

A Consideration of a Mandatory Family Mediation Model under section 9 of the  
British Columbia *Family Law Act*

By: Bethany Knox

A Master's Project Submitted in Partial Fullfillment of the Requirements for the Degree  
of:

MASTER OF ARTS in DISPUTE RESOLUTION

School of Public Administration, Faculty of Human and Social Development

University of Victoria

November 2014

© Bethany Knox, 2014

University of Victoria

All rights reserved. This Master's Project may not be reproduced in whole or in part, by  
photocopy or other means, without the permission of the author.

**Project Committee:**

Client: Dan VanderSluis, Provincial Executive Director  
Family Justice Services Division, BC Ministry of Justice

Nancy Carter, Executive Director  
Civil Policy and Legislation, BC Ministry of Justice

Supervisor: M. Jerry McHale, Q.C., Lam Chair in Law and Public Policy  
School of Public Administration, University of Victoria

Second Reader: Dr. Thea Vakil, Associate Professor and Associate Director  
School of Public Administration, University of Victoria

Chair: Dr. Lynne Siemens, Associate Professor  
School of Public Administration, University of Victoria.

**List of Contributors:**

This study incorporated contributions from professionals in the family justice sector across Canada, the United States and Australia. The following is a list of the contributing organizations/individuals who helped inform the research.

Peter Allen, Senior Manager, Office of Communications,  
*Judicial Council – Administrative Office of the Courts, California*

Patrick Parkinson, Professor of Law  
*University of Sydney, Australia*

Practitioner Accreditation Unit of the Family Law Branch,  
*Attorney – General’s Department, Australia*

Staff from Family Justice Services Branch, Family Justice Division  
*BC Ministry of Justice*

Contributions were also received from the survey/interview participants from various geographic locations and family justice professions.

## ACKNOWLEDGEMENTS

I would like to take this opportunity to express my gratitude to my supervisor, Jerry McHale. The guidance, useful comments, and engagement through this learning process were invaluable and I appreciate all the time (and patience!) put into this project. I would also like to thank Thea Vakil for your continuous support and ease in helping me complete this work. I would like to thank my clients, Dan VanderSluis, Nancy Carter, along with Irene Robertson for their support. A major thank you to those who willingly took the time to participate in the survey/interview process.

It goes without saying that the support and love from my family and friends was a constant stream of encouragement that did not go unnoticed. My family, friends, Luke and classmates were incredibly supportive throughout this process. Thank you all so much!

## EXECUTIVE SUMMARY

In recent years, the British Columbia (BC) Ministry of Justice Family Justice Services Division has increasingly promoted the use of out of court family dispute resolution processes for families addressing separation, divorce or child-related matters. The push for early resolution, out of court processes is evident in the new BC *Family Law Act*, which explicitly encourages family law litigants to resolve their disputes through agreements and appropriate ‘family dispute resolution’ before making an application to a court. Consistent with this policy, the Act gives the Lieutenant Governor in Counsel the authority to make regulations requiring parties to engage in family dispute resolution, i.e. a process like mediation, arbitration or collaborative practice.

The existence of statutory provisions within the Act suggests a strong interest in the possibility of mandatory family mediation in BC. While, as a matter of law, mandatory family mediation might be relatively straightforward, much more difficult questions have to be considered in order to know whether it is feasible and/or advisable to do so, and if it is, what should such a model look like.

This study explores the question of mandatory mediation within the family justice system for BC, with a focus on considering possible approaches to model design and program implementation.

### The Research Questions

The two key research questions of this report are:

1. What would mandatory mediation look like within the framework created by the BC *Family Law Act*?
2. What steps should be taken to initiate and implement effective mandatory mediation within the BC family court system?

Sub- questions included in this report include:

- What elements are integral in the design and implementation of mandatory mediation regimes (including, what are the advantages, disadvantages, barriers and supports)?
- What lessons have been learned from jurisdictions with mandatory family mediation in place?
- Through what process should the question of mandatory mediation regulation be explored?
  - What steps should be taken in examining the question and developing a model?
  - Who should be involved?

### The Client

Family Justice Services is one of four divisions within the Justice Services Branch of British Columbia’s Ministry of Justice, and is responsible for delivering timely and just dispute resolution programs and services for families within the family justice system. The Civil Policy and Legislation Office, in the same Branch of the Ministry of Justice, is responsible for all legislation policy and law reform in the areas of family and private civil law. Both

divisions work with a variety of stakeholders to develop ways to facilitate better access to justice for families in BC.

## **Methodology**

A jurisdictional scan of existing mandatory mediation programs in Australia and California identified the benefits, challenges, barriers and issues to implementing a mandatory mediation model. Three interviews were conducted with respondents from these jurisdictions: one from Australia and two from California.

Five interviews were conducted with respondents involved in family law and mediation in BC. The interview questionnaire was subsequently adapted into an online survey that collected data from an additional nine respondents. The purpose of the interviews was to gauge the desirability and feasibility of adopting a mandatory mediation model in BC, and to learn what design elements would need to present to implement the model. A thematic analysis was used to identify themes and develop recommendations.

## **Findings and Discussion**

Data from the findings fell within two response categories: model design considerations and implementation considerations. Six interrelated themes emerged from a thematic analysis of the data as follows:

- Encourage active participation of the parties involved in mandatory mediation;
- Allow for flexibility in the referral process and timing of the mediation session;
- Ensure that the diverse needs of families are met and are reflected in the model;
- Guarantee that screening and assessment measures are in place to determine the appropriateness of mediation for the parties;
- Ensure that universal standards and consistent practices are in place throughout all regions in BC;
- Garner government support and subsidization to ensure the long-term viability of a mandatory mediation program to uphold public confidence.

## **Recommendations**

The recommendations reflect data collected from the findings. Recommendations are categorized into model design, program implementation and program measurement and continuous improvement recommendations.

### **Model Design Recommendations:**

**Scope, Timing and Duration of Mediation:** It is recommended that mediation should be implemented, at least initially, only in the provincial court for contested matters dealing with children under the *Family Law Act*. Parties should be mandated to attend a pre-mediation session followed by a mediation session prior to filing an application with the court. Similar to Rule 5, the pre-mediation meeting would serve the purposes of screening for safety and the appropriateness of mediation; pre-mediation exchange of information; reviewing the ‘agreement to mediate’; and, where mediation is not appropriate, perform a triage function. The mediation session should be mandated to last at least 120 – 180 minutes.

**Trusted Screening and Referral:** It is recommended that existing screening and assessment protocols (available through the Family Justice Services *Manual of Operations* and the *Family Law Act* (2013)) continue to be used as the standard of screening and assessment for a mandatory mediation model and that all practitioners be knowledgeable and adhere to such standards. Exemption from participation should follow the standards outlined in s. 8(2)(b) of the *Family Law Act*.

**Certificate of Non-compliance:** The client should ensure that a mechanism to address non-compliance is in place and outlined in the legislation. A certification system or compliance mechanism should reflect Australia's model, which requires that the family dispute professional issues a certificate based on certain grounds or circumstances. The standards for compliance should be clearly set out in section 9 of the *Family Law Act* through amendments to the statute.

**Diversity and Inclusion in Process:** The program needs to reflect the multi-cultured, multi-skilled and geographically diverse composition of the BC population. It is recommended that the program account for this diversity by consulting with community organizations and Family Justice Centres to ensure the program is developed in concert with pre-existing services and is relevant to the community it is serving.

#### **Program Implementation Recommendations:**

**Building Government and Community Partnerships:** To consider the possibility of mandatory family mediation as a central piece of provincial policy, it is recommended that the client continue to consult about mandatory mediation with stakeholders of the family justice sector, including those professionals working within and outside of the formal justice system.

**Community Outreach:** It is recommended that the client launch an educational campaign to inform British Columbians, and to clearly explain how the mandatory mediation program would differ from (and relate to) current policies and legislative directives.

**Government Funding and Subsidization:** It is recommended that the client build on the Justice Access Centre and Family Justice Centre model and take advantage of the established reputation of these services as entry points. It is further recommended that the client establish and publicize a partially subsidized mediation service model. This may involve: developing a sliding scale formula based on the annual income of each of the parties in mediation; providing one free session to all families, and requiring that any additional sessions be paid for by the parties; or, ensuring that the most needy family litigants have access to government funded mediation services and require that all remaining litigants be required to mediate in the private sector.

