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Cracking the Code: the role of mediators and flexibility post-LASPO

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In recent decades, family mediation has taken centre stage in policy concerning family dispute resolution. The knock-on effects of recent cuts to legal aid mean mediators are under rising pressure to introduce flexibility into their practices. However, mediators remain bound by orthodox approaches dating back to mediation's introduction in the 1970s and 1980s, underpinned by the inflexible and sometimes unrealistic concept of absolute neutrality. As a result, it is crucial to explore whether mediator neutrality serves parties well in the modern family justice landscape and how mediators can adapt to this new climate.

Drawing on research exploring Codes of Practice in England and Wales, this article identifies a general misunderstanding around the role of family mediators as envisioned by their regulatory bodies. It establishes a continuum of mediator functions that demonstrates the different roles permitted in Codes of Practice. In particular, it is argued that mediators' evaluative role is more prominent than is recognised in the orthodox concepts of mediation and that this reality must be regulated effectively. Ultimately, the findings presented in this article are a sign of hope for family mediation after LASPO and show that regulatory guidance has increasingly permitted flexibility since the 1980s.

Introduction

Family mediation was introduced in England and Wales in the 1970s in response to a struggling court system. It was not intended to replace the adjudication system but was instead expected to become an alternative for divorcing or separating couples.¹ This objective has shifted over time, with policymakers placing mediation at the centre-stage of family justice and attempting to make mediation 'the norm rather than the exception', as envisioned by the Lord Chancellor's Department in 1993.² This was manifested in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), which removed legal aid for most private family law court proceedings. In spite of these policy changes, mediation has faced multiple difficulties post-LASPO.³ Notably, uptake of mediation has decreased and failed to

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¹ G Davis, *Report of a Research to Monitor the Work of the Bristol Courts Family Conciliation Service in its First Year of Operation* (University of Bristol, 1980), 3; Home Office, *Marriage Matters: A Consultative Document by the Working Party on Marriage Guidance* (Crown, 1979), para 7.10.

² Lord Chancellor's Department, *Looking to the Future: Mediation and the ground for divorce a Consultation Paper*, Cm 2424 (1993), para 7.11.

³ M Maclean and J Eekelaar, *Lawyers and Mediators: The Brave New World of Services for Separating Families* (Hart Publishing, 2016), 69.

recover. Moreover, when mediation is used, a significant proportion of users, albeit a minority, are dissatisfied with the process.⁴

Since its inception, mediation's theoretical base has heavily restricted both mediator practice and debates about its reform. Traditionally, mediators are bound to remain neutral and must not take sides during negotiations. These constraints stem from the long-standing assumption that decision-making power must rest with the participants throughout. The mediator is consequently considered to be a guide and assistant and is prohibited from combatting any imbalance of power between the participants. However, as concluded by Anne Barlow and others, 'one size does not fit all'.⁵ If, as seems likely, policymakers are to continue to promote mediation's central role in family justice, Barlow and others recognise that mediation must be 're-designed to operate more effectively'.⁶ This view reflects rising calls for mediator practice to become flexible and adapt to a diverse and heterogeneous client base post-LASPO.⁷ The strength of these recommendations is, however, hindered by the demand for mediator neutrality. Consequently, debates on the role of mediators after LASPO are stagnant and circular: to refuse reform hinders access to justice as it inhibits any development in the role of mediators that would help compensate for the removal of lawyers, but to permit it goes against mediator neutrality. Effectively, family mediation reform comes to a standstill.

This article seeks to restore momentum by showing that mediation's regulatory bodies already permit flexibility in mediator practice. The aim of the paper is not to challenge the importance of mediator neutrality, but to show that the foundation for practices that are more tailored to individual circumstances already exists. The first section sets out the widespread perception that mediators follow a strictly facilitative model that casts evaluative practices as an affront to the principle of mediator neutrality. The discussion recognises that this framework was successful when mediation was supplemented by legal advice. Following LASPO, solicitors have been withdrawn from the process, and mediation's client base has diversified, with the result being that there have been increased calls for mediators to adopt a more evaluative role. Following this, the focus moves onto findings from a qualitative content analysis of Codes of Practice for family mediators in England and Wales. The analysis is primarily based on guidance currently available to mediators but also considers Codes of Practice dating back to the 1980s and 1990s. Based on this analysis, the article debunks the widely endorsed distinction between facilitation and evaluation and challenges the orthodox conceptualisation of family mediation. Instead, four mediator functions are identified within the current guidance. It is argued that evaluation is visible within this continuum of functions, though it is frequently disguised as a facilitative practice, creating a lack of transparency. The final section considers the future role of the mediator and the importance of evaluative strategies, given the added flexibility they provide in the current context. It concludes with a

⁴ For a detailed discussion on party satisfaction with family mediation, see A Barlow and others, *Mapping Paths to Family Justice: resolving family justice in neoliberal times* (Palgrave Macmillan, 2017).

⁵ A Barlow and others, *Mapping Paths to Family Justice: Briefing Paper and Report on Key Findings* (University of Exeter, 2014), 25.

⁶ Barlow and others (2017), n 4 above, 211.

⁷ J Walker, 'Building a better future for separating families: the search for humanity?' (2016) 46(3) *Fam Law* 387; Maclean and Eekelaar (2016), n 3 above, 129; Barlow and others (2014), n 5 above, 30.

recommendation that evaluation by mediators should be acknowledged, conducted transparently and subjected to various checks and balances. Overall, the article paves the way for a fresh discussion of family mediation reform.

The dominant facilitative framework

It is essential first to set out the orthodox conceptualisation of family mediation, underpinned by a strict adherence to mediator neutrality. Leonard Riskin previously situated mediator practices on a continuum from *facilitative* to *evaluative*.⁸ Facilitative actions ‘clarify’ and ‘enhance communication’. As a mediator begins to evaluate, she becomes more directive by adopting techniques that ‘direct some or all of the outcomes’.⁹ Mediators thus have two broad frameworks, each with their own ideologies, at their disposal. A facilitative mediator, for instance, has a limited, strictly defined role because it is believed that the parties are best placed to produce a viable settlement that reflects their personal circumstances. This framework intends to provide parties with a greater sense of autonomy and control over their dispute. However, this can be dangerous when a power imbalance exists between the parties or one individual requires additional support. By contrast, and in response to this perceived problem, evaluation is rationalised through the need for mediators to provide ‘guidance as to the appropriate grounds for settlement’.¹⁰ Although evaluation is a form of scrutiny that enables the professional to screen for unfair or unworkable outcomes, it also reduces the opportunity for parties to control the negotiation process, transferring some power from the parties to the mediator.

Both frameworks thus have their own benefits and limitations.¹¹ For this reason, Riskin presented facilitation and evaluation as a set of interconnecting strategies, rather than two competing practices. According to his analysis, mediators may initially facilitate but evaluate when further support is required, or vice versa if a mediator feels they can take a step back in negotiations. Ultimately, Riskin’s thesis enables a mediator to move between the two frameworks and adapt her strategy to the case at hand, promoting flexibility.

It is argued in this article that strong adherence to mediator neutrality neglects the value of Riskin’s continuum. In general, the literature on family mediation has largely misinterpreted Riskin’s continuum as a binary concept. Facilitation and evaluation have come to be seen as two opposing strategies. Family mediators are bound by the former dominant facilitative model and expected to remain neutral at all times. Their ability to move across the continuum (towards evaluation) is, therefore, removed, as depicted in *figure one*.

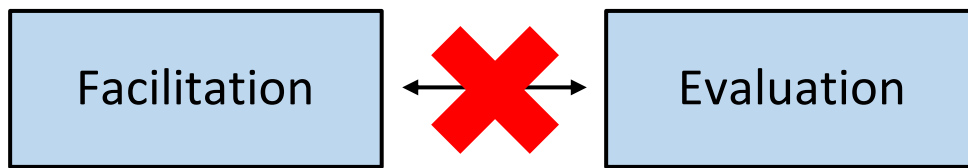
⁸ L Riskin, ‘Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed’ (1996) 1 *Harvard Negotiation Law Review* 7.

⁹ *Ibid*, 24.

¹⁰ *Ibid*.

¹¹ Riskin also sets out the relative benefits of both approaches in his article: *ibid*, 44-46.

Figure One: The binary approach to Riskin's continuum



Two key criticisms of the mediator evaluation are used to justify this binary approach, as summarised by Nancy Welsh.¹² First, it is argued that evaluation is dangerous if left unregulated. Without adequate checks and balances, a mediator could promote a particular outcome, diminishing party autonomy. The second, more extreme, claim is that evaluation contradicts the concept of mediation itself. Since the 1970s, family mediation has been promoted as a facilitative process. In 1974, the Finer Report defined mediation, previously known as conciliation, as ‘assisting the parties to deal with the consequences of the established breakdown of their marriage’.¹³ The following decade, the Matrimonial Causes Procedure Committee reiterated that the mediator was to ‘assist the parties’ and remain ‘neutral’ at all times.¹⁴ In addition to these policy documents, Mavis Maclean and John Eekelaar found that the *Family Mediation Council’s (FMC) Code of Practice*, binding all registered mediators in England and Wales, ‘represents the traditional orthodoxy’ of mediation as ‘a process that assists the participants in reaching their agreement’.¹⁵ If mediators are assistants, rather than sources of authority, it may be questioned whether they have the legitimacy, let alone the ability, to evaluate. As a result, an image of a mediator who *assists* and guides parties throughout their dispute is established, reflecting Riskin’s facilitative framework.

