

Developing the evidence base on family justice: Mediation and litigants in person

22nd February 2012, Nuffield Foundation, London

Summary of the joint Nuffield/ Ministry of Justice seminar on developing the evidence base on litigants in person, mediation and making better use of surveys

1) Professor Richard Moorhead, Cardiff Law School: Litigants in Person (Lips)

This presentation discussed the policy questions around Lips, the current evidence base and what future research should focus on in this area.

- We don't know enough about the characteristics of Lips. Common questions asked include: do they increase case length, will their numbers increase if legal aid is reduced, how can we divert them from court and how do courts deal with them.
- Should we think about Lips in different ways? For example, do we have to think of them as a problem? Is diversion the right way to think about them? Is it their presence or their exclusion from the courts which is a concern? Should we use different terminology e.g. unrepresented parties instead of Lips?
- Two key studies in this area are Moorhead and Sefton (2005) *Litigants in Person. Unrepresented Litigants in First Instance* and Williams, K (2011) *Litigants in Person a Literature Review* (Ministry of Justice). This small evidence base suggests that:
 - Lips struggle to present their cases and create more work for judges and the courts.
 - Lips appreciate the assistance they are given at court but it is difficult to say if its helps without a Randomised Control Trial or a stronger look at outcomes.
 - When Lips participate in the court process it is often with a low intensity and when they do take part, they often make mistakes.
 - Representation seems to give better outcomes, but this could be the result of legal representatives selecting cases they are more likely to win.
- Lips tend to be people who are forced to be in court and feel they have no alternative.
- There are more Lips in the small claims court. It is likely that this is due to the cost recovery rules minimising risks and possibly that the rules are simpler – rather than the absence of legal aid.

Discussion points and areas for further research:

- We need to understand how the baseline has been shifting to measure change against.
- We need to capture some of the detail about what actually happens in Lips cases and place it in context. This involves balancing quantitative and qualitative data and

putting studies in the context of sets of particular types of problems and the diverse response to them.

- Judges seem to take varied approaches when dealing with Lips and we need to work out which one is best and in what circumstances. We can learn lessons from work done in California where judges were asked to think about this issue.
- Should we consider the value of an adversarial approach when dealing with in Lips? Perhaps lessons can be learnt from the small claims courts where there is less emphasis placed on procedure and Ombudsmen who intervene to protect individuals when there are power imbalances between parties.

Jo Miles, Cambridge University (discussant)

- Agreed that there is a lack of data in the family justice system. Going forward we should establish a baseline before the changes from Legal Aid, Sentencing and Punishment of Offenders Bill (LASPO) are made to allow us to understand the effect it has on Lips. Withdrawal of legal aid may have a bigger impact on women than men.
- We should consider replicating the kind of studies done in Australia, especially in 2000 by John Dewar et al. This used questionnaires for judges, observational data, focus groups with court staff, interviews with practitioners and with Lips to give a panoramic view of Lips cases.
- The Civil and Social Justice Panel Survey (CSJPS) allows us to follow those who decide to do nothing with their problem or give up, who will be missed from any justice system based survey. However, the sample sizes achieved through this survey will be small.
- To establish a counterfactual ideally we would identify people with similar legal problems (e.g. from CSJPS) who are represented and those who are not and observe the impacts over time – but numbers may be too small.
- Important to distinguish between issues related to finances and children. Although matters related to children are emotionally more difficult, financial matters are more factually and legally complicated and so harder to resolve.
- It can be anticipated that there will be increasing use of McKenzie Friends; this may heighten concerns around their lack of regulation, particularly for those that charge fees. Another subject for research.
- Need to look at the assistance for Lips ranging from the accessibility of forms on the website to the advice given (or not given) by court staff. In particular we need to look at the impacts of reducing the counter service.
- Need to look at how exceptional funding is granted by LSC.

Other issues raised in the discussion

- There is a problem around the availability and accuracy of court data; attempts are being made to improve this but it is very difficult to resolve given tight resources and competing operational demands.
- Anne Barlow is carrying out research looking at pathways in family justice (type of DRS used) for those who divorced or separated since 1996 and includes information on those who were a Lip.

- Consent orders depend on lawyers making sure parties understand what has been agreed. If Lips increase, then judges may have to spend more time doing this.
- Australian research (Batagol and Brown 2011) shows that those who choose to go to ADR and avoid court seem to divide into two groups. These tended to be those that felt they would not fare well in court (typically men concerned about financial matters) and those who wanted to avoid a stressful experience (typically women). We need better information about the outcomes for these two groups.