#### **Measurement and Continuous Improvement Recommendations:**

**Program Evaluation:** It is recommended that the client delegate a group to measure and recognize what is effective and what is ineffective in order to ensure the program continues to align with the ever-changing dynamics of family needs/relationships.

## TABLE OF CONTENTS

<b>PROJECT COMMITTEE .....</b>	<b>2</b>
<b>LIST OF CONTRIBUTORS .....</b>	<b>2</b>
<b>ACKNOWLEDGEMENTS .....</b>	<b>3</b>
<b>EXECUTIVE SUMMARY .....</b>	<b>4</b>
<b>TABLE OF CONTENTS .....</b>	<b>7</b>
<b>1.0 INTRODUCTION .....</b>	<b>9</b>
<b>1.1 Project Objectives.....</b>	<b>9</b>
<b>1.2 Rationale .....</b>	<b>10</b>
<b>1.3 Organization of Report .....</b>	<b>10</b>
<b>2.0 BACKGROUND.....</b>	<b>12</b>
<b>2.1 The Growing Popularity of Mediation .....</b>	<b>12</b>
<b>2.2 Access to Family Justice in British Columbia .....</b>	<b>13</b>
<b>2.3 Family Justice Initiatives in British Columbia .....</b>	<b>13</b>
2.3.1 Provincial Court (Family) Rule 5 .....	14
2.3.2 Mandatory Parenting After Separation (MPAS) .....	15
2.3.3 Notice to Mediate (Family) Regulation .....	16
<b>2.4 Moving Mediation Forward: <i>The Family Law Act (2013)</i> .....</b>	<b>17</b>
<b>3.0 LITERATURE REVIEW .....</b>	<b>19</b>
<b>3.1 Mediation and Family Law Matters.....</b>	<b>19</b>
<b>3.2 A Critique of Mandatory Family Mediation .....</b>	<b>19</b>
3.2.1 Compulsion and Legal Safeguards in Family Mediation .....	20
3.2.2 Power Issues in Family Mediation.....	21
3.2.3 The Presence of Violence in Family Disputes .....	22
3.2.4 Upholding Mediator Neutrality and Impartiality .....	24
3.2.5 The Cost Effectiveness of Mediation.....	25
<b>4.0 JURISDICTIONAL SCAN .....</b>	<b>26</b>
<b>4.1 Mandatory Mediation in Practice Internationally .....</b>	<b>26</b>
4.1.1 Alberta .....	26
4.1.2 United Kingdom .....	27
4.1.3 Hong Kong.....	27
4.1.4 Norway.....	27
<b>4.2 Australia .....</b>	<b>28</b>
4.2.1 Regulatory Framework .....	29
4.2.2 Service Providers and Referral to Mediation.....	29
4.2.3 Costs.....	30
4.2.4 Process .....	31
4.2.5 Screening Protocols .....	32
4.2.6 Outcomes .....	32
<b>4.3 California .....</b>	<b>33</b>
4.3.1 Regulatory Framework .....	34
4.3.2 Service Providers and Referral to Mediation.....	35
4.3.3 Costs.....	35
4.3.4 Process .....	36

4.3.5	Screening Protocols .....	37
4.3.6	Outcomes .....	37
<b>5.0</b>	<b>METHODOLOGY .....</b>	<b>38</b>
<b>5.1</b>	<b>Population of Interest.....</b>	<b>38</b>
<b>5.2</b>	<b>Sample .....</b>	<b>38</b>
<b>5.3</b>	<b>Instruments .....</b>	<b>39</b>
5.3.1	Jurisdictional Scan .....	39
5.3.2	Interviews.....	40
5.3.3	Survey .....	40
<b>5.4</b>	<b>Data Analysis .....</b>	<b>40</b>
<b>5.5</b>	<b>Limitations .....</b>	<b>41</b>
<b>6.0</b>	<b>FINDINGS AND DISCUSSIONS .....</b>	<b>42</b>
<b>6.1</b>	<b>Model Design Considerations .....</b>	<b>43</b>
6.1.1	‘Active’ Participation in Mediation .....	43
6.1.2	Flexibility in Referral and Timing of Mediation .....	44
6.1.3	Extensive Screening and Assessment .....	46
6.1.4	Diversity of Needs .....	47
<b>6.2</b>	<b>Program Implementation Considerations .....</b>	<b>48</b>
6.2.1	Universality and Consistency .....	48
6.2.2	Government Subsidization.....	50
<b>7.0</b>	<b>RECOMMENDATIONS .....</b>	<b>52</b>
<b>7.1</b>	<b>Model Design Recommendations .....</b>	<b>52</b>
7.1.1	Scope and Duration of Mediation .....	52
7.1.2	Trust Screening and Referral .....	54
7.1.3	Certificate of Non- compliance.....	55
7.1.4	Diversity and Inclusion in the Program .....	56
<b>7.2</b>	<b>Program Implementation Recommendations.....</b>	<b>56</b>
7.2.1	Building Government and Community Partnerships .....	57
7.2.2	Community Outreach.....	57
7.2.3	Government Funding and Subsidization.....	58
<b>7.3</b>	<b>Measurement and Continual Improvement Recommendations .....</b>	<b>59</b>
7.3.1	Program Evaluations .....	59
<b>8.0</b>	<b>CONCLUSION .....</b>	<b>61</b>
	<b>REFERENCES.....</b>	<b>62</b>
	<b>APPENDICES .....</b>	<b>70</b>
	<b>APPENDIX A .....</b>	<b>70</b>
	<b>APPENDIX B .....</b>	<b>71</b>
	<b>APPENDIX C .....</b>	<b>72</b>
	<b>APPENDIX D.....</b>	<b>75</b>
	<b>APPENDIX E .....</b>	<b>77</b>
	<b>APPENDIX F .....</b>	<b>81</b>

## INTRODUCTION

**1.0** There is general understanding that Canadians do not have adequate access to family justice. Factors such as cost, delay, complexity, in addition to the numerous dynamics inherent to family disputes, make it incredibly difficult for families to effectively navigate the system and meet their unique needs and concerns. Countless reports and studies continue to articulate the increasing frustration and concern regarding Canada's family justice system, as research reveals a significant link between an inaccessible justice system and human and social costs (Action Committee on Access to Justice in Civil and Family Matters, 2012, p. 1; Semple & Bala, 2013, p. 1).

Limited access to family justice is a serious problem and mediation has been seen as one part of the solution for many years. There is an important policy question as to how extensively mediation might be employed. The recent proclamation of the *Family Law Act* (the "Act"), in March 2013, has brought to the fore a series of questions regarding the potential use of mandatory mediation in the family law context.

The existence of regulatory powers within the Act are sufficient to compel participation in mediation and may suggest an interest in the possibility of implementing mandatory family mediation in BC. While, as a matter of law or authority, implementing mandatory family mediation might be relatively straightforward, much harder policy and design questions have to be considered in order to know whether it is feasible, what it should look like, and if it is in fact advisable to pursue. To answer this question, research and analysis needs to be undertaken to better understand what issues exist, what barriers would be encountered, what a mandatory mediation scheme would look like, and how it could be implemented.

### 1.1 Project Objectives

The central objective of this research project is to explore and analyze the feasibility of mandatory family law mediation for BC. The deliverable for this project takes the form of this report identifying the concerns, issues and a possible model framework. The report also provides recommendations with respect to the possible design and implementation of a family law mediation regime for BC. This will involve, amongst other things, examining mandatory mediation legislation and programs that currently exist in Australia and California.

The two key research questions are:

1. What would mandatory mediation look like within the framework created by British Columbia's *Family Law Act*?
2. What steps should be taken to initiate and implement effective mandatory mediation within the BC family court system?

Sub-questions stemming from this research project include:

- What elements are integral in the design and implementation of mandatory mediation regimes (including, what are the advantages, disadvantages, barriers, and supports)?
- What lessons have been learned from jurisdictions with mandatory family mediation in place?

- Through what process should the question of mandatory mediation regulation be explored?
  - What steps should be taken in examining the questions and developing a model?
  - Who should be involved?

## **1.2 Rationale**

This research is relevant to the work and commitment of the Ministry of Justice in improving access to justice for BC families. Section 9 of the new *Family Law Act* potentially presents an avenue for enhancing access to justice for families. The existing language indicates that certain dispute resolution practices, which could include family mediation, may be mandated.