So the evaluative approach to mediation is (in theory) rejected in England and Wales in favour of the orthodox concept of neutrality that binds all mediators.¹⁶ The idea of mediator evaluation is thus considered an ‘oxymoron’ and the antithesis of neutrality.¹⁷ A mediator must *help* parties, but must not impose an outcome. This reinforces a facilitative framework whereby mediators neutrally facilitate discussion but cannot scrutinise its content or the proposed settlement. Once a mediator evaluates, she is no longer neutral under the orthodox framework.

An important backdrop to the binary interpretation of Riskin’s continuum is the widespread assumption that parties can access legal support through a solicitor. Barlow and others

¹² N A Welsh, ‘The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalisation?’ (2001) 6 *Harvard Negotiation Law Review* 1.

¹³ Committee on One-Parent Families, *Report of the Committee on One-Parent Families: Volume 1*, Cmd 5619 (1974), para 4.288.

¹⁴ Matrimonial Causes Procedure Committee, *Report of the Matrimonial Causes Procedure Committee* (HM Stationery Office, 1985), para 3.10.

¹⁵ Maclean and Eekelaar (2016), n 3 above, 89.

¹⁶ An overview of mediator neutrality is provided by H Astor, ‘Mediator Neutrality: Making Sense of Theory and Practice’ (2007) 16(2) SLS 221; L Mulcahy, ‘The Possibilities and Desirability of Mediator Neutrality – towards an ethic of partiality?’ (2001) 10(4) SLS 505.

¹⁷ K K Kovach and L P Love, ‘“Evaluative” Mediation Is An Oxymoron’ (1996) 14(3) *CPR Institute for Dispute Resolution* 31, 31.

describe mediation as an ‘optimum process’ when supplemented by legal advice.¹⁸ In general, academics and legal professionals consider the collaboration between solicitors and mediators to be ‘a complementary framework’ in lieu of two ‘exclusive approaches’.¹⁹ This preference for solicitor involvement stems from the way in which mediation was introduced into the family justice system during the 1970s and 1980s. During this period, mediation schemes were largely not-for-profit but supported by lawyers who provided legal advice.²⁰ Public support for mediation was also available, with local councils funding a variety of initiatives and the state introducing legal aid for the process in 1997.²¹ Later studies from the 1990s described those attending mediation as ‘relatively “middle class”’²² and of ‘high socio-economic’ standing, suggesting that most users could afford to hire a solicitor privately.²³ Legal support for those mediating therefore continued into the late 20th century and can still, in theory, be accessed today (discussed below).

The prominence of solicitors in early mediation schemes reflects the orthodox binary approach to Riskin’s continuum in England and Wales. Both facilitative and evaluative practices are of value. But if mediators can only facilitate, the parties must obtain evaluation through an alternative source, i.e. solicitors. This creates distinct, but complementary, roles for both professions: mediators *facilitate*, whereas lawyers *evaluate*. On a practical level, this distinction means that mediators provide *information* and lawyers give *advice*, enabling mediation to operate as an ‘optimum process’. However, the existence of this working relationship is questioned post-LASPO, as the article will now investigate.

A change in mediator practice: a struggling facilitative model post-LASPO

The impact of LASPO on family justice and mediation was immediately noticeable.²⁴ In April 2013, state-funded legal advice and representation became unavailable for most private family law matters, subject to exceptions, such as for victims of domestic abuse, which have been criticised as narrow in their application, reducing the potential pool of legal aid users.²⁵ Rising levels of unmet legal need are heavily attributed to the legislation. More particularly, solicitors are no longer the first port of call for individuals without the sufficient funds to pay for a lawyer privately.²⁶ The fact that solicitors are no longer the entry-point into the system for clients has caused solicitor referrals to publicly-funded mediation to diminish

¹⁸ Barlow and others (2017), n 4 above, 133.

¹⁹ F Myers and F Wasoff, *Meeting in the Middle: A Study of Solicitors’ and Mediators Divorce Practice* (The Scottish Executive Central Research Unit, 2000), 150.

²⁰ G Davis, *Partisans and Mediators* (Oxford University Press, 1988), 9.

²¹ *Ibid*; Family Law Act 1996, s 29.

²² G Davis and others, *Monitoring Publicly Funded Family Mediation: Report to the Legal Services Commission* (Legal Services Commission, 2000), 48.

²³ J Walker, P McCarthy and N Timms, *Mediation: The Making and Remaking of Co-operative Relationships: An evaluation of the effectiveness of comprehensive mediation* (Relate Centre for Family Studies, 1994), 44.

²⁴ The short-term impact of LASPO is outlined by the House of Commons Justice Committee, *Impact of Changes to Civil Legal Aid Under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, HC 311 (The Stationary Office, 2015).

²⁵ J Mant, ‘Neoliberalism, family law and the cost of access to justice’ (2017) 39(2) JSWFL 246, 250.

²⁶ House of Commons Justice Committee, n 24 above, 54-55.

significantly.²⁷ In the year after LASPO's enactment, the number of publicly funded mediation starts falls from 13,983 to 9,632.²⁸ Numbers have continued to decrease, reaching a low of 6,390 in 2018-2019. Two further knock-on effects of LASPO are also apparent.

First, publicly funded legal advice through a lawyer is now largely inaccessible even in mediation, notwithstanding the limited legal aid 'Help with Family Mediation' scheme that pays solicitors a limited fixed sum to advise parties in mediation or draft a (financial) consent order. Low rates of remuneration mean that work under this scheme is not commercially feasible for solicitors.²⁹ So of those who do mediate, fewer individuals are now attending family mediation with access to a legal advisor, which reduces the opportunities for individuals to receive that form of evaluative support. Alternative sources of support, such as Citizens Advice, remain available to some individuals, but these services have also struggled to keep afloat following continued cuts to funding. In general, access to evaluation is now determined by a 'postcode lottery' in which individuals from rural areas in particular have reduced access to lawyers or other advice services.³⁰ With solicitors largely removed from the process, evaluation has become a reserved add-on for a small population who can afford the costs involved.

The second knock-on effect of LASPO is that mediators see more diverse and complex disputes. A shift in clientele was first apparent in the late 1990s,³¹ but the evidence suggests that this diversification increased from 2013.³² Since most individuals can now only receive legal aid for private family law matters for mediation (and associated legal help), the potential pool of clients for mediators has expanded to any dispute that would have previously been dealt with entirely by solicitors or heard in court, including cases with domestic abuse or other severe power imbalances.³³ This change in population reflects the lack of options for family dispute resolution post-LASPO. Evaluation is theoretically available through adjudication, but the evidence shows that this traditional form of scrutiny is now widely inaccessible to the public, and most family law problems are not settled through a formal legal process, whether adjudicated or via a binding consent order.³⁴ A range of initiatives to support individuals

²⁷ For further discussion on the withdrawal of solicitors as the first point of contact for family matters, see A Bloch, R McLeod and B Toombs, *Mediation Information and Assessment Meetings (MIAMs) and mediation in private family law disputes: Qualitative research findings* (Ministry of Justice, 2014), 12.

²⁸ Ministry of Justice, *Legal Aid statistics tables - April to June 2019* (Ministry of Justice, 2019), table 7.2.

²⁹ Emma Hitchings and Joanna Miles describe the statistics on publicly funded legal advice as 'disturbing'. See E Hitchings and J Miles, 'Mediation, financial remedies, information provision and legal advice: the post-LASPO conundrum' (2017) 38(2) *JSWFL* 175, 178.

³⁰ S Hynes, 'Austerity Justice' (2013) 21(1) *Journal of Poverty and Social Justice* 97, 100.

³¹ The Family Law Act 1996, s 29 required all applicants to legal aid for private matters to attend a mediation intake meeting prior to court proceedings. A pilot study distinguished section 29 cases as 'different kinds of dispute', describing the participants as 'less interested, less knowledgeable, and less motivated'. See Davis and others (2000), n 22 above, 203.

³² Bloch, McLeod and Toombs, n 27 above, 15.

³³ Although legal aid for a private family law matter in court remains available where there has been, or there is risk of, domestic abuse, the evidence requirements for the exemption have been heavily criticised. See S Choudhry and J Herring, 'A human right to legal aid? – The implications of changes to the legal aid scheme for victims of domestic abuse' (2017) 39(2) *Journal of Social Welfare and Family Law* 152.

³⁴ R Franklyn and others, *Findings from the Legal Problem and Resolution Survey, 2014-15* (Ministry of Justice, 2017), 46.

without legal aid (or a paid solicitor) have materialised in recent years, including self-help guides, pro bono schemes and a growing number of 'professional' McKenzie Friends.³⁵ However, these services may be inaccessible (particularly where an individual lacks the emotional capacity to take in information), unavailable in some areas, or simply unhelpful to the parties.³⁶ As a result, the potential range of cases seen by mediators post-LASPO has widened and includes complex cases that were either previously screened out of mediation or simply did not approach that service.³⁷ Despite this varied client base which might need evaluative input, a mediator remains bound by the facilitative framework under the binary interpretation of Riskin's continuum.