2) Professor Liz Trinder, University of Exeter: Mediation Research: What we need to know and how

- This presentation highlighted the existing evidence base and future research needs about family mediation.
- There has been a longstanding emphasis in government policy to divert cases away from using court resources. The Government's policy position is that mediation is "better, faster and cheaper" than using court/solicitors although there is not much evidence yet, nationally or internationally, to support or refute this.
- Mediation is typically compared to litigation but this does not compare like with like; different clients with different types/complexity of cases may use each process. There are self selection research issues with mediation – the outcomes may be a function of the type of clients choosing to using mediation and their cases. It may be that mediation could be a "better, faster and cheaper" alternative for low conflict cases and/or where relatively intensive interventions are used.
- Recent mediation research includes a MoJ analysis of legal aid data to explore the sustainability of mediation and legal representation (Quartermain 2011). There is only one randomised control trial involving mediation (Emery 2001), although this focuses on an intense therapeutic form of mediation and is based on small numbers. Barlow and Hunter's 'Pathways to family justice' ESRC funded study is the only major ongoing ADR study. The study will provide a picture of awareness of and experiences of mediation, collaborative law and solicitor negotiation. The study completes in July 2014 but papers will also be published during the project.
- Potential areas of interest future research include:
 - What is working well/ not well within ADR cases e.g. conversion, satisfaction, compliance.
 - Which types of ADR are working best and for whom? Who are the appropriate clients for mediation?
 - How will conversion rates from assessment to mediation change with the changes to legal aid? In Australia the drive to increase use of mediation has led to an increase in the 'worried well' using this service.
 - How are cases progressing through the system? What happens to cases where agreement isn't reached? This descriptive analysis of case pathways and

outcomes is preferable given the self selection issue for interventions cannot be resolved.

- Impact of mediation pre-application protocol on applications.
- Longer term outcomes from different resolution methods including impact on contact, conflict and well being as well as financial costs.

Alissa Goodman, Institute for Fiscal Studies (discussant):

- The past may not be a good guide for the future in this area of research given the proposed changes to legal aid– new client groups may use this service, the effectiveness of mediation may change for these new client groups and the quality of mediation may alter. New data is needed in this area to use as a baseline prior to the changes ahead. Current admin data is limited but should be made use of. Possibilities for linking admin data to survey data should also be investigated.
- A longitudinal study would add value but there are challenges. How meaningful is it to look at client pathways and outcomes over time without a comparison to what may have occurred in the absence of mediation? MoJ will be interested in case outcomes, conversion rates, satisfaction and compliance but it will also be important to explore the long term benefits about contact, well being and conflict, although these can be difficult to quantify.

Additional comments:

- It may be useful to explore what is meant by mediation? Does it depend on/matter who delivers it? What is meant by a mediator? What does screening or a triage system look like?
- What are appropriate comparisons? It is not as simple as comparing mediation with court, there are different types of mediation which need to be considered when thinking about appropriate comparisons.
- There was interest in exploring the use of controlled work and client pathways incorporating this service.
- What will happen to the use of mediation and mediated decisions when the threat/possibility of going to court is removed?
- Research is needed around domestic violence issues and the voice of the child in mediation.
- There is an urgent need to collect baseline information before the legal aid changes and a need to collect information about the implementation of the mediation pre-application protocol.

- There are lessons to be learned from recent Australian research about changes to their family law system.
- The LSC gave an update on changes to referrals and conversion rates for publicly funded mediation since the introduction of the pre- application protocol:
 - Conversion rates from referral to assessment meeting have increased from 44% in 2010 to 47% in 2011 although conversion rates from assessment meetings to mediation have decreased from 55% in 2010 to 50% in 2011.
 - Overall referrals have now increased by 12.5% if we compare the same 9 month period in 2010 and 2011 (since the introduction of the Pre Application Protocol).
 - Overall mediation starts have now increased by 8.5% if we compare the same 9 month period in 2010 and 2011

| | April 2010 to Dec 2010 (9mths) | April 2011 to Dec 2011 (9mths) |
|---|---------------------------------------|---------------------------------------|
| Volume of referrals | 44,218 | 49,761 |
| Volume of couples attending an assessment meeting | 19,328 | 23,174 |
| Volume of mediation starts | 10,589 | 11,494 |

(Legal Services Commission unpublished data).