By examining relevant literature around mandatory mediation, conducting interviews, surveys and consulting with various stakeholders, the research will look at both mandatory and voluntary programs, and will articulate the lessons learned in order to describe what an appropriate model could look like for BC. From this, the objective of the research will be to pinpoint the issues, triggers, and outcomes associated with the implementation of mandatory mediation regulation, and provide recommendations about best practices based on mandatory family programs already in place elsewhere. The findings and recommendations will help the Justice Services Branch of the BC Ministry of Justice to better understand the pros and the cons as well as the issues and possibilities associated with mandated family mediation in BC.

There is much research responding to the question of mandatory family mediation. It is the premise of this report, supported by substantial literature in the family justice field, that the benefits of mediation for family disputes generally outweigh the potential disadvantages. This should not be read to give undue weight to the issues that surround the debate, or that such criticisms not be accentuated. However, this report does not directly address whether or not mediation is suitable for family law disputes, but rather focuses on the question of mandatory mediation and its application and implementation in BC.

## **1.3 Organization of the Report**

This report is divided into the following sections:

- 1.0 Introduction
- 2.0 Background
- 3.0 Literature Review
- 4.0 Jurisdictional Scan
- 5.0 Methodology
- 6.0 Findings and Discussion
- 7.0 Recommendations
- 8.0 Conclusion

Section 2.0 provides background information on the work and mandate of the Ministry of Justice, including recent initiatives and reform efforts to make the family justice system more effective for families. Section 3.0 is a literature review of family mediation processes and provides a critique of mandatory mediation for family disputes. Section 4.0 provides a

jurisdictional scan of family dispute resolution models in place throughout the world, but most notably the models in place in Australia and California. The jurisdictional scan draws out the key elements including advantages, disadvantages, and issues inherent in mandatory mediation systems. Section 5.0 outlines the methods utilized for this research project. Section 6.0 provides a summary of the findings from the jurisdictional scan, interviews and surveys and includes an interpretation of the information. This section also discusses the research findings as they relate to the research question and the limitations of the study. Section 7.0 lists recommendations for the Ministry of Justice Family Services Division with respect to the possible process design and implementation of a family law mediation regime for BC. Section 8.0 is the conclusion followed by appendices, including copies of all supporting reference documents and relevant paperwork to the project.

## BACKGROUND

**2.0** This section provides insight into the increased use of mediation in the public and private sectors while outlining various initiatives that have been implemented to improve access to justice for BC families.

### **2.1 The Growing Popularity of Mediation**

Over the last few of decades, many reports have publicized the reality of the problematic civil justice system. It is in many cases too expensive, too complex, too slow, and can be an inaccessible environment for citizens to assert their rights (McHale, 2012, p.7; Shaw, 2012, p. 5). The growing frustration with this system has led to a number of reforms in BC and throughout the country aimed at mitigating the cost and complexity of the court process. Various forms of alternative dispute resolution, most notably mediation, have begun to answer this call by seeking to resolve conflicts more quickly, efficiently, and amicably than the traditional justice system.

Throughout the country, mediation has been incorporated into the procedural operations of tribunals, ministerial agencies and bodies, and court systems. It has proven effective in resolving public service complaints, reducing transaction costs and reducing time to resolution, while at the same time yielding higher party satisfaction rates than other more formal processes (Semple & Bala, 2013, p. 23; Vander Veen, 2014, p. 4). For example, in the public domain, research respecting BC's *Notice to Mediate (Motor Vehicle) Regulation* showed that 80- 90% of mediated cases settled in mediation (Hogarth & Boyle, 2002, p. 4). At the national level, a pilot project conducted by the Canadian Public Service Staff Relations Board offered mediation to employees with grievances that would otherwise be formally adjudicated. An evaluation of the pilot project found that 500 files had been mediated and reported an 85% success rate. Today, a modified version of the pilot project is a permanent program within the Board's dispute resolution processes (Baron, 2003, p. 13).

There have also been a growing number of private agencies implementing conflict management strategies that rely principally on interest-based options. American research reveals that the use of mediation to resolve disputes involving major corporations has increased from 85% in 1997 to 97% in 2011 (Lipsky, 2013, slide 8). Increasingly, professionals in the private sector recognize the cost benefits associated with an early, collaborative resolution strategy. The strength of this trend in the private sphere is evidenced by the International Institute for Conflict Prevention and Resolution's (CPR) *Corporate Policy Statement on Alternatives to Litigation* ("the Pledge") which commits signatory corporations to "manage and resolve disputes through negotiation, mediation and other ADR processes when appropriate" and work to establish "practicing global, sustainable dispute management and resolution process" (International Institute for Conflict Prevention and Resolution, 2012, para 1). Today, over 4000 companies and 1,500 law firms have signed the Pledge and are committed to focusing on alternative approaches to dispute resolution and to changing the culture of litigation that has traditionally characterized the corporate field (International Institute for Conflict Prevention and Resolution, 2012, para.1).

## 2.2 Access to Family Justice in British Columbia

Research shows that family relationship breakdown is the primary reason most Canadians enter the family justice system<sup>1</sup> (Ontario Civil Legal Needs Project Steering Committee, 2010, p. 57). Although thousands of Canadians attempt to enter the justice system each year, there is a general understanding that the adversarial nature of the traditional legal pathway fails to adequately address family disputes.

Today in British Columbia, approximately 25,000 family law cases are filed in the Supreme and Provincial courts every year. They account for 1/3 of civil filings in the Supreme Court. Of those 25,000 cases, 56% involve dependent children. Reports show that after 5 years of separation, 46% of BC families have, or are seeking, a custody order; 23% have a formal agreement and 31% have no formal agreement or order (McHale, 2013, slide 3).

As early as the 1970s, it became increasingly clear to lawyers, judges and policy makers that family legal needs are fundamentally different from the needs in other forms of civil law. Throughout the last four decades, there has been increasing recognition of the unique needs and challenges inherent in family disputes, including emotional needs, the involvement of children, the post – dispute continuation of relationships between family members, and heightened susceptibility to violence (Action Committee on Access to Justice in Civil and Family Matters, 2012; pp. 14- 16). As we have better understood the nature of family disputes, it has become increasingly clear that the adversarial framework of the family justice system is not designed for, and is not adequate to address the complex issues that commonly drive family conflict (BC Justice Review Task Force, 2005, p. 10).

Today, many reports, studies, and academic papers are remarkably consistent in highlighting the shortcomings of the family justice system and how it continues to negatively impact Canadian families. Recommendations from these reports have suggested greater use of consensual dispute resolution processes, namely mediation; greater collaboration amongst professionals; and increased use of non-adversarial processes that focus on the needs and interests of the parties and their children. Such approaches are intended to minimize conflict, empower families, and keep family law cases out of the courts (Action Committee on Access to Justice in Civil and Family Matters, 2012; Law Commission of Ontario, 2012; Ontario Civil Legal Needs Project Steering Committee, 2010; Shaw, 2012).

## 2.3 Family Justice Initiatives in British Columbia

Throughout Canada, steps have been taken to respond to the inadequacies of the family justice system. Information, programs and services that expose Canadian families to alternative options for dealing with family disputes are now in place. These include a broad range of alternative dispute resolution processes, such as mediation. Although there is still some reluctance to utilize out-of-court processes, mediation has gained a significant amount

---

<sup>1</sup> This report adopts the definition of “family justice system” set out in *A New Justice System for Families and Children: A Report of the Family Justice Reform Working Group to the Justice Review Task Force* (2005) which defines it broadly as including public and private services that help families with issues pertaining to separation, divorce, or child protection; public institutions such as the courts, government ministries, and the Legal Services Society; individual professionals, including lawyers, mediators, social workers and counselors who work in these areas.

of credibility in addressing family problems, and the process continues to gain acceptance (Shaw, 2012, p. 34).

Despite considerable efforts to improve the family justice system and provide out-of-court options for families, there remains an inclination for families to use the courts to address their family legal matters. Reports and commentaries continue to call for more use of non-adversarial processes. This plea for change is articulated in a 2012 report from the Action Committee on Access to Justice in Civil and Family Matters, which states:

The language of “drastic change” and “fundamental overhaul” corresponds with calls made in earlier reports for a “paradigm shift” and for a family justice system that is fundamentally different from what we have known in the past (p. 8).

In response to the research suggesting that non-adversarial approaches are better suited to family disputes, the BC Ministry of Justice has engaged in a number of reform initiatives and has implemented a number of strategies to make the system more effective for families. Over the past 15 to 20 years, various initiatives have been introduced that make it mandatory for family disputes to go through non-adversarial processes prior to entering the court system. The following sections describe such initiatives.