Important benefits derived from evaluation have, as a result, been lost from much of current family justice. Without an evaluation of the agreement, it will be unclear whether the settlement is practical, viable or workable in the long-term. The continued emphasis on mediator neutrality fails to acknowledge the impact of gender on party standing and power. In many family disputes, 'gender neutrality' is not synonymous with 'equality', as acknowledged by Nicola Lacey.³⁸ Resources that are statistically likely to be held by men, notably work experience, pension savings and income, give them greater power in negotiations compared to the caring and household roles frequently associated with women.³⁹ The formal equality endorsed by orthodox mediator neutrality overlooks this crucial context. If a mediator must remain neutral, she cannot adapt her practices to support the weaker party. Barlow and others' *Mapping Paths* project identified this problem through observed mediation sessions, finding that formal equality (which tended to operate to the women's disadvantage) was generally favoured over substantive equality.⁴⁰ Combined with the withdrawal of solicitors from family mediation, the lack of oversight provided through the facilitative framework is troubling.

The value of mediator neutrality in its current form has been questioned for some time, not least after LASPO. Academics have long argued that neutrality is an 'elusive concept' and 'folklore' that muddies, rather than illuminates, mediator practice.⁴¹ For example, a popular debate in the Australian mediation literature is whether the term 'impartiality' should be adopted instead of neutrality.⁴² Advocates of impartiality claim that the concept advances even-handedness and fairness, whereas neutrality promotes disinterest that could prevent

³⁵ M Maclean and J Eekelaar, *After the Act: access to family justice after LASPO* (Hart Publishing, 2019); L Smith, E Hitchings and M Sefton, *A study of fee-charging McKenzie Friends and their work in private family law cases* (The Bar Council, 2017).

³⁶ Without 'realistic alternatives' at their disposal, as recognised by Rosemary Hunter and others, some individuals may feel effectively forced into mediation, removing the voluntary aspect from the process. See Hunter and others, 'Access to What? LASPO and Mediation' in A Flynn and J Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Hart Publishing, 2017), 247.

³⁷ Maclean and Eekelaar (2016), n 3 above, 121; Bloch, McLeod and Toombs, n 27 above, 39.

³⁸ N Lacey, 'Feminist Legal Theory Beyond Neutrality' (1995) 48(2) CLP 1, 12.

³⁹ P E Bryan, 'Killing Us Softly: Divorce Mediation and the Politics of Power' (1992) 40 Buff L Rev 441.

⁴⁰ Barlow and others (2017), n 4 above, 201.

⁴¹ J Rifkin, J Millen and S Cobb, 'Toward a New Discourse for Mediation: A Critique of Neutrality' (1991) 9(2) *Mediation Quarterly* 151, 152.

⁴² L Boule, *Mediation: Principles, Process Practice* (LexisNexis, 2nd edn, 2005); J Crowe and R Field, 'The Empty Idea of Mediator Impartiality' (2019) 29(4) *Australasian Dispute Resolution Journal* 273.

the mediator from acting in light of an unfair agreement. However, academics such as Hilary Astor question how far this is simply a lexical distinction, or if there are noticeable differences between neutrality and impartiality in practice.⁴³ In addition to this, empirical research suggests that mediators already evaluate, despite their supposed adherence to neutrality. David Greatbatch and Robert Dingwall previously described a technique called ‘selective facilitation’ whereby mediators move parties towards a particular outcome by making that potential outcome the focus of discussions.⁴⁴ Through selective facilitation, a mediator may challenge the strength and viability of a solution, bringing her neutrality into question. Similarly, Janet Rifkin, Jonathan Millen and Sara Cobb described mediators’ ‘supportive’ role in private caucuses.⁴⁵ First, a mediator provides additional support to a party in an attempt to help them express their argument. This support may influence the outcome, whatever the mediator’s intentions, but the mediator is then required to retreat to her former neutral and facilitative role once a party begins to seek further approval for their stance. This technique, known as practising ‘equidistance’, creates a never-ending ‘paradox’ in which evaluative techniques are concealed within an ostensibly facilitative framework.⁴⁶ There may be a blanket rule against evaluation, but the reality is always more complex.

Despite this research, a pro-facilitative discourse continues to dominate policy after LASPO. John Howell, a Conservative MP speaking about family justice reform in 2017, claimed that ‘anyone who sits through a mediation will experience the enormous amount of power that that gives people to be able to decide for themselves, rather than passing it off to a third party’.⁴⁷ Moreover, the post-implementation review of LASPO, defined mediation as a process ‘where an impartial and independent professional mediator helps individuals... work out agreements’.⁴⁸ So it is clear that neutrality is widely assumed to remain central to mediator practice, despite the difficulties faced by mediators post-LASPO. Mediators are effectively caught in what Astor describes as a ‘double bind’.⁴⁹ On the one hand, upholding neutrality supports the traditional facilitative model but could hamper access to justice where an increase in the proportion and number of complex claims more or less requires mediators to evaluate in the absence of any other professional input. On the other hand, if a mediator adapts her practices and evaluates – much as Riskin envisaged might happen – she responds to the needs of parties for that type of support, yet in doing so departs from the orthodox conceptualisation of neutrality. In order to escape the circularity of this debate, it is crucial to ask how far the traditional approach to neutrality benefits family mediators and their clients in the current climate.

⁴³ Astor, n 16 above.

⁴⁴ D Greatbatch and R Dingwall, ‘Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators’ (1989) 24(4) *Law & Society Review* 613, 636.

⁴⁵ Rifkin, Millen and Cobb, n 41 above, 154-155.

⁴⁶ *Ibid*, 159.

⁴⁷ *Hansard*, HC Deb, vol 631, cols 176WH-177WH (15 November 2017).

⁴⁸ Ministry of Justice, *Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)*, CP 37 (2019), para 603.

⁴⁹ Astor, n 16 above, 226.

An empirical study: assessing Codes of Practice

It is evident that mediators remain bound by a dominant facilitative framework that overlooks the need for flexibility. Recent research has investigated how this issue translates into practice. Following LASPO, Maclean and Eekelaar observed and interviewed family mediators, identifying several participants who went beyond a facilitative approach, including those who were 'attempting to influence an outcome'.⁵⁰ They described the distinction between information and advice as vague, arguing that mediators frequently give information that moves parties towards a particular action.⁵¹ Emma Hitchings and Joanna Miles also interviewed family mediators as part of a larger study on settlement of financial disputes on divorce.⁵² They identified a continuum of information-giving that, towards the end of the spectrum, became 'specific, proactive information more closely tailored to the parties' situation'.⁵³ Both sources clearly demonstrate that evaluative measures are taken by many mediators, notably in relation to giving information and advice. It is important to build on such findings to explore how else the evaluative framework seeps into – and is acknowledged as a legitimate aspect of – mediator practice.

The remainder of this article is based on findings from a study of family mediation Codes of Practice in England and Wales. Specifically, the analysis considers how far the facilitative framework dominates Codes of Practice after LASPO. Codes of Practice are understudied in empirical research but play a valuable role in demonstrating the development of mediation practice over time. Lisa Webley previously argued that the Code of Practice enforced by the *UK College of Family Mediators (UKCFM)*, the then leading regulatory body, emphasised a facilitative approach, whereas guidance by the *Law Society* permitted some flexibility.⁵⁴ Webley's study did not examine whether regulatory bodies openly permit evaluation, nor whether disciplinary action would be taken if a mediator fails to follow a facilitative framework. Maclean and Eekelaar, building on the argument described above, claimed that the distinction drawn between information and advice in Codes of Practice was difficult to maintain in practice.⁵⁵ This was followed by Barlow and others, who explored the lack of discussion on domestic abuse in Codes of Practice and its impact on party autonomy.⁵⁶ However, the latter two studies, whilst essential to the literature on family mediation, do not provide a deeper analysis of the reference to facilitative and evaluative methods in Codes of Practice. This article attempts to fill in this research gap by providing an original and detailed analysis of Codes of Practice from the last four decades during which the role of family mediation has significantly evolved.

⁵⁰ Maclean and Eekelaar (2016), n 3 above, 115.

⁵¹ *Ibid*, 95.

⁵² Hitchings and Miles, n 29 above.

⁵³ *Ibid*, 191.

⁵⁴ L Webley, *Adversarialism and Consensus? The Professions' Construction of Solicitor and Family Mediator Identity and Role* (Quid Pro, 2010), 178.

⁵⁵ Maclean and Eekelaar (2016), n 3 above, 79-81.

⁵⁶ Barlow and others (2017), n 4, above, 101.

Codes of Practice between the 1980s and 2010s were analysed for this project. The findings reported in this article primarily focus on the three Codes of Practice currently available to family mediators:

1. The *FMC's 'Code of Practice for Family Mediators'*;⁵⁷
2. *Resolution's 'Guide to Good Practice on Mediation'*;⁵⁸
3. *The College of Mediators' 'Code of Practice for Mediators'*.⁵⁹

The first Code of Practice analysed was published by the *FMC* and last updated in May 2018 (with later modifications in November that year). The *FMC* is an umbrella body for family mediators in England and Wales, established in 2007; it introduced its first Code of Practice in 2010. The Code was revised in September 2016, three years after LASPO was enacted, which suggests that the amendments were not an immediate response to the new family justice landscape. Guidance published by the *FMC* binds all mediators registered with a Member Organisation. There are currently five Member Organisations in England and Wales: the *College of Mediators*, *Family Mediators Association (FMA)*, the *Law Society*, *National Family Mediation (NFM)*, and *Resolution*. The *ADRgroup* was an additional Member Organisation but removed from the *FMC's* list of affiliated institutions in 2019.⁶⁰ Neither the *FMA*, *Law Society* nor *NFM* publish their own Codes of Practice; they follow the rules set by the *FMC*. The other Codes of Practice analysed in the study are published by *Resolution* (2) and the *College of Mediators* (3). *Resolution's 'Guide to Good Practice on Mediation'* was last updated in May 2018, although a direct link to the document was removed from their website in early 2019. The *College of Mediators* updated its Code of Practice in February 2019, adding various appendices for further information. These two Codes of Practice bind their members, although mediators must also follow the *FMC's* guidance at all times.

