance as reflecting ignorance or irresponsibility, Barlow *et al* in their representative survey found that 44% of the general population in England and Wales and 65% of the divorcing population had heard of mediation. Nationally 47% of couples separating or divorcing between 1996 and 2011 sought no legal advice in relation to their situation and 1% went directly to mediation (Barlow *et al*, 2014, p. 4). Lack of knowledge cannot therefore provide a complete explanation for failure to attend; 65% of the target group knew about mediation whilst only 1% actively used it. Among those offered mediation who did not take it up, Barlow *et al* report the most common reasons as an ex-partners refusal to co-operate, inability to communicate with an ex and fear of violence and abuse (Barlow *et al*, 2014, p, 6). Individual

family members may at times behave ‘irrationally,’ may not consider, or may reject mediation for spurious reasons. Nonetheless, even when presented with no alternative, many people have very valid reasons for rejecting mediation for their particular dispute. As mediation information sessions are often conflated with mediation in the minds of the public, similar considerations will stop them volunteering to attend free session. In the absence of a specific referral to an information session by a legal advisor or court, family disputants, as the experience in England and Wales demonstrates, will often not attend a free information session.

The Irish government’s strategy of promoting mediation via solicitors engaged by family disputants has the advantage of ensuring that clients receive at least minimal legal direction before being provided with information on mediation. However, most family litigants, particularly in child custody and maintenance applications, are unrepresented and the system established by the 2017 Act provides no mechanism to provide legal advice or mediation information to these litigants. The existing information system has been in place since 1989 and the limited uptake of mediation among family litigants evidences its inefficacy in promoting mediation. The experience in England and Wales suggests that a more directive approach is similarly unlikely to increase participation in mediation.

### **Is mediation an alternative to litigation in all-issues divorce/dissolution disputes?**

Providing information at the point of entry to the family justice system is thus not an effective way to increase the number of family disputants attempting mediation, but even for those who do attempt it, mediation is not an *alternative* to litigation and lawyers. Commentators have repeatedly pointed out that mediation cannot entirely replace lawyers and litigation in the family justice system (Barlow et al 2017, 211; Barlow, 2017, p.204; Genn 2010; Hunter 2017; Parkinson, 2013). Indeed, the removal of legal aid for representation in

family law matters in England and Wales has led to a dramatic increase in self-represented clients in the family law courts, not a rush to mediation (Hunter 2017; 198). The mediation industry in that jurisdiction has framed this outcome as a failure by government and lawyers to change a litigation focused culture. Rosemary Hunter, on the other hand, characterises the continued promotion of mediation as a failure to apply the logic of the market to mediation services; consumers remain indifferent to the 'brand' of mediation, yet government continues to prop up the sector (Hunter 2017; 199). In context of Irish all-issues divorce law, the lack of interest in mediation is not only a matter of government policy clashing with consumer choice. Mediation cannot replace litigation as a dispute resolution process because, by and large, the legal framework governing divorce and judicial separation *requires* court-based resolution of disputes.

Irish law did not substantively address the issue of marriage breakdown until 1989 and the form of judicial separation legislation introduced then, and largely reproduced in the Family Law (Divorce) Act 1996, reflects political concerns to save marriage, or where that is not possible, to continue its obligations beyond dissolution rather than to facilitate post-relationship life (McGowan, 2016, p. 313). The grant of a decree of divorce is made contingent, both constitutionally and legislatively, upon meeting three pre-requisites; a four year period of separation, proof that there is no prospect of reconciliation between the spouses, and 'proper provision' being made for the spouses and any dependent children. Proper provision is to be ensured through ancillary relief orders, but the Family Law (Divorce) Act 1996 does not set out any over-riding policy objective for proper provision and despite having had ample opportunity to do so, the courts have not developed specific guiding principles (Crowley, 2011, p. 233; Berkery, 2017, p.16; O'Sullivan 2016a, p.112) creating what Louise Crowley describes as 'an unguided regime of boundless possibilities'