### **2.3.1 Provincial Court (Family) Rule 5**

In 1998, in response to the increasing concern over issues regarding the accessibility and timeliness of the family court process, the Ministry of Attorney General (now the Ministry of Justice) introduced new Provincial Court (Family) Rules in an effort to improve case management and provide more opportunities for early settlement. Initially, the new procedural changes applied to all provincial court registries in BC. However, one rule, Rule 5, was only introduced in selected registries on a pilot basis (Ministry of Attorney General Justice Services Branch Family Justice Services Division, 2002, [Summary Report], p. 3).

Rule 5 was designed to reduce the use of the courtroom for matters that fell within the *Family Relations Act*<sup>2</sup>, as it supported the use of alternative dispute resolution avenues that would encourage timely and cost effective solutions of family disputes. Rule 5 was unique as it introduced a new process to the BC justice system, informally known as “triage”.<sup>3</sup> In the registries selected for the pilot project (Surrey, Vancouver (Robson Square), Nelson, Castlegar and Rossland, and later Kelowna), parties were required to meet with a Family Justice Counsellor (FJC) for a triage appointment before appearing in court. This appointment involves a FJC working with each party individually and assisting them in clarifying their issues and broadening their understanding of the non-adversarial dispute resolution options, namely mediation, that are available to them. (Ministry of Attorney General Services Branch Family Justice Services Division, 2002, [Final Report], p. 1).

---

<sup>2</sup> *Family Relations Act* (FRA) is now the *Family Law Act* as of March 2013.

<sup>3</sup> “Triage” refers to the initial assessment of a case. Here, matters such as “urgency, pressing needs, and the most efficient path to resolution” are determined for the family (Action Committee on Access to Justice in Civil and Family Matters, 2012, p. 40).

In 2002, the Ministry of Attorney General contracted a consulting firm to conduct an evaluation of the Family Justice Registry (Rule 5) Pilot Project. The objective of the evaluation was to determine whether the Project effectively increased the use of non-adversarial dispute resolution processes; promoted early dispute resolution; and if the number and complexity of *Family Relation Act* trials were reduced (R.A. Malatest & Associates Ltd., 2002, p. 4). Results of the evaluation revealed that the Rule 5 initiative significantly reduced the number of cases coming before the court, and when cases did reach the court the parties were more effectively able to articulate their issues and move more quickly through the process. Both clients and judges who were a part of the evaluation indicated that the triage process was useful in educating and exposing the family to new processes. (Ministry of Attorney General Justice Services Branch Family Justice Services Division, 2002 [Summary Report], p. 8).

Today, Rule 5 applies to applications that are filed within a “family justice registry” (which now includes Kelowna, Surrey, Nanaimo and Vancouver (Robson Square) registries). In these family justice registries, parties filing applications for orders on guardianship, parenting arrangements or contact with a child are required to meet with a FJC. There are some exemptions to this requirement, for example if parties are seeking a protection order (Provincial Court Family Rules, B.C. Reg. 417/98, 2013). The FJC exposes the parties to alternative processes outside of the court, including mediation, which are available at the triage offices (Ministry of the Attorney General Justice Services Branch Family Justice Services Division, 2002, [Summary Report], p. 3). The FJC assists each party in understanding and clarifying the issues so they can more effectively seek out alternative options that would be suitable to their specific needs, or if desired, more effectively navigate the court system. At any time after meeting with a FJC, a party can request to appear before a judge or seek a consent order under Rule 14 of the Provincial Court (Family) Rules.

Exemptions from Rule 5 are permitted where there is an urgent need for a court appearance and in other limited circumstances. These situations proceed as “claims of urgency” and in such cases court registry staff book an appearance before a judge on the same or next day (Provincial Court Family Rules, B.C. 417/48 Reg., 2013). Since its inception, there has been concern that parties may circumvent the mandatory referral to triage by making an inappropriate claim of urgency. This concern was reflected in the 2002 evaluation, which revealed a slight increase of claims of urgency (approximately 1%) following Rule 5 implementation (R.A. Malatest & Associates Ltd., 2002, p. 16).

### **2.3.2 Mandatory Parenting After Separation (MPAS)**

Mandatory Parenting After Separation (MPAS) is another compulsory initiative put in place by the Attorney General (now Ministry of Justice) which, like Rule 5, was established in response to the difficulties faced by the courts, parents, and children in the context of family separations. The goal of MPAS is to assist parents in making informed decisions during the separation process, especially with respect to their children, and to provide support for the emotional and legal aspects of separation. MPAS strives to reduce the conflict between the parents and educate them on the advantages of alternatives to court while upholding the best interests of their children (Ministry of Attorney General Policy, Planning and Legislation Branch Corporate Planning Division, 2000, p. 2).

Similar to Rule 5, MPAS began as a pilot project in 1998, and originally was only offered in two provincial court registries, Burnaby and New Westminster.<sup>4</sup> The project required that all families in dispute over child custody, access, guardianship or child support matters attend a PAS class before using the courts (p. 2). The results of an evaluation released in 1999, which assessed clients' satisfaction, cooperation and willingness to participate in the program, led to the expansion of the pilot project in Surrey, Vancouver and Kelowna, and by 2000 to Victoria, Abbotsford and Prince George (Canadian Forum on Civil Justice, 1998, para. 4).

In October 2000, the Ministry of the Attorney General released its evaluation entitled *Mandatory Parenting After Separation Pilot: Final Evaluation Report*. The evaluation was undertaken "to determine the impact of MPAS on litigation rates in the pilot jurisdiction compared to the impact of offering Parenting After Separation (PAS) on a voluntary basis" (Ministry of Attorney General Policy, Planning and Legislation Branch Corporate Planning Division, 2000, p. 2). The report revealed that at the sites where MPAS was in place, the number of cases entering the family court were reduced. The study also found that when cases did proceed to family court, they were more efficiently handled and did not reappear before the courts as frequently as other non-MPAS sites. Further, clients expressed that the MPAS course exposed them to a number of alternative dispute resolution options, many of which they had not been previously aware. Clients also reported that they had gained a greater understanding of how family separation can affect the wellbeing of children (BC Ministry of Attorney General Policy, Planning and Legislation Branch Corporate Planning Division, 2000, p. 13).

Today, attendance to the Mandatory Parenting After Separation is outlined in Rule 21 of the Provincial (Family) Rules and is required in a number of provincial court registries throughout BC including: Abbotsford, Campbell River, Chilliwack, Courtenay, Kamloops, Kelowna, Nanaimo, New Westminster, North Vancouver, Penticton, Port Coquitlam, Prince George, Richmond, Surrey, Vancouver (Robson Square), Vernon and Victoria (Provincial Court Family Rules, B.C. Reg. 417/48, 2013). MPAS continues to be free for BC parents and other family members or guardians facing access, custody, guardianship, and support issues (Canadian Forum on Civil Justice, 1998, para. 4).

### **2.3.3 Notice to Mediate (Family) Regulation**

In 2007, British Columbia implemented the *Notice to Mediate (Family) Regulation* pursuant to section 68 of the *Law and Equity Act*. The *Notice to Mediate (Family) Regulation* was conceived after the success of the *Notice to Mediate (General) Regulation*, which originally addressed all civil law cases with the exception of family law cases (Boyd, 2012, para. 2).

Under the *Notice to Mediate (Family) Regulation*, a party to a family law matter in the Supreme Court can compel mediation by filing a Notice to Mediate form and sending it to the other party. Parties may file a Notice to Mediate no earlier than 90 days after filing a response to a family claim no later than 90 days before the scheduled trial date. The parties must mutually select an acceptable mediator within 14 days of filing a Notice to Mediate. If the parties cannot agree to a mediator within the 14-day period, the parties must apply to a mediator

---

<sup>4</sup> Prior to this Parenting After Separation was a voluntary project and was only offered in four locations in British Columbia (Canadian Forum on Civil Justice, 2012).

roster, namely Mediate BC Society, and request that a mediator be appointed by the society (Mediate BC, 2013).

The *Notice to Mediate (Family) Regulation* requires that both parties contribute to the process. Section 30 requires that parties complete a fee declaration, prior to the mediation, that outlines how the mediation services will be paid. Parties may agree to share the costs or agree to other payment options. Once the fee declaration is agreed upon, it is binding to both parties (*Notice to Mediate*, B.C. Reg. 296, 2007). In 2012, the Notice to Mediate (Family) pilot project expanded to all registries of the Supreme Court (Mediate BC, 2013). While specific data is not available, feedback from Ministry of Justice officials indicates that the volume of parties using this process is exceedingly small.