3) Dr. Tina Haux, Queen’s University Belfast: Better use of surveys

This presentation provided an overview of the existing surveys in this area with a focus on the understanding society and millennium cohort surveys

- The UK has very good survey data. There are extensive questions in all surveys on household characteristics and composition and questions in the longitudinal and cohort surveys on relationship history, parenting while in a couple, child well-being and income.
- Understanding society (US) is a longitudinal study. The sample size is 40,000 with 10,000 families in the main sample. The family modules are run every other year. Children aged 10-15 are surveyed on some issues but are not asked about contact. Questions about maintenance were asked in wave 3 but this only captures current arrangements – not the settlement at separation.
- The millennium cohort study (MCS) has a sample size of 19,000 children and their families with sweeps at 9 months, 3 years, 5 years, 7 years and 11 years so far. This is not representative of the population but does allow children to be asked age-related questions. Children are included from age 7 but are not asked about contact. Resident

parents were asked about contact in all four sweeps, with the most detailed questions included in sweep 4. Questions about maintenance were asked in sweeps 1-4.

- The Labour Force Survey also contains some analysis of families and households. The survey has a sample of 40,000 households. Shared care is not covered in this survey. There is an issue of double counting of shared care families – ONS were planning development work on this issue but this is currently suspended.
- US and the MCS are large sample surveys; the advantage of this is that you can drill down to look at specific groups; the disadvantage is that there is pressure on survey time. Even with large sample sizes in the whole survey, numbers become quite small when looking at people with shared care or with court-ordered agreements.
- The main issues with the current surveys are a lack of filter questions that would allow researchers to identify the populations of interest to be able to make use of the data that is collected on all participants as well as more specific questions on shared care, problems with contact, parenting after separation, financial arrangements and the quality of contact.
- A new birth cohort study is planned – this should start in the next few years and will cover child contact and maintenance and will ask both parents. This may not be sufficient and we may need a specific survey of separated parents.

Caroline Bryson, Bryson Purdon Social Research (discussant)

- There are limitations with the data but there is a wealth of information in the current surveys and this has not been fully exploited yet. Survey data should be promoted and used as much as possible especially given limited budgets.
- Existing survey data can be used as a baseline to evaluate *some* planned changes in family law, maintenance etc., although they sometimes lack the necessary granularity of information.
- There are a number of issues on usability:
 - The questions are not always sufficiently nuanced for our needs e.g. we know about the frequency of contact but not the quality, we don't know about the pathways after separation.
 - How quickly surveys can adapt to policy questions e.g. the push towards to voluntary agreements for maintenance – need future questions capture charges (if introduced), more information about ad hoc informal payments, etc.
 - Under-representation of non-residents parents. Some non-resident parents don't identify themselves in surveys so we miss them. Also in some surveys when people leave the household they leave the survey. We need to monitor these people from the start and continue to track them
 - Many surveys are biennial, which makes it difficult to track families in sufficient detail to understand the processes immediately prior to separation.

- Sample sizes, especially for separated families who currently end up in the court system
- Surveys need to be future proof e.g. to take account of shared parenting and child maintenance changes but development takes years.
- We may need a new vehicle to monitor separated parents
- Two types of survey possible;
 - A longitudinal survey focusing on ‘family relationships’, including both in-tact and separated families, methodologically similar in design to the previous FACS survey
 - A longitudinal survey of separated families, tracking cohorts of families from the point at which they separate

Additional comments:

- There was a discussion on the possibility of studying separating/ separated families. We may need to look at people ‘at risk’ of separation.
- We need to learn lessons of DWP's FACS study - which wasn't widely used. This may have been because the focus was initially on the report rather than the data as a resource. There is a capacity issues of researchers who have quantitative analysis skills and an understanding of the law in this area
- A longitudinal study won't solve the issue of causality – can't measure the impact of policy changes and can't assess the impact of separation because we don't know what would have happened in the absence of separation
- Longitudinal studies ask questions of children, this can help understand quality of contact
- We need to clearly define shared care and meaningful relationship when asking questions on shared parenting. It may not be sensible to map questions onto legal terms
- We need to understand link between shared care and employment and financial arrangements
- There is concern over different departments having separate data access procedures. This makes it difficult for organisations to use the available data.
- There is value in having good descriptive baseline data in this area and this could be improved.