(Crowley, 2011, p. 238). The opacity of the proper provision requirement is exacerbated by the *in camera* rule which requires all family law proceeding to be held in private. Although the rule has been relaxed recently to allow limited reporting by accredited researchers and journalists, it remains very difficult to ascertain judicial attitudes to ancillary relief on divorce.<sup>5</sup> Most divorces are granted by the Circuit Court where it is not customary to issue written judgments leaving decisions of the High Court in so-called 'ample resources' cases as the only authoritative guidance available. Adjudicating rights and responsibilities where assets outstrip needs is a very different process to that necessary in ordinary families where resources are limited. In any event, the judiciary in deciding these cases have largely replicated the legislative emphasis on flexibility and discretion (Crowley, 2011, p. 233).

The level of discretion and apparent inconsistency of judicial decision making in divorce and judicial separation cases coupled with the *in camera* rule are significant barriers to spouses reaching a solution satisfying 'proper provision' at mediation (O'Sullivan, 2016b, p. 3). Although researchers and, since 2013, members of the press may report the content of family law cases without identifying the participants, in practice very little reporting actually takes place. A family law reporting project funded by the Courts' service was in place during 2005 but reporting of family law cases since it ended has been limited to *ad hoc* work by independent researchers and journalists (for example O'Shea, 2013). Members of the public may only hear about cases where there are high levels of conflict, substantial assets or other unique characteristics that make them attractive to media outlets. Cases in which the parties were satisfied with the court's ruling or where a settlement was reached through solicitor negotiation are unlikely to receive media attention or be the subject of written judgments (Healy, 2015, p. 182). Individual spouses, particularly where they have not received legal advice, can therefore never be entirely sure what precise rights and

obligations apply to their relationship. In a difficult interpersonal situation, individuals are free to build their own image of relationship rights and obligations making compromise or agreement almost impossible. 'Bargaining in the shadow of the law' has been offered as a way of thinking about the effect of law in relationship breakdown situations. Order, it is argued, is not imposed from above, rather divorce law provides a framework within which couples can determine their post-relationship rights and responsibilities as empowered individuals (Mnookin & Kornhauser, 1979, p. 950). The extreme levels of discretion and shroud of secrecy surrounding judicial decision making in Irish divorce law certainly cast shadows, but not of a kind that might create a framework for private ordering. The limited guidance provided by Irish law is made more problematic in view of Bagatol and Browns findings, in their study of the shadow of the law in Australian family mediation, that over-all law played a minimal role in mediation and did not act as a frame for negotiation. Other power relationships arising from issues of fault, moral transgression, fear of litigation and the attitude of the mediator had more effect on outcomes (Bagatol & Brown, 2011 as cited in Barlow et al, 2017, p 42). Individual disputants are themselves aware of the difficulties of mediating outside of the legal framework. A lack of legal advice during mediation was also a significant issue for Barlow et al's subjects in their qualitative exploration of mediation experiences in England and Wales (Barlow et al, 2017, p 133-134).

Even where spouses can negotiate terms, the governing legislation and relevant court rules do not facilitate administrative divorce, meaning that all applications for a divorce require the issue and service of proceedings, the exchange of full financial information and pleadings and attendance by the applicant in court.<sup>6</sup> Although there is some evidence that a full assessment of the extent to which the 'proper provision' requirement has been met is not always undertaken in consent cases (Coulter, 2009, p. 39;

Buckley, 2007, p. 63; O'Shea 2013, p. 92), it is both a constitutional and legislative prerequisite to divorce. Expecting the court to accept a mediated agreement as the basis of a consent order, particularly where no legal advice was provided during mediation, runs contrary to both the specific terms and general tenor of the governing legislation. Whilst the paternalistic approach of the law as it stands is open to criticism, there is an obvious contradiction between the expectation that spouses are autonomous individuals capable of negotiating the end of their relationship outside the law and the requirements of the legal framework which vests a broad discretionary power in the judiciary to oversee and potentially radically vary any agreement reached. Additionally, mediation is of little benefit to spouses who do not have any assets or children and do not need to apply for ancillary relief. Divorce legislation assumes a very specific type of income earning, property owning family where one spouse may potentially be left financially vulnerable following marriage breakdown. Proper provision is intended as a guard against post-relationship poverty, but for families already living in poverty it is of little assistance. If there are no children, or the parties are agreed in relation to child-related issues, there is nothing further to agree and mediation is unnecessary. This cohort of people must nonetheless apply to the court for an order if they want a divorce; mediation cannot assist them in any meaningful way.