#### **2.4 Moving Mediation Forward in BC: *The Family Law Act (2013)***

The BC *Family Law Act* (the “Act”) came into force on March 18, 2013, and replaced the *Family Relations Act*. Similar to the goals and objectives of the initiatives mentioned above, the new Act supports and emphasizes settling disputes out of the courtroom, and where appropriate, through agreements using mediation, parenting coordination and arbitration (Boyle, 2013, p. 5). This is highlighted in section 9, which states:

The parties to a family law dispute must comply with any requirement set out in the Regulations respecting mandatory family dispute resolution or prescribed procedures.

Further, at s. 245(3) the Act provides:

- (3) The Lieutenant Governor in Council may make regulations requiring parties to a family law dispute to engage in family dispute resolution or undertake prescribed procedures, and for this purpose, may make regulations respecting one or more of the following:
- (a) the nature or type of mandatory family dispute resolution or procedures;
  - (b) limits or conditions on engaging in mandatory family dispute resolution or undertaking procedures;
  - (c) steps that a person must take before engaging in or during mandatory family dispute resolution or before undertaking or during procedures;
  - (d) requiring that a person do something, or prohibiting a person from doing something, before the person engages in mandatory family dispute resolution or undertakes procedures, or during mandatory family dispute resolution or mandatory procedures;
  - (e) exempting a person or class of persons, with or without conditions, from engaging in mandatory family dispute resolution or undertaking procedures, or respecting the circumstances in which a person or class of persons may be exempted;
  - (f) any other matter in relation to engaging in mandatory family dispute resolution or undertaking procedures as necessary for the purposes of section 9 [*duties of parties*]

*respecting dispute resolution] or 197 [complying with duties respecting family dispute resolution].*

The existence of these statutory provisions within the *Family Law Act*, in addition to the series of initiatives taken by Ministry of Justice to improve access to family justice, provide the necessary context for introducing mandatory family mediation in BC. The remainder of this report will examine the arguments surrounding the advantages and disadvantages of mandatory family mediation, and will explore what mandatory family mediation might look like within the framework created by the Act. The latter part of this report will outline key elements of a mandatory mediation program and provide implementation strategies.

## LITERATURE REVIEW

**3.0** As mentioned earlier, the premise of this report is based on the thought that the benefits of mediation for family disputes generally outweigh the potential disadvantages. The purpose of the following section is not to address whether or not mediation is suitable for family law disputes, but rather to focus on the findings from the literature that are relevant to the question: What are the arguments for and against mandatory family mediation?

### **3.1 Mediation and Family Law Matters**

Mediation is an alternative dispute resolution process that involves a neutral third party who helps parties to resolve disputed issues (Sloan & Chicanot, 2009, p. 67). Policy makers and scholars have long suggested that there are a variety of characteristics that give mediation a distinct advantage, in particular, over adversarial processes. Specifically, mediation offers flexibility in its approach and outcomes. For example, in mediation the onus is on the mediator and the parties involved to establish the “rules” or guidelines of the process. This can empower those involved by allowing them to craft the outcomes and engage in the process voluntarily (Hughes, 2001; Rosenberg, 1991; Smith, 1998; Sloan & Chicanot, 2009).

Scholars and policy makers have argued that mediation is an appropriate way to address family and child-related matters, primarily because it encourages collaborative problem-solving and produces benefits which are “deeper and more long-term than settlement” (Semple & Bala, 2013, p. 24). Others claim that mediation produces positive outcomes relating to the reconstruction of family relationships and is a stronger vehicle to respond to children’s interests. For instance, in California 89% of family mediation participants agreed that the mediator helped keep them “focused on our children’s best interests” (Center for Families, Children and the Courts, 2010, p. 21). Research measuring the success of family law mediation found that between 50% and 90 % of family disputes that enter mediation reach settlement (Kelly, 2004, p. 7) and that the quality of the couple’s post-separation interactions was improved (Shaw, 2010, p. 460).

### **3.2 A Critique of Mandatory Family Mediation**

Many jurisdictions have formally implemented mandatory family mediation programs or processes into the family justice system, and in some cases have done so through legislation. Despite countless claims supporting the use of mediation for family matters, there is some tension in the field regarding the extent to which the coercion implied by mandating the process risks exposing parties to danger and affects the flexible, non-binding, party-driven elements commonly associated with the process (Semple, 2012, p. 211).

The following section provides a definition of mediation and an in-depth discussion of issues associated with mandatory family mediation. Matters pertaining to mandatory family mediation that occur regularly in the literature and that will be explored in this chapter include:

- compulsion
- power
- violence
- mediator neutrality and impartiality

- cost effectiveness

### 3.2.1 *Compulsion and Legal Safeguards in Family Mediation*

Mandatory family mediation is controversial because of perceived contradictions in the nature of coercive discussion and mediation as a voluntary process (Lee & Lakani, 2012, p. 343). Proponents of mandatory mediation reconcile the contradiction between voluntary consent and compulsory participation by observing that while attendance is mandated, settlement is voluntary and by arguing that bringing the parties together gives them the opportunity to freely reconstruct relationships for the future (Vincent, 1996, p. 263). Further, mandating mediation can encourage hesitant but fundamentally willing parties to enter the process. When mediation is mandated, neither party has to persuade or cajole the other party into the process or be the one to first broach the subject of mediation; actions that can put the supplicant in a position of perceived weakness (Smith, 1998, p. 874). Others contend that mandating family mediation is the only effective way to attract attention to the process and to ensure participation<sup>5</sup> (Genn et. al, 2007, p. 9).

In contrast, critics argue that mediation is unlikely to be effective if it is forcefully imposed on unwilling participants and suggest that reaching mutual and sustainable agreements will be unlikely (Van Rhijin, 2010, para. 5- 6). Opponents highlight that the private nature of most mediations can have a negative effect by “removing it from the influence and interference of both social and legal scrutiny” (Boyd, 2003, p. 30). If private agreements are less frequently subject to “later challenge” by the parties than are adjudicated ones, this discrepancy might be explained not by greater satisfaction with the process and outcome, but rather, by the fact that their “confidential and unrecorded nature gives exploited parties no documentary basis for challenging them” (Semple, 2012, p. 219). Moreover, many critics argue mandatory mediation regimes involve “no recourse to the procedural and substantive safeguards, which protect litigants as part of a public justice system” (Goundry et. al, 1998, pg, 39).

In an effort to minimize unlawful agreements and inequalities that may prove detrimental, many jurisdictions encourage the parties to seek legal support or advice prior to, and after, the mediation. It is argued that lawyer involvement in mediation can lead to more effective negotiations. An increased understanding of the legal rights and obligations of both parties can help to better prepare the parties to fully participate and negotiate throughout the process. (Riverdale Mediation, 2014, para. 3).

In BC, parties are strongly encouraged to seek independent legal advice, both while preparing for a mediation and before committing to any legal agreement. Additionally, parties who are represented by legal counsel can elect to have their lawyers attend the mediation sessions (Ministry of Justice, 2012, para. 24). In Australia, recent policy changes allow Family Relationship Centres (FRCs) to encourage parties to have a lawyer attend a family dispute resolution session, provided the lawyer is not actually representing either party but is there to ensure that any agreement made is in the legal best interests of each party (Caruana, 2010, p.

---

<sup>5</sup> In a study conducted by the Ministry of Justice UK it was found that despite countless court connected voluntary mediation programs in place, there was resistance to mediation as there was a lack of motivation, understanding and encouragement to engage in the process. The study found that demand for mediation can only be created by means of education, encouragement, facilitation and pressure accompanied by sanctions or incentives (Genn et. al, 2007, p. 9 & 196).

12). The ‘non-recommending’ model of mediation that is employed in some counties in California, involves the mediator helping parties (who have reached an agreement) to write a parenting plan that may then serve as a custody or visitation order after it is signed by a judge. In counties where the ‘recommending’ model of mediation is offered, the process emulates the principles of arbitration as the mediator (called a “child custody recommending counsellor”) intervenes when the parties involved in the process cannot agree to a parenting plan. When parties cannot come to an agreement, the child custody recommending counsellor makes a written recommendation to the parties and to courts<sup>6</sup> (Administrative Office of the Courts California, 2014, para. 1).