A series of Codes of Practice from the 1980s and 1990s were then analysed in order to track long-term developments in relation to the facilitative framework:

4. The *National Family Conciliation Council's (NFCC) 'Extended Code of Practice for Family Conciliation Services'*;⁶¹
5. *NFM and FMA's 'Joint Code of Practice'*;⁶²
6. *UKCFM's 'Code of Practice'*.⁶³

⁵⁷ Family Mediation Council, *Code of Practice for Family Mediators* (Family Mediation Council, 2018).

⁵⁸ Resolution, *Guide to Good Practice on Mediation* (Resolution, 2018).

⁵⁹ College of Mediators, *Code of Practice for Mediators* (College of Mediators, 2019).

⁶⁰ Family Mediation Council, 'About Us' (Family Mediation Council, 2019) available at: www.familymediationcouncil.org.uk/about-us/, last accessed 17 January 2020.

⁶¹ National Family Conciliation Council, 'Extended Code of Practice for Family Conciliation Services' (1985) 15 Fam Law 274.

⁶² UK College of Family Mediators, *UK College of Family Mediators: Directory & Handbook 1997/98* (FT Law & Tax, 1997).

⁶³ UK College of Family Mediators, *UK College of Family Mediators: Directory & Handbook 1998/99* (FT Law & Tax, 1998).

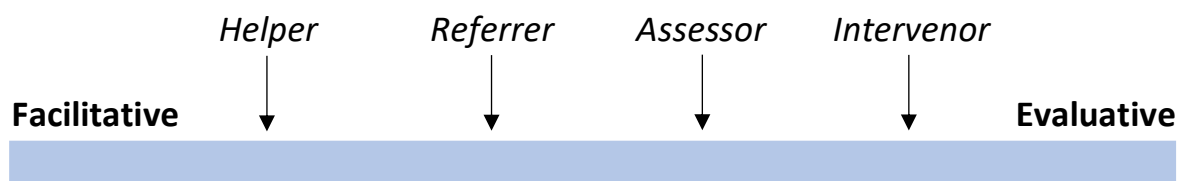
The *NFCC* (4) was the first association for family mediators, established in 1981.⁶⁴ Its Extended Code of Practice, published in 1985, was analysed for this study. The *NFCC*, later renamed *NFM*, represented not-for-profit family mediation services. Mediators working in the private sector, by contrast, became members of the *FMA*. A later Code of Practice was jointly created by *NFM* and *FMA* (5) in 1994 to promote consistency across mediator practice in England and Wales. Despite this new structure, further regulation was sought.⁶⁵ In 1996, the *NFM* and *FMA*, alongside *Family Mediation Scotland*, established the *UKCFM*.⁶⁶ The *UKCFM* introduced its own Code of Practice (6) for family mediators across the UK in 1998. Although the *UKCFM* later broadened its focus and became the *College of Mediators* (see 3 above), the organisation marked a significant step towards the regulation of a diverse profession that had exponentially grown in size.

All six Codes of Practice were subjected to qualitative content analysis for this study in order to identify themes across the data, all with a view to providing an original insight into the meaning of family mediation from the perspective of regulatory bodies.

The four functions of family mediators

The analysis revealed four functions of mediators: *helpers*, *referrers*, *assessors* and *intervenors*. These functions can be situated across Riskin's continuum, as reflected in *figure two*. Recognising these various functions avoids the binary trap suffered by Riskin's thesis and reintroduces facilitation and evaluation as two strategies situated on a continuum. These four mediator functions, evident within the Codes of Practice, demonstrate the flexibility that is in fact already permitted in mediator practice, encapsulating a much greater range of mediator techniques and strategies than the binary approach.⁶⁷ Each function will now be explored in detail, followed by a discussion of their importance in the post-LASPO climate.

Figure Two: Situating the four mediator functions on Riskin's continuum



(1) Mediators as helpers

The first function identified, mediators as *helpers*, encapsulates the facilitative framework that underpins the traditional conceptualisation of family mediation. Mediators are expected to *help* parties reach a solution or improve their relationship. However, a mediator cannot force the achievement of settlement or influence its shape and must ensure that all outcomes

⁶⁴ L Parkinson, 'Family Mediation in Practice – 'A Happy Concatenation'?' in J Westcott (ed), *Family Mediation: Past, Present and Future* (Family Law, 2003), 43.

⁶⁵ For an overview of the regulation of family mediation throughout this period, see M Roberts, *Mediation in Family Disputes: Principles of Practice* (Ashgate, 3rd edn, 2008).

⁶⁶ L Parkinson, *Family Mediation* (Sweet & Maxwell, 1997), 355.

⁶⁷ Hitchings and Miles previously explored 'the parameters of the possible' in family mediation, identifying five responses when mediators came across an unfair settlement. See Hitchings and Miles, n 29 above, 188.

are the voluntary decision of both parties. The *helper* function was originally evident in the NFCC's Code of Practice:⁶⁸

*'...The conciliator **helps** the parties to explore possibilities of reaching agreement, without coercion. Where children are involved, the conciliator **helps** the parties to work out arrangements which balance their individual interests with those of their children.'*
NFCC⁶⁹

This definition heavily endorses a facilitative approach because the mediator is conceptualised as an assistant, whereas the parties 'work out' the agreement. Neutrality is implicit in this provision: if a mediator goes beyond their *helper* function, she no longer assists the parties to explore possible arrangements but, rather, sets the terms of settlement herself. Family mediation is defined consistently in this way across all the remaining Codes of Practice considered:

*'Mediation is a process in which those involved in family relationship breakdown, change, transitions or disputes, whether or not they are a couple or other family members, appoint an **impartial third person**, a Mediator, to **assist them to communicate better with one another and reach their own agreed and informed decisions** typically relating to some, or all, of the issues relating to separation, divorce, children, finance or property by negotiation.'* FMC⁷⁰

*'Family mediation is a process in which those involved in family breakdown, whether or not they're a couple or other family members, appoint an **impartial third person** to **assist them to communicate better with one another and reach their own agreed and informed decisions** concerning some, or all, of the issues relating to separation, divorce, children, finance or property by negotiation.'* Resolution⁷¹

*'Mediation is a process in which an **impartial third person assists** those involved in conflict **to communicate better with one another and reach their own agreed and informed decisions** concerning some, or all, of the issues in dispute.'* College of Mediators⁷²

*'Family mediation is a process in which **an impartial third person assists** those involved in family breakdown, and in particular separating or divorcing couples, **to communicate better with one another and reach their own agreed and informed decisions** about some or all of the issues relating to or arising from the separation, divorce, children, finance or property.'* NFM and FMA, UKCFM⁷³

Across these definitions, regulatory bodies define the mediator as an 'impartial third person' whose role is to 'assist' participants. This description reinforces the image of a facilitative,

⁶⁸ All emphases in the following quotes are added for clarity.

⁶⁹ National Family Conciliation Council, n 61 above, s 2.

⁷⁰ Family Mediation Council (2018), n 57 above, s 1.3.

⁷¹ Resolution, n 58 above, 13.

⁷² College of Mediators, n 59 above, s 1.2.

⁷³ UK College of Family Mediators (1997), n 62 above, s 1.2; UK College of Family Mediators (1998), n 63 above, s 1.2.

neutral mediator. Following this interpretation, all regulatory guidance examined in this study explicitly covers neutrality and impartiality, bar the *NFCC* which instead refers to the concept implicitly:

*'The Mediator must remain **neutral as to the outcome** of the Mediation at all times. The Mediator **must not seek to impose any preferred outcome** on Participants, or to influence them to adopt it... The Mediator must at all times **remain impartial** as between the Participants and conduct the Mediation **process in a fair and even-handed way**' FMC⁷⁴*

*'Mediators must at all times **remain impartial** as between the participants. They must conduct the **process in a fair and even-handed way.**' UKCFM⁷⁵*

*'Take care not to **become (or be perceived to have become) partial** to the view of one client rather than the objectives and aspirations of both.' Resolution⁷⁶*

*'They should also be aware of **the impact of unconscious bias** towards participants in mediation.' College of Mediators⁷⁷*

These sections reflect the three visions of neutrality frequently identified in the literature on mediation: *neutrality as to the outcome, not the process*;⁷⁸ *neutrality as impartiality and even-handedness*;⁷⁹ and, *neutrality as non-bias*.⁸⁰ Neutrality is established as an absolute expectation of mediators at all times. A mediator must not advance a particular solution (or be perceived to have done so), reinforcing her *helper* function. This also prohibits mediators from evaluating the validity of any statements made by individual clients. As stipulated by the *FMC*: *'The Mediator must make it clear that he or she does not make further enquiries to verify the information provided by any Participant'*.⁸¹ While mediators must emphasise the need for 'full and frank disclosure', they cannot ensure that the parties are transparent with each other⁸² It is left to the clients to ensure that disclosure occurs, based on a presumption that they have the capacity required to scrutinise information and hold the other party to account.⁸³ Mediators are therefore confined to a *helper* function that neutrally assists but does not direct the outcome.