Private ordering also has limitations for those seeking to negotiate the end of a marriage before they are eligible to apply for divorce. Separation agreements and judicial separations are relatively common in Ireland because of the four year wait period for divorce. A judicial separation can be granted on a number of grounds, both fault and no-fault and the structure of the relevant legislation makes it almost inconceivable that parties could reach agreement on the terms of an order without substantial legal assistance. Where application is made within one year of marriage breakdown, it is necessary to demonstrate

fault in the form of adultery or unreasonable behaviour by the respondent. Although a respondent can admit alleged facts, or consent to an order on a fault-based ground, the facts relied upon must be put before the court. By definition, a judicial separation cannot be effected by agreement, only granted by the court, and a judicial separation cannot be obtained subsequent to execution of a separation agreement (*PO'D v AO'D* [1998] 1 LIRM 543). A separation agreement precludes application for ancillary relief (other than maintenance or orders in relation to children) and parties cannot deal with pension rights in a separation agreement. Obtaining a judicial separation does not negate the need for a subsequent court application for divorce and the terms of a pre-existing judicial separation (or separation agreement), do not dictate the terms of divorce nor make the grant of divorce automatic. The court must consider both the constitutional and legislative prerequisites, even if these have already been reviewed on an application for Judicial separation (*YG v NG* [2011] 2 IR 717). Within this frame there will clearly be couples for whom mediation alone is inadequate, and many others who would be ill advised to reach agreement without at least some legal advice.

In view of the complexity of divorce and judicial separation law, the Law Reform Commission has repeatedly recommended that mediation be accompanied by legal advice and access to the courts where necessary (Law Reform Commission, 2010, p. 112; Law Reform Commission, 2008, p. 153; Law Reform Commission, 1996, p. 137). Nonetheless, the mediation service provided by the state does not facilitate contemporaneous publically funded legal support. The Family Mediation Service provides free family mediation services to all-comers without means test, although a wait time of three months for a first appointment applies in most centres (Legal Aid Board 2016, p. 13). A Family Mediation Leaflet made available to service users and the general public outlines the mediation

process, referring to a series of between three and six one hour sessions aimed at producing a written mediated agreement that 'can then be taken to solicitors to be drawn into a Legal Contract or Legal Deed of Separation and/or used as the basis for a Decree of Divorce.' (Family Mediation Service, 2014, p. 4). The leaflet does not otherwise refer to the legal framework surrounding marriage and its breakdown, in particular there is no statement that legal advice should be sought during the mediation process nor that mediation can be of assistance after court proceedings have issued. Mediation, the Family Mediation Service intimates, can provide a way to regularise relationship breakdown without reference to law, save a visit to solicitors at the end of the process. Some participants do obtain legal advice during state-funded mediation, but for those relying on legal aid it is unlikely to be available. Although the Family Mediation Service and the Legal Aid Board are part of the same organisation, their services are not integrated. Each service runs its own case management system and clients are not tracked from one service to the other. Long waiting lists for both services, and the lack of co-ordination between them, mean that it is almost impossible for a client to obtain legal advice from a Legal Aid Board solicitor in tandem with mediation sessions at the Family Mediation Service. Prospective clients routinely wait more than four months for a first appointment with a Legal Aid Board Solicitor. An individual presenting at a Law Centre running a pilot mediation information scheme will be referred to a mediator, and although the information session may take place relatively quickly, there will be a 3 month wait for mediation. Another 2 or three months may pass before mediation is completed. The client must then return to the Legal Aid Board and wait a further 4 months for an appointment with a solicitor. Publically funded clients seeking a formal end to their relationship with a judicial separation, separation agreement or divorce, and who choose to mediate are pushed to the end of the queue for legal services and could see a further six

months added to their dispute resolution process. In practice, therefore, for publically supported clients without access to a private solicitor, mediation is an *additional* dispute resolution stream, not an alternative to lawyers and litigation.