### **3.2.2 Power Issues in Family Mediation**

Within mediation, power can be defined simply as the ability to bring about one’s desired outcomes. In matters of family law, where children are often involved, the desired outcomes of parties generally revolve around the following: increased time with their children; increased decision-making and authority over matters involving their children; and, the maintenance and enforcement of financial and custody matters (Baylis & Carrol, 2005, p. 135).

According to Goundry et. al (1998), there are at least three sources of unequal bargaining power. First, one party may have insufficient financial resources to pursue a contested divorce; second, the emotional vulnerability of a partner may undercut the give-and-take process of mediation; and third, one party may be more anxious to settle (p. 47). A concern outlined in the literature surrounding family mediation is the extent to which power imbalances between the parties can jeopardize the fairness of the process and the agreement. In cases where there is a power imbalance, critics argue that the dominant party is less likely to “compromise” and more likely to use “tactics of coercion” while the weaker party is more likely to revert to “passive concession making or reactive defiance” (Baylis & Carroll, 2005, p. 135).

Numerous power-balancing techniques and interventions have been developed to counteract power imbalances in mediation. Some of the most effective interventions take place before parties are involved in mediation. For example, Baylis and Carroll (2005) emphasize the importance of effective intake and screening processes to expose relationship dynamics and to identify power imbalances (p. 135).

Semple (2012) uncovers several counter arguments of the feminist critique, which assert that men hold more power in mediation processes, by highlighting the point of female empowerment in mediation. For example, Semple quotes Rifkin (1984) who believes that mediation complements female concerns of “responsibility and justice” and serves as an alternative to the “male” focus on individual rights (p. 222). Semple also quotes Grey & Merrick (1996) who suggest that courtroom divorce litigation is disadvantageous to women because “the legal system is fundamentally familiar and analogous to how men are socialized and is unfamiliar and alien to how women are socialized” and that mediation might speak in a “female voice” in contrast to litigation (p. 222).

---

<sup>6</sup> As covered off in greater detail later in section 4.3, California employs two mediation models; ‘non-recommending’. Unlike the non-recommending mediation model where all information is confidential, the recommending model requires that the mediator make recommendations to the court when the parties do not reach an agreement.

### 3.2.3 *The Presence of Violence in Family Disputes*

One of the issues stemming from family relationship breakdown is the presence of violence. A 2008 report from the Mediate BC Society suggests that violence is one of the most common reasons why couples separate (Mediate BC, 2008, p. 3). What is unique about family violence is that it does not typically end when the relationship does; in fact, the breakup of the family unit may just be the spark that ignites or escalates the violence. As Shaw (2012) writes, the restructuring of the family unit often creates a higher susceptibility for family violence (p. 30). According to Ballard et. al, (2011), 50-60 percent of relationships with a history of violence come to mediation (p. 17).

Family dispute resolution is generally “future-focused”, meaning the mediation focuses on future arrangements and restructuring the family to move forward rather than analyzing past actions and events (Action Committee on Access to Justice in Civil and Family Matters, 2012, p. 14; Bala et. al, 2010, p. 401). Critics argue that violence may thus be treated as an issue of the past and be encouraged to let go in order to move forward. For example, Semple (2012) writes that mediators may consider violence as a “manifestation of conflict, rather than a manifestation of control and domination” and he argues that this exposes “victims to a higher risk of actual physical harm from the perpetrators” (Semple, 2012, p. 218).

Proponents of mediation highlight the use of screening tools for abuse, and look to the literature that reveals evidence that steps are being taken to effectively address the presence of violence in family law matters. Through the years, a number of systemic screening measures have been put in place to respond to the concerns of domestic violence in family mediation. Screening tools and strategies such as Domestic Violence Evaluation (DOVE), which sorts cases into four categories based on the risk of family violence (Semple, 2012, p. 228) and most recently, the Mediator’s Assessment of Safety Issues and Concerns (MASIC) which involves interviewing parties separately to assess the presence, or the risk of, power imbalance and/or violence (Holtzworth-Munroe et. al, 2006, p. 651).

The Family Justice Services *Manual of Operations* (2014) clearly outlines how family justice counselors (FJCs) navigate a dispute resolution process in cases of suspected/or present family violence. Section 4.3 of the Manual requires that all FJCs have the parties complete a Family Justice Services Assessment form before meeting the FJC for an intake interview. The purpose of the form is to screen for violence and to also gauge the level of conflict so the FJC can find the appropriate avenue for the parties. In cases where family violence has occurred and the parties still request dispute resolution, Section 2.5 of the Manual requires FJCs to:

- Determine if the violence is recent or historical;
- Recognize how intimidation affects a persons’ ability to effectively participate and make independent decisions;
- Determine if shuttle mediation, involvement of a support person, or using separate sessions should be used as a means to support the parties to fully participate and engage in the process;
- Counsel the parties, together or individually, to ensure that both parties are participating voluntarily and have the ability to negotiate fairly (BC Ministry of Justice Family Justice Services Division, 2014, p. 34).

In cases where the dispute resolution process has already commenced and the FJC suspects violence or that coercion is being used to intimidate or manipulate one party, s. 2.5.2 states that the FJC is instructed to:

- Stop the session;
- Take time to interview each party separately;
- Ask screening questions to reassess the nature and extent of violence and determine if there is immediate risks or safety concerns to the other party or children;
- Review the limits of confidentiality; or
- Assess the appropriateness of continuing the dispute resolution process (BC Ministry of Justice Family Justice Services Division, 2014, p. 35).

The presence of violence in family disputes is also addressed in BC's *Family Law Act* section 8 which requires all family dispute resolution professionals<sup>7</sup> to meet certain training standards, including:

- A minimum level of family – related experience (i.e. family law, counselling, child protection etc.) and at least 2-10 years of training experience in that particular field;
- At least 14 hours of in-depth training on methods to identify, screen for and manage family violence or power imbalances;
- Training to determine what type of dispute resolution process is appropriate for the situation, if at all;
- A minimum of 10 hours a year of ongoing training to ensure their skillset remains relevant;
- Extensive training in family law from a recognized institution (BC Ministry of Justice, 2013, p. 3).

Despite sophisticated measures taken to address the potential presence of violence as it relates to family mediation, many critics point out the further difficulty of incorporating these strategies into the practice of mediation. Field (2009) writes that the “party oriented nature of the process provides perpetrators with an opportunity to continue to exercise power and control over their victims”. Some screening methods do not fully account for the systemic nature of violence and abuse. For example, Holtz-Munroe et. al (2010) discuss the potential dangers of faulty pre-screening and write “...mediators who do not use systemic screening methods may under-detect intimate partner violence/abuse among families entering mediation” (p. 647).

In recent years, the debate has evolved and a more nuanced approach to consider whether victims of violence and certain forms of abuse are appropriate for mediation is emerging. Based in part on evidence that violence and abuse appear in many different forms, this

---

<sup>7</sup> The *Family Law Act* (2013) defines ‘family dispute resolution professional’ to mean:

- a.) a family justice counselor;
- b.) a parenting coordinator;
- c.) a lawyer advising a party in relation to a family law dispute;
- d.) a mediator conducting a mediation in relation to family law dispute, if the mediator meets the requirements set out in the regulations;
- e.) an arbitrator conducting an arbitration in relation to a family law dispute, if the arbitrator meets the requirements set out in the regulations;
- f.) a person within a class of prescribed persons.

approach rests on the mediator's ability to accurately screen for and identify specific type(s) of violence and abuse, and to know what to do given the type(s) of violence and abuse identified, an evaluation some argue is highly relative and complex (Beck et al., 2010, p. 633).

### **3.2.4 Upholding Mediator Impartiality and Neutrality**

Much of the literature surrounding mediation and law regard neutrality and impartiality as "central to our ideas of fairness and justice" (Astor, 2007, p. 221- 223). However, there are some unique questions as to whether mediator neutrality is possible.

While mediators are to behave as disinterested "neutrals", in practice the role they play in the process of decision- making is significant. Research suggests that, intentionally or unintentionally, a mediator influences the agreement that the parties eventually come to. Unlike legal counsel, mediators are not to give legal advice. In fact, to provide a legal opinion while serving as a mediator for a client contravenes all major mediation codes of ethics (ADR Institute of Canada, 2005). However, the parties may perceive a mediator's suggestions and questions as authoritative or as a legal opinion, as the mediator often provides an explicit opinion or evaluation as the mediation unfolds (Hughes, 2001).