⁷⁴ Family Mediation Council (2018), n 57 above, s 6.2, s 6.3.1.

⁷⁵ UK College of Family Mediators (1998), n 63 above, s 4.3; College of Mediators, n 59 above, s 4.3.1.

⁷⁶ Resolution, n 58 above, 24.

⁷⁷ College of Mediators, n 59 above, s 4.9.1.

⁷⁸ Astor, n 16 above, 223.

⁷⁹ S Douglas, 'Neutrality in mediation: a study of mediator perceptions' (2008) 8(1) *QUT Law and Justice Journal* 139, 143.

⁸⁰ R Delgado and others, 'Fairness and formality: Minimizing the risk of prejudice in alternative dispute resolution' (1985) 6 *Wisconsin Law Review* 1359, 1374.

⁸¹ Family Mediation Council (2018), n 57 above, s 8.13.

⁸² Family Mediation Council (2018), n 57 above, s 8.11; College of Mediators, n 59 above, s 6.5; Resolution, n 58 above, 33, 36; UK College of Family Mediators (1997), n 62 above, s 5.2; UK College of Family Mediators (1998), n 63 above, s 6.5.

⁸³ Resolution emphasises this position and advances mediators' *'responsibility to assist clients in making a full and frank disclosure of their finances. However, it is not [their] role to interrogate.'* Resolution, n 58 above, 36.

Information and advice

The strict divide between information and advice that was alluded to above also underpins the *helper* function. As stipulated by regulatory bodies:

'The Mediator may inform Participants of possible courses of action, their legal or other implications, and assist them to explore these, but must make it clear that he or she is not giving advice.' FMC⁸⁴

'Mediators must not give legal or other advice.' College of Mediators⁸⁵

***'...Mediators will provide information about the legal process, general legal principles and associated matters...but won't provide any individualised advice. It's therefore very important that clients are able to take advice as and when they need it.'*
Resolution⁸⁶**

'They must not give legal or other advice.' NFM FMA, UKCFM⁸⁷

'...while offering a different approach from the legal process of negotiation by solicitors or adjudication by the court, conciliation should not be seen as a substitute for legal advice.' NFCC⁸⁸

Under these provisions, in no way must a mediator be perceived to have given legal advice, instead being confined to an information-giving role. While 'information' may enhance settlement, mediators present it as a neutral form of support that is available to both parties. In contrast, 'advice' is tailored to each party's position and may benefit one individual over the other. The ability of mediators to provide information (only), therefore, reflects the dominant facilitative framework, whereas advice entails an evaluation of a proposed settlement, departing from mediator neutrality.

The clauses analysed above also reflect the historical assumption that mediation's client base can access solicitor support (and thereby obtain evaluation). Legal advice can guide parties through the legal process, manage their expectations and potentially lead to settlement. This support is particularly important in the family law system, where most disputants lack any legal education and seek some evaluation of their proposed agreement.⁸⁹ The Codes of Practice studied also portray legal advice as a vital element in mediation, and, at times, the final stage of negotiation. *Resolution* explicitly endorses collaboration between solicitors and mediators by recognising its benefits for both professions, as well as their clients:

⁸⁴ Family Mediation Council (2018), n 57 above, s 6.2.

⁸⁵ College of Mediators, n 59 above, s 6.11.

⁸⁶ Resolution, n 58 above, 54-55.

⁸⁷ UK College of Family Mediators (1997), n 62 above, s 5.9; UK College of Family Mediators (1998), n 63 above, s 6.10.

⁸⁸ National Family Conciliation Council, n 61 above, s 6.

⁸⁹ Barlow and others (2017), n 4 above, 201.

*'Where solicitors and mediators **work closely together**, the **outcomes** for clients **are likely to be improved** and both solicitor and mediator stand to gain from client recommendation as a result.'* **Resolution**⁹⁰

In another passage, *Resolution* instructs mediators to '*remind clients of the onward path from their mediation*', which includes solicitor involvement to obtain '*individual advice*' and '*a binding agreement/consent order*'.⁹¹ This reinforces the distinction between information and advice, as well as the professional work of lawyers and mediators more generally. Mediators are accordingly, and clearly, limited to a facilitative framework, advancing their *helper* function.

(2) Mediators as referrers

Under the *helper* function, mediators are reliant on lawyers to evaluate. If a mediator has exhausted all facilitative techniques to try to progress the dispute, she cannot act any further to promote settlement without straying into evaluation. She can, however, recommend that the parties seek legal advice, enacting her second function as a *referrer*.

Under the *referrer* function, mediators signpost parties to professional advice or support. This includes signposting to support services in light of alleged abuse⁹² or another mediator if the parties seek a publicly funded service.⁹³ The central type of *referral*, however, is to encourage individuals to obtain legal support. The *NFCC* originally stated in its Code of Practice that parties '*should be encouraged to seek legal advice in **all cases***'.⁹⁴ This universal instruction removed any expectation that the mediator should determine *when* legal advice is beneficial, effectively creating a blanket rule that she must *refer* each individual to advice. The mediator continues her role as an information provider, whereas the solicitor advises outside the mediation process. The *referrer* function therefore protects the facilitative role of the mediator, reinforcing the binary interpretation of Riskin's continuum.⁹⁵

Importantly, however, later Codes of Practice provide more specific (less universal) instructions about when *referral* must occur, moving the mediator into more evaluative territory:

*'They must advise participants that it is **desirable** in their own interests to seek independent legal advice before reaching any legally binding agreement.'* **NFM FMA**⁹⁶

⁹⁰ Resolution, n 58 above, 53.

⁹¹ *Ibid*, 47.

⁹² Family Mediation Council (2018), n 57 above, s 5.4.2, s 6.6.4.

⁹³ *Ibid*, s 8.9.

⁹⁴ National Family Conciliation Council, n 61 above, s 3.

⁹⁵ Mediation is typically conducted without lawyers present, although interest in lawyer-assisted models has increased in recent years. See Maclean and Eekelaar (2016), n 3 above, 130.

⁹⁶ UK College of Family Mediators (1997), n 62 above, s 6.4.

*'The Mediator must inform the Participants of the advantages of seeking independent legal or other appropriate advice whenever this appears **desirable** during the course of the Mediation.'* **FMC**⁹⁷

*'Be alert to points at which it would be **helpful** for either or both clients to have advice from their individual legal advisers or other specialised advice or support to assist them in reaching an outcome.'* **Resolution**⁹⁸

As these quotations show, since the *NFM* and *FMA*'s Joint Code of Practice in 1994, regulatory bodies have required mediators to promote legal advice when 'desirable'. The *FMC* adopts the same language today, and *Resolution* similarly mandates a referral if considered 'helpful'. Mediators are left to determine the meaning and application of such provisions, inevitably requiring them to make an evaluation about whether a *referral* to legal advice is beneficial. This more nuanced *referrer* function consequently departs from the orthodox, wholly facilitative framework.

Facilitative purists may criticise the *referrer* function for undermining or even contradicting mediator neutrality. If a mediator *refers* parties because she considers that the lack of legal advice disadvantages one individual, she inevitably evaluates the settlement or party dynamic, for example, to deflect a risk that a disempowered party could agree to what the mediator considers to be a 'bad deal', unaware – without legal advice – of its impact.⁹⁹ It is therefore argued that regulatory bodies appear to require mediators to evaluate in order to fulfil the obligations set out in their Codes of Practice. However, this evaluation is typically hidden under a facilitative guise, presumably to ensure harmony with the almost sacrosanct principle of mediator neutrality. When mediators refer parties to advice or support, they continue to be portrayed as *helpers* who provide information. The underlying evaluation that *referral* would be 'desirable' or 'helpful' is concealed to preserve the neutral image of the mediator and party autonomy, and effectively occurs through what can be termed a 'facilitative proxy'. Evaluation by facilitative proxy is similar to Rifkin, Millen and Cobb's 'equidistance', whereby a mediator engages in evaluation to advance a mediation but later retreats to a facilitative *helper* function when a party recognises her evaluation and seeks affirmation for their position, although it differs to the extent that regulatory bodies themselves endorse it.¹⁰⁰

Evaluation by facilitative proxy is a valuable descriptor of how mediators move along Riskin's continuum and do so with the permission of their regulatory bodies. Overall, the *referrer* function (no longer cast in one-dimensional, universal terms) shows that regulatory bodies recognise that some evaluation is necessary for mediators to fulfil their obligations enshrined in the Codes of Practice. But this evaluation remains hidden, causing a lack of transparency.

⁹⁷ Family Mediation Council (2018), n 57 above, s 8.14. Also see UK College of Family Mediators (1997), n 62 above, s 6.11; College of Mediators, n 59 above, s 6.12.

⁹⁸ Resolution, n 58 above, 17.

⁹⁹ However, legal advice does not necessarily prevent a weaker party agreeing to a poor settlement. See S Thompson, *Prenuptial Agreements and the Presumption of Free Choice* (Hart Publishing, 2015), 165.