The position in Ireland is somewhat different to that in England and Wales in that there is no political movement toward removal of legal aid for family law cases nor an expectation that mediation can act as a complete marriage law solution. If there is any specific policy objective beyond endorsement of the general aims of mediation in facilitating communication and co-operation between spouses, it is to reduce demand in very overburdened family courts. It is difficult to see how mediation, even if attempted by all separating couples, could achieve this objective. As noted above, couples in complete agreement regarding the terms of their divorce still need the actual order and some will self-represent to obtain it. In her observation of 1,087 marriage law cases in the Circuit Court, Roisin O'Shea reported that 22% of litigants were unrepresented (O'Shea, 2013, p. 213). O'Shea found a consent-order rate of 67% in Circuit family cases and noted that a substantial proportion of these involved lay litigants with little or no assets seeking divorce (O'Shea, 2013, p. 94). Lucy-Ann Buckley, in her study of solicitor case files completed between 1999 and 2003, and necessarily relating to represented clients, found a consent rate of 60% (Buckley, 2007, p 63). Research in other jurisdictions has demonstrated that lawyers and court applications do not necessarily represent adversarial attitudes and self-representing litigants are often more adversarial than lawyers (Hunter, 2003; Genn, 2010; Healy, 2015, p. 177). Lay litigants generally lack the resources or expertise to negotiate settlement terms or conduct a trial efficiently and may be reluctant to engage with the other party's solicitor. Providing legal assistance to unrepresented parties before they reach the court could prove a more effective way to reduce the number of contested divorce

cases, and the court time taken up by them, than encouraging mediation before either party has obtained legal advice.

It seems trite to claim that reaching agreement about children, money and property at mediation will not undo the legal ties of marriage. Clearly neither a mediator, nor the parties themselves, can produce an order for divorce or judicial separation; these orders can only be obtained from a court in compliance with constitutional and legislative requirements. This seems obvious, and the point has been made many times before in other jurisdictions (Dingwall, 2010; Dennison, 2010; Maclean & Eekelar, 2016; Hunter, 2003), but the persistence of political discourse about the advantages of mediation as an alternative to lawyers and litigation mean that it clearly needs to be repeated. There will, of course, always be couples who simply need some assistance with practical matters in order to walk away from a relationship, but the vast majority of people need formal legal recognition of the end of their marriage. Mediation can provide a support to dispute resolution in all-issues divorce cases, but marriage is a law bound institution and its breakdown is subject to comprehensive legal regulation. Given the very public profile of marriage and divorce law reform in Ireland over the last four decades, it is difficult to imagine how spouses experiencing marital difficulties could fail to appreciate the legal quality of their relationship and the need for a court order to end it. The rejection of mediation as a dispute resolution process could be characterised as a consumer choice, but it is a well informed choice, not an advertising-driven preference.

It seems surprising that political discussion surrounding the Mediation Act 2017 made little or no reference to the procedural and practical difficulties surrounding private ordering in family law. This can largely be explained by the scope of the legislation which is intended to provide a framework for resolution of a broad range of civil disputes through

mediation, applying to all 'civil proceedings that may be instituted before a court' (section 2(1)). Political focus was very much on commercial disputes which take up significant court time but can be effectively resolved by agreement between the parties. Potential conflicts between existing family law provisions and the Bill were pointed out in a submission made by the Law Society to the Department of Justice and Equality which resulted in some committee stage amendments (Law Society, 2017). Although the Law Society submission did address wider issues with the Bill's application to family law these were not taken up by Deputies. As pointed out most recently by Barlow et al, the outcomes of private family disputes have significant societal implications (Barlow et al, 2017). The complexity and paternalism of Irish substantive and procedural family law is the result of political attempts to address these issues. Unfortunately the promise of family dispute resolution in a conflict-free zone appears to have taken precedence over consideration of the very real constraints of Irish divorce law.