Beck and Sales (2000) have also raised doubts as to whether private mediators are unbiased in their role and whether mediation is the appropriate process for resolving certain family disputes. The authors note various factors that influence the mediator's neutrality, including the claim that mediators may be influenced by a belief that all family disputes should be settled expeditiously. In other words, mediators may hasten settlement in order to promote the idea that mediation is a more efficient way to resolve disputes compared with the time consuming and backlogged court process (Beck & Sales, 2000, p. 1009).

Cobb & Rifkin (1991) also weigh in on the "paradox of neutrality" (p. 48) and challenge the notion that a "neutral" mediator can produce a just and fair settlement. To the authors, the fact that mediators are constrained from controlling or providing input into the substance of the agreement can compromise justice. The authors question the legitimacy of a "justice" process that contains no formal mechanism (i.e. legal representation) to ensure that fairness in the agreement is achieved (Cobb & Rifkin, 1991, p. 48).

Proponents of mediation have also grappled with the dilemma of neutrality in a variety of ways. Astor (2007) argues that mediators can "do neutrality" in a way that acknowledges the parties' positions and honours the core features of the mediation process (p. 226). She suggests that a distinction must be drawn between neutrality and impartiality. She claims that mediators will inevitably bring a perspective or bias to the process, but that they can behave in an impartial way towards the parties and the dispute. "Though it is conceded that mediators inevitably bring their own perspectives to mediation, it is also asserted that they will nevertheless treat the parties equally" (p. 227).

Others maintain that it is sometimes appropriate to abandon the goal of maintaining strict neutrality and impartiality in mediation in favour of allowing other characteristics of dispute resolution to come forward, such as trust and a reputation for fairness (Mayer, 2003, p. 17).

Mayer (2003) also believes that mediators can effectively take on many “non-neutral” roles to help settle disputes and move conflicts toward resolution (Mayer, 2003, p.17).

In response to the concern that mediators may unduly influence agreements and/or prohibit mechanisms to ensure legal fairness, various organizations and mediators have adapted their practice. Many mediation organizations and individual mediators are now required to recommend that parties obtain independent legal advice before committing to any agreement. For example, Mediate BC’s *Standards of Conduct* s. 12.1 require that mediators “be alert to the need to recommend independent legal advice...” and ensure parties are “aware of the value of consulting other professionals in order to make fully informed decisions” (Mediate BC, 2013, p. 6)

### **3.2.5 The Cost Effectiveness of Mediation**

One of the primary drivers behind the movement toward mediation is its cost efficiency. Policy-makers, judges and court administrators are increasingly demonstrating an avid interest in mediation’s promise to conserve public and private resources, reduce animosity, and alleviate the heavy volume of cases in the courts (Vander Veen, 2014, p. 18). Many proponents consider mediation to be an integral part of the justice system as it provides timely solutions for disputes and minimizes costs to litigants (Winkler, 2007, para. 4). Some claim the low costs generally associated with mediation for family law disputes is particularly relevant because “the parties are individuals rather than institutions or corporations, they usually have less ability to pay and cost savings are important” (Semple, 2012, p. 210). Others highlight that mediation provides increased access to justice and is a process that helps to meet the unmet demand for resolution of the legal problems of the poor (Spain, 1994, p. 271).

Semple & Bala (2014) write that although mediation is commonly credited as a cost effective and efficient process, the “best results may come from the most resource- intensive versions of mediation” (p. 30). Others argue that mediation’s ability to offer “self determination” is often not possible given the constrained resources within family annexed, publicly funded mediation regimes, which often can limit the scope and proceedings of the process (Salem, 2009, p. 377). For example, the mediator may not be able to delve deeply into the issues that are relevant to the dispute due to time constraints. The parties may feel limited in exploring and digesting what is being discussed due to the mediator’s agenda to keep the session moving forward. It is argued that in circumstances where mediation fails, the parties may have no other choice but to expend additional time and money to resolve their dispute, i.e. returning to court or seeking other avenues for assistance (Lee & Lakhani, 2010, p. 343).

## JURISDICTIONAL SCAN

**4.0** The following section reviews the experiences and lessons Alberta, the United Kingdom, Hong Kong, Norway, Australia and California. The emphasis of the scan is on Australia and California. These jurisdictions were selected because extensive literature and data exist, and also that both jurisdictions are common law systems. This section seeks to answer the research question: What lessons have been learned from jurisdictions with mandatory family mediation in place?

As such, the discussion focuses upon the elements that are integral to their mediation models, including:

- The regulatory framework
- Service providers and referral to mediation
- Process
- Costs
- The measurement of outcomes

### **4.1 Mandatory Family Mediation in Practice**

Although the Australian and Californian experiences will inform much of the discussion in this report, the following section presents a brief overview of other jurisdictions that have recently moved toward incorporating mandatory family mediation into their civil legal systems.

#### **4.1.1 Alberta**

On December 1, 2014, the Alberta Court of Queen’s Bench and Family Justice Services (Resolution Services) will implement a program that has proven successful in the Alberta Provincial Court. The components of the program are:

**Intake:** Self-represented litigants who wish to make an application to court under the *Family Law Act* must attend an “intake appointment” with a member of the Family Justice Services staff, who will:

- conduct a safety screen;
- discuss alternatives to the court process, including mediation;
- make referrals to in-house or external services; and
- if the party wants or needs to proceed to court, assist them in completing and filing the appropriate court forms.

**Caseflow Conference:** Except in urgent or emergency circumstances the application will then be scheduled for a “Caseflow Conference” as the first court date. The Caseflow Coordinator is a senior member of the Family Justice Services staff who will discuss alternatives to the court process, explore settlement options and assist in securing a consent order if the parties can agree to terms. If issues remain unresolved the parties are, depending on the circumstances, referred to a Dispute Resolution Officer or to appear in Queen’s Bench Chambers. If referred to Court, self-represented parties will be able to speak with Family Court Counsellors, who will again discuss settlement of the issues. If there is no settlement,

they will ensure the parties are ready to proceed to court and will liaise with Duty Counsel to ensure that the facts and issues effectively summarized for the court.

#### **4.1.2 United Kingdom**

In the United Kingdom, the overwhelming costs, wait times, and complexities that challenge public access to justice for family law matters are issues that have garnered the attention of both legal professionals and political organizations. The English Court of Appeal is presently prompting the review of the *Halsey v. Milton Keynes General NHS Trust* [2004] EWCA Civ 576, a landmark case that currently prohibits a court to order parties to mediation. This call to review is the result of a case, *Wright v. Wright* [2013] EWCA Civ 234 where a “breakdown of trust and friendship” for the parties resulted in unreasonable costs and time spent in the court. The court observed that “mediation is the obvious way in which to explore these matters and allow the parties to move on before they cripple themselves with more debt” (British and Irish Legal Information Institute, 2013, para. 31). Additionally, recent proposed measures in the Children and Families Bill, which came into effect April 2014, require couples who are separating and who want to apply for a court order to address children or financial matters should first attend a “mediation information and assessment meeting”, referred to as ‘MIAM’ (Bowcott, 2014, para. 2). The proposed measures require that parties consider mediation before applying to the Family Court. Parties should consider mediation as a plausible option unless they can demonstrate legitimate reason for exemption, or by proving that they have attended the MIAM and have subsequently decided that mediation is not a suitable process (UK Ministry of Justice, 2014, para. 4-5).

#### **4.1.3 Hong Kong**

In Hong Kong there are also “changing attitudes and public perceptions” toward mandatory family mediation (Lee & Lakhani, 2012, p. 333). In 2000, the government launched the Family Mediation Pilot Scheme which proved to be very successful, and resulted in the judiciary formally adopting the use of family mediation through Practice Direction 15.10. This legislation specifically requires practitioners in Hong Kong to pursue family mediation as the first alternative prior to filing a case in court. In 2003, the Law Reform Commission of Hong Kong’s report on the family dispute resolution process indicated a need to introduce mediation at the early stages of the dispute. This was followed by the 2009 Civil Justice Reforms legislation, Practice Direction 15.12 (Matrimonial and Family Proceedings), and Practice Direction 31 (Mediation-General), all of which now formally require parties and their lawyers to make a concerted effort in mediation before trying other options. Practice Direction 31, in particular, makes mediation the primary dispute resolution process for nearly all civil disputes, with few exceptions (Lee & Lakhani, 2012, pp. 328-333).