¹⁰⁰ Rifkin, Millen and Cobb, n 41 above, 154-155.

It is this disguise that can unfortunately hinder debates around mediation reform, as will be discussed below.

(3) Mediators as assessors

The *assessor* function is situated closer to the evaluative end of Riskin's continuum. *Assessment* is vital to screening for suitability to use mediation, as well as understanding the presence and impact of power imbalances. Comparisons across Codes of Practice reveal an increasing recognition that mediators must screen for suitability, particularly post-LASPO. Codes of Practice also hint at mediators' ability to predict court outcomes and reality-test proposals (echoing findings from Hitchings and Miles' previous work), although these tools also remain concealed by a facilitative proxy.

Screening for suitability

An important precondition to dispute resolution is whether the parties are well-suited to a particular process and the level of support required for their dispute to progress.¹⁰¹ Under the *FMC* Code of Practice:

*'In all cases, the mediator **must** seek to discover through a **screening procedure** whether or not there is fear of abuse or any other harm and whether or not it is alleged that any Participant has been or is likely to be abusive towards another (or towards a child).'* **FMC**¹⁰²

If a mediator 'must' determine whether abuse is feared, has occurred or is likely to occur, she is required to *assess* the parties' relative standing. This screening process entails an *assessor* function and a more active role for mediators. Interestingly, the *FMC* introduced a new provision on safeguarding in 2018. Under section 3.7:

*'Mediators **must** have **appropriate safeguarding policies** and procedures in place.'* **FMC**¹⁰³

The *FMC* does not define nor explain '*appropriate safeguarding policies*'. Further guidance was published in a newsletter the same year:¹⁰⁴

*'Paragraph 3.7 reinforces that family mediators are **responsible** for making sure that they take appropriate measures that protect clients from harm or damage throughout the family mediation process. It applies to all family mediators, though mediators who*

¹⁰¹ Barlow and others (2014), n 5 above, 25. The authors identify several ideal characteristics in mediation, including emotional readiness, an equal balance of power and engagement with the process.

¹⁰² Family Mediation Council (2018), n 57 above, s 5.4.2.

¹⁰³ *Ibid*, s 3.7.

¹⁰⁴ Family Mediation Council, 'FMC Newsletter: September 2018' (Family Mediation Council, 28 September 2018) available at: www.familymediationcouncil.org.uk/wp-content/uploads/2018/09/FMC-Newsletter-September-2018.pdf, last accessed 17 January 2020.

*see children as part of the mediation process may have different policies and procedures in place to those who do not.’ FMC, September 2018*¹⁰⁵

Whilst guidance often states that mediators ‘should’ or ‘must seek’ to conduct mediation in a particular manner, the *FMC* frames screening as the ‘responsibility’ of mediators. Similar to section 3.7, the *College of Mediators* also introduced new guidance on screening in 2019. Appendix C, titled ‘Assessing Suitability to Mediate’, sets out five factors for mediators to consider when screening participants.¹⁰⁶ This includes whether the parties engaged in mediation voluntarily and made decisions free of undue pressure. In essence, these clauses direct mediators to assess imbalances of power, rather than remain a silent third party who cannot intervene.

Screening is not just an initial gate-keeping matter, but also an ongoing responsibility for family mediators, requiring them to confirm that mediation remains appropriate for the parties’ dispute. Under the *FMC* Code of Practice, if a mediator believes that a party ‘*is unable or unwilling to take part in the process freely and fully*’, they are required to ‘*raise the issue and where necessary suspend or terminate the Mediation.*’¹⁰⁷ The ability of mediators to ‘raise the issue’ or suspend mediation will be considered under the final function, mediators as *intervenors*. What is relevant to the *assessor* function is the opening part of this section, namely the responsibility of a mediator to determine if a party can engage ‘freely and fully’ in mediation. This is a clear example of *assessment* as a mediator must consider the parties’ relative standing throughout the mediation sessions.

A critical point to take from this is that the evaluation entailed in screening is not hidden by a facilitative proxy – the mediator does not hide her *assessment* and can take steps to address the problems she identifies. However, this entails a procedural gatekeeping role that a mediator holds in determining who is appropriate for mediation, rather than a substantive evaluative function that assesses the issues at the centre of the dispute. First, the mediator must screen the parties for suitability to ensure that a facilitative framework is appropriate. Once the mediator concludes (and remains content) that the parties can attend (and continue) mediation, she returns to her *helper* function. From this point, the mediator can only assess the party dynamic or settlement to ensure that the parties are participating in mediation voluntarily. Assessments that scrutinise the substantive proposals themselves must be provided by another third party, reinforcing the mediator’s facilitative framework.

Predicting court outcomes

Some Codes of Practice also permit mediators to predict court outcomes were the case to be litigated. This is a useful tool that can provide insight into the legitimacy of a proposal measured against legal standards. This technique is increasingly important in the

¹⁰⁵ Family Mediation Council, ‘Safeguarding Policies and Procedures for Family Mediators’ (Family Mediation Council, September 2018) available at: www.familymediationcouncil.org.uk/safeguarding-policies-and-procedures-for-family-mediators/, last accessed 17 January 2020.

¹⁰⁶ College of Mediators, n 59 above, appendix C.

¹⁰⁷ Family Mediation Council (2018), n 57 above, s 6.1.

contemporary family justice system where legal advice from a solicitor is inaccessible by many.

This is a significant change from past practice. Both Codes of Practice from the 1990s explicitly prohibited mediators from predicting the likely court outcome in their dispute:

*'[Mediators] **must not predict the outcome of court proceedings** in such a way as to indicate **or influence the participants** towards the outcome preferred by the mediators.'* **NFM FMA**¹⁰⁸

*'They **must not predict the outcome of court proceedings** in such a way as to indicate **or influence the participants** towards the outcome preferred by the mediators.'* **UKCFM**¹⁰⁹

Contrast with the current guidance:

*'...**if the Participants consent, the Mediator may inform** them (if it be the case) that he or she considers **that the resolution they are considering might fall outside the parameters which a court might approve** or order.'* **FMC**¹¹⁰

*'Resolution mediators do have a **responsibility**, however, **to inform clients if** they think that **the outcomes they are considering might (or would) fall outside that which a court might approve** or order.'* **Resolution**¹¹¹

*'[Mediators] **must not attempt** to move the participants towards the mediator's own preferred outcome or **to predict the outcome of court or formal proceedings**.'* **College of Mediators**¹¹²

Under the *FMC's* Code of Practice, a mediator can tell both parties that a judge may not approve their agreement. The mediator must, however, first obtain the parties' consent to conveying that information. In contrast, *Resolution* outlines mediators' 'responsibility' to notify parties that the outcome might not be approved by court and does not require party consent. The *College of Mediators'* Code of Practice contains a similar clause to the *FMC*, first stating that mediators must not 'predict the outcome of court or formal proceedings'. The organisation is, however, silent on whether mediators can inform parties if the agreement may fall beyond the likely *range* of a court decision. It is evident that the regulatory bodies adopt significantly different approaches on this issue. Maclean and Eekelaar recognised these inconsistencies, as did Barlow and others.¹¹³ Despite these criticisms, the conflicting guidance set by the *FMC* and its Member Organisations remains unresolved. This could lead to

¹⁰⁸ UK College of Family Mediators (1997), n 62 above, s 5.9.

¹⁰⁹ UK College of Family Mediators (1998), n 63 above, s 6.10.

¹¹⁰ Family Mediation Council (2018), n 57 above, s 6.2.

¹¹¹ Resolution, n 58 above, 17.

¹¹² College of Mediators, n 59 above, s 4.2.

¹¹³ Maclean and Eekelaar (2016), n 3 above, 80; Barlow and others (2017), n 4 above, 109. Another issue identified by Maclean and Eekelaar occurs when one party consents to being informed whilst the other does not.

significant inconsistencies in mediation practice, particularly because predicting court outcomes involves an *assessment* of the proposed settlement.

In order to *assess* whether a proposed agreement sits beyond the range of outcomes that a court would be expected to adopt, a mediator must inevitably depart from the facilitative, neutral role that currently dominates Codes of Practice. The same section of the *FMC* Code of Practice that permits mediators to predict court outcomes also stipulates that mediators '*must not seek to impose any preferred outcome on the Participants*'.¹¹⁴ This clearly upholds mediator neutrality as to the outcome. However, predicting court outcomes is likely to have some impact on the final settlement. After the mediator has predicted the court outcome, the parties may continue with their plan or they may terminate the mediation, or they may alter the proposed settlement to follow what would be reached in court. These potential consequences create a substantial neutrality dilemma as it becomes increasingly difficult for mediators to balance the two conflicting obligations (to predict outcomes and to maintain neutrality), both located in the same section of the *FMC* Code of Practice. The *FMC* does not explain how and whether this conflict influences the validity of any complaints made against a mediator. But rather than provide information on how to balance the two conflicting functions, the regulatory bodies simply portray mediators as facilitative *helpers* who provide information on the likely outcome in court. This continues to conceal mediator evaluation with a facilitative cloak, creating a lack of transparency in Codes of Practice.