### **An alternative to mediation v litigation?**

Mediation may be inadequate as a complete solution to all-issues divorce disputes, but it undoubtedly has a useful role to play in identifying and resolving issues arising when the interpersonal relationship at the heart of a marriage breaks down. In family law disputes mediation has an important pastoral or welfare role in facilitating improved communication and on-going co-operation between former spouses on financial and child-related issues (Conneely, 2002, p. 16; Law Reform Commission, 2008, p. 175; Barlow, 2017, p. 204; Kelly 2004). Irish policy-makers recognise this welfare role; supporting families was the objective of the Family Mediation Service when it was first established in 1986. More recently, government expectations for mediation have shifted to reflect an assumption that it can resolve a significant proportion of family disputes without recourse to law. An over-reliance

on this expectation, coupled with a powerful cost saving agenda, led the British government to remove funding for legal aid in most family related disputes in England and Wales. A similar approach does not seem likely Ireland, but the continued focus on mediation as an alternative to litigation means that no realistic attempt has been made to harness the benefits of mediation for couples and families who must engage with all-issues divorce law.

The Mediation Act 2017, with its emphasis on increasing uptake of mediation through information provision, does little to support innovation in dispute resolution services. Family law disputes are conflated with ordinary civil disputes in the Act evidencing a failure to consider the unique constitutional and legislative framework governing marriage and its breakdown and the extent to which it precludes private ordering. Further, the Act refers, at section 2(2) to the 'desirability of resolving, in so far as practicable, disputes, within a family...in a manner that is non-adversarial, and the need for the expeditious resolution of such disputes in a manner that minimises the costs of resolving those disputes.' This is a noble aim, but offering information on mediation as an alternative to lawyers and litigation will not achieve it within the existing Constitutional and legislative framework.

Kathryn O'Sullivan suggests that a more rule based approach to ancillary relief on divorce would produce judicial consistency which would in turn facilitate more private bargaining (O'Sullivan, 2016a, p. 118). Consistency in decision making is a worthwhile objective and the existing legal framework undoubtedly makes both private ordering and self-representation problematic. Nonetheless, as the experience in other jurisdictions demonstrates, mediation is not a universal panacea. Some cases will never be suitable for mediation, particularly those involving domestic violence or child protection issues, or where the level of conflict precludes the potential for an agreed approach to dispute

resolution. Even where spouses can reach agreement on all issues a mediated agreement, of itself, will not sever the legal ties of marriage. Whichever legal framework applies, mediation can have benefits for disputing family members (Kelly, 2004) but it needs to be understood as an *additional* dispute resolution process, not an alternative to lawyers and litigation.

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<sup>1</sup> Minister for Justice and (Deputy Frances Fitzgerald) 941 *Dáil Debates* 10494/17, 2 March 2017.

<sup>2</sup> Minister for Justice (Deputy Frances Fitzgerald), response to parliamentary question 22 June 2016.

<sup>3</sup> Figures from Irish Mediators Institute website [www.imi.ie](http://www.imi.ie), accessed 8 May 2017. There is no requirement for mediators to register with the IMI in order to practice and although the Legal Aid Board has no specific policy requiring its mediators to be registered it does pay a registration fee for all mediators employed by it. Personal correspondence between author and Legal Aid Board 13 April 2017.

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<sup>4</sup> The term 'all-issues divorce' is used for convenience and includes applications for judicial separation, dissolution of civil partnership and applications for cohabitants relief under the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. Civil Partnership was available in Ireland between 2011 and 2015, for an account of its demise see Ryan (2016).

<sup>5</sup> Section 40, Civil Liability and Courts Act 2004 as amended by Courts and Civil Law (Miscellaneous Provisions) Act 2013.

<sup>6</sup> Circuit Court Rules, Order 59, S.I. No 312 of 2007 as amended require the service by the applicant of a Civil Bill with affidavit of means and affidavit of welfare in response to which the respondent files an appearance, defence and their own affidavit of means and welfare. The process can be shortened by the filing of a motion for judgment on consent following exchange of affidavits.