Reality-testing

Evaluation by facilitative proxy is also evident in the Codes' clauses on reality-testing.¹¹⁵ Both *Resolution* and the *College of Mediators* cover reality-testing in their Codes of Practice:

*'As clients work towards achieving an outcome, their preferred option should be **carefully reality-checked** and information given where an option being considered may fall outside that which a court would approve.'* **Resolution**¹¹⁶

*'Assist parents to consider:... **reality testing arrangements** they are considering in the context of their growing children's needs.'* **Resolution**¹¹⁷

*'In contexts where mediators are operating within a legislative framework they should **reality test the workability of proposals** put forward by the participants to be clear whether they fall within legal parameters.'* **College of Mediators**¹¹⁸

The *FMC* does not explicitly discuss reality-testing in its Code of Practice. However, in the *Manual of Professional Standards and Self-Regulatory Framework*, first published in 2014, the *FMC* explains that an outcome summary (provided to parties at the end of mediation) must

¹¹⁴ Family Mediation Council (2018), n 57 above, s 6.2.

¹¹⁵ Hitchings and Miles also recognised reality-testing as a form of information provided by family mediators, going beyond 'neutral delivery of general legal information' to increased focus on the case at hand. See Hitchings and Miles, n 29 above, 184.

¹¹⁶ *Resolution*, n 58 above, 40.

¹¹⁷ *Ibid*, 37-38.

¹¹⁸ *College of Mediators*, n 59 above, s 4.2.

'ensur[e] that all mediated outcomes follow a clear rationale, are **reality-tested**, and are approved by both participants'.¹¹⁹ Similar to the ability to predict court outcomes, reality-testing involves an *assessment* of the proposed settlement or party dynamic. The *College of Mediators* also emphasises that the '*workability*' of the agreement should be considered, extending the reach of *assessment* to the viability and longevity of the settlement, echoing the prediction of court outcomes tool discussed above. It is unclear to what extent reality-testing is the responsibility of the mediator or the parties themselves, as neither the *FMC*, *College of Mediators* nor *Resolution* clarify what reality-testing means for a mediator and her neutrality. The nature of the reality-testing function is, by and large, clouded by ambiguity.

However, it can be argued that reality-testing is decidedly evaluative in its nature. At its core, reality-testing *assesses* whether a proposal is workable for both participants. This puts mediators' neutral *helper* function in doubt: if the mediator finds that a proposal is unworkable for one individual, reality-testing will ultimately benefit one party over the other, though it may be argued that reality-testing supports both parties because it provides them with the benefit of an agreement that works in the long-term. However, a mediator may also reality-test to help mitigate against an unequal power dynamic between clients. By doing so, she adopts an evaluative role that could influence the final settlement. To avoid conflict between the *assessor* and *helper* functions, regulatory bodies portray reality-testing as part of the information-giving role of mediators, again exemplifying the facilitative proxy that hides evaluation throughout the regulatory guidance.

(4) Mediators as intervenors

Despite the dominant facilitative framework, mediators also become *intervenors*. This is the fourth and final function identified in this study, closest to the evaluative end of Riskin's spectrum. Mediators must adhere to a number of norms throughout sessions, most notably the welfare of children. Under the *FMC* Code of Practice, the mediator must consider the welfare of any children '*at all times*', and '*should encourage the Participants to focus on the needs and interests of the children*'.¹²⁰ The mediator can therefore *intervene* and refocus discussions if they are concerned that a proposal does not uphold the welfare of the child.

Intervention is also allowed in response to an unequal balance of power and domestic abuse.¹²¹ Rather than simply determining if mediation is appropriate through screening at the outset, a mediator must consider how to change the process in light of the parties' needs. An

¹¹⁹ Family Mediation Council, 'FMC Manual of Professional Standards and Self-Regulatory Framework' (Family Mediation Council, May 2018), 19, available at: www.familymediationcouncil.org.uk/wp-content/uploads/2019/06/FMC-Manual-of-Professional-Standards-Regulatory-Framework-v1.3-Updated-June-2019.docx.pdf, last accessed 17 January 2020.

¹²⁰ Family Mediation Council (2018), n 57 above, s 5.3.

¹²¹ The *UKCFM* introduced a dedicated section on *Abuse and Power Imbalances* in 1998, advising that mediation should reduce '*any risk of violence*'. The *FMC* has since widened this provision to '*any risk of abuse*'. See UK College of Family Mediators (1998), n 63 above, s 2.3, and Family Mediation Council (2018), n 57 above, s 2.3.

assessment of the party dynamic or settlement can lead the mediator to decide that intervention is appropriate:

*'The Mediator **must seek to prevent manipulative, threatening or intimidating behaviour** by any Participant, and **must conduct the process in such a way as to redress, as far as possible, any imbalance of power** between the Participants. If such behaviour or any other imbalance seems likely to render the Mediation unfair or ineffective, the Mediator must take appropriate steps to seek to prevent this, including **terminating** the Mediation if necessary.'* FMC¹²²

Resolution and the College of Mediators replicate this section,¹²³ which originates in the 1990s.¹²⁴ A mediator must, through *assessment*, recognise when one party's behaviour is 'manipulative, threatening or intimidating'. Following this, the FMC establishes three obligations of mediators. First, the mediator must attempt to prevent abusive behaviour. Second, she must alter mediation in response to any power imbalances, limiting their intervention to one of process. From a pro-facilitation perspective, these two requirements promote mediator neutrality because the mediator is managing the process, not the outcome. The mediator could, for example, give one individual longer to speak or hold private caucuses with each party. Third, if mediation becomes 'unfair or ineffective', the mediator takes 'appropriate steps'. This includes termination, although that appears to be a last resort.

All three steps undoubtedly (and intentionally) involve an evaluation of, and interference with, the party dynamic. A mediator must first determine that the parties are of unequal standing. She must then determine the best course of action and put this into effect, moving towards *intervention* in order to reshape the party dynamic. The *intervenor* function thus reflects a heavily evaluative framework. Although many of the steps taken by the mediator may be processual, it may lead the mediator to an intervention that involves evaluating the substantive issues of a dispute. This is key evidence that regulatory bodies permit mediators to evaluate, revealing the foundation for extra flexibility in mediator practice.

The analysis suggests that *intervention* produces a significant neutrality dilemma, similar to the *assessor* function. If one strictly adheres to neutrality, as advocated in the *helper* function and under the original conceptualisation of family mediation, most forms of evaluation are too radical to be conducted by a mediator. Yet this perception conflicts directly with the obligation on mediators to redress abusive behaviour and imbalances of power. Regulatory bodies provide no further support to mediators attempting to balance these competing interests. For instance, the FMC does not define 'appropriate steps' or explain when mediation is 'unfair or ineffective', leaving the reach of the obligation to intervene entirely unclear. This uncertainty could, understandably, cause anxieties around mediator practice and will be revisited below when discussing future reform. Nonetheless, both the *assessor*

¹²² Family Mediation Council (2018), n 57 above, s 6.3.2.

¹²³ Resolution, n 58 above, 14; College of Mediators, n 59 above, s 4.3.2.

¹²⁴ UK College of Family Mediators (1997), n 62 above, s 2.4; UK College of Family Mediators (1998), n 63 above, s 4.4.

and *intervenor* functions reveal a flexible set of tools that could be utilised by mediators in the post-LASPO climate.

Access to Justice after LASPO: the significance of the *assessor* and *intervenor* functions

This final section considers how far the four functions could help meet the challenges faced by mediators in the modern family justice system, given the withdrawal of solicitors and the diverse client base.

The *helper* function clearly dominated the original conceptualisation of family mediation in the late 20th century. The *NFCC's* Extended Code of Practice explicitly stated that mediators '*must never give an evaluation or subjective appraisal of either party to either solicitor.*'¹²⁵ Whilst the terms 'facilitative' and 'evaluative' did not become vernacular until Riskin's work in the 1990s, it is evident that the *NFCC* heavily restricted mediators to the former framework. Mediators were required to *refer* every dispute to legal advice, consequently removing any evaluative aspect from this function. Furthermore, *assessment* and *intervention* were only permitted in anticipation of serious harm to a child.¹²⁶ This focus on facilitation reflects the state of the family justice system at a time when mediation's clientele was more homogeneous and solicitors were largely accessible. The demand for a wider continuum of mediator strategies was low during this period, enabling the facilitative framework to flourish.

The *referrer* function was later envisioned to contain an evaluative remit. From 1994, mediators signposted parties to additional support when 'desirable' or 'helpful'. Mediators' *referrer* function shows that regulatory bodies now allow, and to some extent expect, some departure from the dominant facilitative model. Yet *referral*, as well as the *helper* function, perpetuates mediators' dependence on third parties to advance negotiations. This is of serious concern in the post-LASPO context where solicitor involvement is an aspiration for many but a reality for few.¹²⁷ Interestingly, *Resolution* recognises the dearth of legal support post-LASPO in its Code of Practice, but quickly clarifies that this must not influence mediator practice:

***'An increasing percentage of people are not seeking legal advice on family legal issues. This may be because they don't have the means to afford it or that they have made a choice not to do so... Whilst you may have considerable concerns for those who cannot afford legal advice, you must ensure you work within the requirements of the FMC Code of Practice and must not provide partial advice, as to do so would breach your neutrality and the impartiality of any mediation process.'* Resolution¹²⁸**

In just one paragraph, *Resolution* acknowledges the post-LASPO climate and refuses to act upon it, preferring to follow the dominant facilitative framework and absolute neutrality. An

¹²⁵ National Family Conciliation Council, n 61 above, s 3.

¹²⁶ *Ibid*, s 5.

¹²⁷ Hitchings and Miles conclude that, following LASPO, any mediation model dependent on accessible legal advice is 'doomed to fail': Hitchings and Miles, n 29 above, 188.

¹²⁸ *Resolution*, n 58 above, 17-18.

assumption that solicitors are involved in mediation continues to underpin this modern conceptualisation: mediators *help*, whereas solicitors *advise*. The dominance of absolute neutrality in mediation guidance consequently obstructs the very flexibility that may be desirable, or even necessary, in the contemporary context.

A further criticism of the *referrer* function is that regulatory bodies do not clarify what steps a mediator should take if parties do not seek further advice or support. The *NFCC* originally stated that '*unrepresented clients should be told that their situation may have legal implications on which legal assistance may be advisable.*'¹²⁹ This provision stopped mediators from taking any action beyond warning the parties of the risks if they do not obtain legal advice. Whilst this section was, by its very nature, constricting, it at the very least provided certainty. Modern Codes of Practice, by comparison, are ambiguous on this point. A pro-facilitative mediator, for instance, may refrain from any evaluation, justifying this through the orthodox *helper* function. By contrast, a mediator more closely aligned with the evaluative framework may provide the additional support the parties would previously have obtained elsewhere, straying into *assessment* and *intervention*, based on the argument that to refrain from doing so hinders access to justice. On this latter view, the *helper* and *referrer* functions are by themselves not enough to accommodate mediation's increasingly diverse client base. Mediators continue to be bound by the orthodox approach to practice, although as this analysis of the Codes has shown, there are cracks in the facilitative framework. Nevertheless, the ambiguity in the guidance surrounding the *referrer* function limits its value in providing flexibility post-LASPO.

By contrast, the remaining two functions permit flexibility in mediator practice. The *assessor* function reflects an increasingly legal role for mediators in the post-LASPO era, requiring them to have a sense of likely court outcomes. Mediators also *assess* the workability of an agreement through reality-testing. These provisions were introduced in the *FMC's* original Code of Practice in 2010 three years before the legal aid cuts were introduced, leading to the implication that LASPO is not the sole reason why there has been a move towards evaluation. It is suggested that regulatory bodies have reinterpreted the objectives of family mediation, expecting mediators not only to be aware of family law but to apply it to the case at hand. Moreover, the *FMC* and *College of Mediators* recently introduced new provisions on screening in their Codes of Practice. This may be a response to the recent withdrawal of solicitors, a profession that referred and screened most parties into mediation before LASPO.¹³⁰ It appears, therefore, that regulatory bodies are beginning to recognise the demand for flexibility in mediator practice, particularly following the withdrawal of solicitors in family justice.

However, mediator *assessment* of this sort does not necessarily mean that the mediation will proceed in the shadow of the law. Hitchings argues that outsider notions of justice (located outside the formal legal process) that often reflect social or moral, rather than legal, norms

¹²⁹ National Family Conciliation Council, n 61 above, s 3.

¹³⁰ The removal of solicitors as gatekeepers to family mediation is outlined by B Hamlyn, E Coleman and M Sefton, *Mediation Information and Assessment Meetings (MIAMs) and mediation in private family law disputes: Qualitative research findings* (Ministry of Justice, 2015), 20-21.

can find their way into various family justice settings.¹³¹ An individual mediator may end up unwittingly advancing what she thinks the law ‘should’ be rather than what the law actually requires, misconstruing or misapplying what she may present as likely legal outcomes. The risk that the *assessor* function can be misappropriated is heightened when it is considered that a significant proportion of mediators have a therapeutic background and little legal training. This returns to the apprehension outlined at the start of this article that evaluation currently lacks the proper checks and balances to be effective. Further regulation is necessary if evaluation is to be controlled and used effectively.

Finally, *intervention* encapsulates an evaluative approach that departs from the strict facilitative framework and may be the answer to the increased calls for flexibility in mediator practice. This evaluative function entails mediators directing outcomes, often in light of what they believe is legal reality or a feasible outcome for both parties. Altogether, *intervention* (preceded by *assessment*) can act as a check or form of scrutiny over the more complex, diverse cases now coming to mediation – though if that assessment is legally wrong, the result could be unfair or, in some instances, dangerous. Regardless, *intervention* remains a cursed practice. As demonstrated above, *intervention* is often concealed in Codes of Practice to ensure harmony with the original conceptualisation of family mediation under the facilitative framework.

The orthodox approach to neutrality and binary interpretation of Riskin’s continuum do not reflect the variety of functions potentially at a mediator’s disposal in the modern landscape. If the breadth of mediator functions is to be recognised and discussed openly, several uncertainties around the *intervenor* function must be resolved. First and foremost, it is unclear what exactly *intervention* covers. The strict adherence to a facilitative framework has prevented an open and thorough debate on how evaluation transpires in practice. While *intervention* is often associated with termination of mediation, this technique will not provide the flexibility that many individuals desire post-LASPO. Mediators were originally permitted to withdraw from mediation only where a party’s actions were (or may be) ‘*seriously detrimental to the welfare of their child/ren*’,¹³² but power imbalances are now also covered in modern Codes of Practice.¹³³ If mediation is terminated, then, rather than move into publicly funded legal advice, assistance and representation, the main alternatives for many individuals will be to self-represent in court or abandon all negotiations entirely, two options that are widely criticised in the family law literature.¹³⁴ *Intervention* as termination is, thus, simply not enough post-LASPO in terms of achieving satisfactory client outcomes and access to justice. Ideally, mediators can access a variety of interventionist methods and reserve termination for the most extreme cases. This analysis reveals a gap in mediation research, primarily caused by the ambiguity in regulatory guidance.

¹³¹ E Hitchings, ‘Official, operative and outsider justice: the ties that (may not) bind in family financial disputes’ (2017) 29(4) CFLQ 359, 374.

¹³² National Family Conciliation Council, n 61 above, s 5.

¹³³ Resolution, n 58 above, 48.

¹³⁴ L Trinder and others, *Litigants in person in private family law cases* (Ministry of Justice, 2014); J Mant, ‘Litigants’ experiences of the post-LASPO family court: key findings from recent research’ (2019) 48(3) Fam Law 300.

Justifying evaluation and the need for regulation

In 1985, the Matrimonial Causes Procedure Committee wrote that the role of the mediator was 'to assist the parties in this [mediation] process.'¹³⁵ This article has challenged that conceptualisation and suggested that the role of mediators is more complex than assumed. Overall, the study indicates that evaluation is a crucial part of modern mediator practice and permitted by their regulatory bodies. Furthermore, the level of evaluation allowed by regulatory bodies has increased over time. In the 1980s, the NFCC's Extended Code of Practice provided mediators with little to no space for evaluation. Mediators' *referrer* function became visible from the 1990s, as well as the ability to *assess* and *intervene* when violence had occurred (or was likely to occur). This trend towards evaluation, albeit practised behind a facilitative façade in many instances, has continued into the 21st century. Mediators can now *assess* proposals through reality-testing and predict the likely outcome that would be reached in court. They can also *intervene* in instances of domestic abuse and power imbalances. There is clearly increasing acceptance for evaluation in Codes of Practice.

It is crucial to ask why mediation cannot be reformed to enable evaluation to occur openly in the post-LASPO context. The aim of this article is not to criticise mediator neutrality or the facilitative framework. Both concepts have their place in modern practice. It is also not the aim of this article to propose that mediators should give legal advice. Instead, it has sought to show that evaluation is *already* permitted by regulatory bodies, notwithstanding the widely-adopted binary interpretation of Riskin's work, and that the distinction between information and advice is often unclear. The continuum of mediator functions proposed in this article acknowledges the value of evaluation post-LASPO. It is hoped that this discussion will stimulate further debates around mediator practice, qualifications and training so that flexibility can complement and promote an alternative interpretation of neutrality. More specifically, the analysis may contribute to the debate around whether mediators should provide legal advice (or more active forms of information-provision) in the future.

The tendency to hide evaluation behind a facilitative guise is problematic because it prevents an open discussion about what mediation involves and its future development. In order to have an informed discussion around the purpose of evaluation, the framework must be recognised fully, operated transparently, and regulated effectively. Facilitative proxies simply bury the issues faced by mediators post-LASPO.

Evaluation is not inherently immoral, harmful or dangerous. Rather, it is a well-established feature of mediation recognised in regulatory guidance. Acknowledging this explicitly would enable mediators to move between facilitation and evaluation, as originally intended by Riskin. For decades, evaluation has been rejected as a framework that attacks party self-determination. As Riskin later clarified, his continuum did not promote evaluation but demonstrated that it already occurred.¹³⁶ The modified version of Riskin's continuum set out

¹³⁵ Matrimonial Causes Procedure Committee (1985), n 14 above, para 3.10.

¹³⁶ L Riskin, 'Decisionmaking in Mediation: The New Old Grid and the New Grid System' (2003) 79(1) *Notre Dame Law Review* 1, 7.

in this article will also be met with some scepticism. Much like Riskin's original work, this article is an attempt to show that regulatory bodies already permit mediators to evaluate and that more should be done to promote transparency. If the argument in this article were to be met by the same criticisms faced by Riskin in the 1990s, that would suggest that discussions about family mediation reform have not developed in three decades. But when faced with an increasingly diverse client base, regulatory bodies, mediators and academics must move beyond the old, circular debates.