#### **4.1.4 Norway**

In Norway, legislation requires that parties with dependent children must participate in mediation. Section 26 of the *Marriage Act (1991)* requires that parents who have children under the age of 16 years must attend mediation sessions before their case for separation or divorce can be brought before the courts. The Act explicitly states: ‘The purpose of the mediation is to reach an agreement concerning parental responsibility, right of access or where the child or children shall permanently reside, with due emphasis on what will be the

best arrangement for the child/children (Norway Marriage Act, Act. No. 47, 1991). Accordingly, mediation focuses on the best interest of children as the top priority. The spouses are under an obligation to attend this mediation, at no cost, unless compelling reasons prevent them from doing so (Casals, 2005, p. 7).

## 4.2 Australia

In Australia, support for mediation for family disputes began in the 1990s, however, the shift toward compulsory family mediation was not realized until the early 2000s (Lee & Lahanki, 2012, p. 338; Rhoads, 2010, p. 183). In 2003, a parliamentary report, entitled *Every Picture Tells a Story*, was released and called for a number of changes to the family law system. The report recommended changes to court proceedings, the law, the child support system and also called for an expansion of services assisting families going through a separation (Pidgeon, 2013, p. 224). In 2004, the Government released a *Framework Statement on Reforms to the Family Law System* which outlined a number of proposals, including the introduction of compulsory dispute resolution before children's matters could be filed in a family court (Pidgeon, 2013, p. 225).

Prior to implementing the outlined changes, the Federal Attorney-General's Department (AGD) released a public issues paper, which outlined the proposed changes. A consultation team from AGD and the Department of Family's and Community Services (FACS) conducted a number of meetings and workshops across the country with advocacy groups, courts, lawyers, mediators and a range of other service providers in the family justice system. Hundreds of submissions were also received from the public. The response from the public was strongly in favour of a majority of the reforms, including the establishment of Family Relationship Centres. However, the proposed changes to the law, specifically compulsory family mediation, received a mixed reaction as men and women's advocacy groups were among the most vocal against the changes (Lee & Lakhani, 2012, p. 339; Pidgeon, 2013, p. 225).

In July 2006, legislative amendments were enacted with changes made to the *Family Law Act 1975* (Cth) through the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) (SPR Act 2006). The changes required parties to attend family dispute resolution sessions (FDR) to resolve disagreements over parenting arrangements prior to lodging an application with the court (Rhoades, 2010, p. 183). The 2006 reforms reaffirmed the best interests of the child and represented an "...ideological shift from an adversarial system to a system that will help families to deal cooperatively and practically with relationship difficulties and separations" (Attorney General's Department [Australia], 2008, p. 10; Moloney, 2006, p. 5).

The processes to support compulsory dispute resolution were rolled out over a three-year period (Pidgeon, 2013, p. 231). From 1 July 2007, attendance at family dispute resolution was made compulsory for all new cases. By 1 July 2008, family dispute resolution was made compulsory for all parenting cases (Attorney General's Department [Australia], 2008, p. 11).

#### 4.2.1 *Regulatory Framework*

Family dispute resolution (FDR) is outlined in section 10F of the Australian *Family Law Act*, 1975 (Cth) which defines it as:

...a process (other than a judicial process) in which an FDR practitioner helps people affected, or likely to be affected, by separation or divorce to solve some or all of their disputes with each other, and in which the practitioner is independent of all the parties involved in the process (*Family Law Act*, 1976) (Cth).

Since 1 July 2007, separating parents in Australia have to provide a certificate issued by an accredited family dispute resolution practitioner (FDRP) that demonstrates their effort to resolve their disputes in relation to child custody issues through a family dispute resolution process before they can apply to the court for parenting orders to be made. This is stipulated by section 60I of the *Family Law Act*, which states:

The object of this section is to ensure that all persons who have a dispute about matters that may be dealt with by an order under this Part (a Part VII order) make a genuine effort to resolve that dispute by family dispute resolution before the Part VII order is applied for (Australian Government Com Law, 2006).

The court may refer the parties back to mediation, and may make the party who refuses to participate responsible for the court fees incurred in total. The exception to the requirement of issuing such a certificate is where the case involves family violence (Lee & Lakhani, 2012, p. 339).

One of the key features of the Australian legislation regarding mandatory family mediation is the clause of ‘genuine effort’ (Kaspiew et. al (2009) . Kaspiew describes genuine effort as the gateway through which parents must pass before they can access the court (p. 94). However, this claim is not without challenge. Others argue that the omission of a unified definition of genuine effort (even within the *Family Law Act*) means that practitioners are relying on “subjective criteria” for making judgments that may not be “informed or reliable” (Astor, 2010, p. 3). To counter such claims, Astor (2010) also writes “the Attorney General’s Department provides some guidance by suggesting that genuine effort involves a real, honest exertion or attempt, realistically directed at resolving the issues” (p. 3).

#### 4.2.2 *Service Providers and Referral to Mediation*

There are three resources that provide the majority of family dispute resolution services: community based family organizations, Legal Aid Commissions, and Family Relationship Centres (FRCs) (Rhoades, 2010, p. 184). Today approximately two thirds of family dispute resolution processes take place at FRCs<sup>8</sup> (Kaspiew et. al, 2009, Table 4.11, p. 76; Pidgeon, 2013, p. 231).

---

<sup>8</sup> Although the 2006 legislation did not require parties to acquire mediation services from FRCs, announcement of mandatory family mediation at the same time of FRC establishment resulted in confusion

The expanded use of FDR following the 2006 reforms called for increased mediator training and accreditation. The federal government responded by funding the development of competency standards for family dispute resolution practitioners (FDRPs) through the national Community Services and Health Industry Skills Council. The standards were used as a basis for national accreditation of practitioners and also for new training packages, which encouraged professionals working in other areas to enter the field (Pidgeon, 2013, p. 231).

Although some FDRPs have a background in law, most tend to have qualifications in a social science discipline (Rhoades, 2010, p. 185). Regardless of their disciplinary grounding, FDRPs must be accredited and listed on the Family Dispute Resolution Register of the Commonwealth Attorney-General's Department (Cooper & Field, 2008, p. 160). FDRPs are obliged by law to fully inform parents of their obligations under the Act (Brandon & Stodulka, 2008, p. 196). These include a duty of impartiality or "independence" from all of the parties to the dispute (Family Law Act s. 10F); and an obligation to conduct an intake assessment in order to ensure that both parties can negotiate safely and effectively on their own behalf, before commencing mediation (Australian Government Com Law, 2008, Reg. 25).

FDRPs are responsible for certifying whether or not the parties have made a genuine effort and, as a result, have a duty to evaluate the performance of their clients in family dispute resolution (s. 60I (8); Astor, 2010, p. 3). In cases where there the parties do not reach a resolution, the FDRP must provide a certificate relating to the parties' attendance and effort in the process.<sup>9</sup> Parties must present this certificate to the court indicating that they were unable to resolve their matters through mediation. The court will then take into account the kind of certificate that was issued when considering whether or not to refer the case back to family dispute resolution (s. 13C), and when determining whether to award the costs against a party (s. 117). Consequently, if one party is assessed as not having made a genuine effort, they may become liable to pay all or part of the costs of subsequent legal proceedings (Astor, 2010, p. 3).

#### **4.2.3 Costs**

In most family dispute resolution services a modest fee applies. The applicant ordinarily pays the fee, unless otherwise ordered (Federal Circuit Court of Australia, 2008, para. 9). Parkinson (2013) writes that after the first hour of mediation, the FRC will impose a modest charge to parents who make over a certain income.<sup>10</sup> Mediation sessions may be held on a "means-tested basis", which is determined from an assessment conducted by the service

---

among some parts of the public and media who understood that it would be mandatory for parties to undergo mediation at FRCs (Pidgeon, 2013, p. 231).

<sup>9</sup> FDRPs have several different types of certificates to give under s. 60I (8). Certificates can be given in the event where a party refused to attend; it was not appropriate to conduct family dispute resolution; that both parties attended and made a genuine effort but could not resolve the issues; that both parties attended and did not make a genuine effort to resolve the issues; that both parties attended and began the process, but the FDRP considered it would not be appropriate to consider the family dispute resolution.

<sup>10</sup> Parkinson writes: "People earning more than \$50,000 per year are required to pay a fee of \$30 per hour for the second and third hours of mediation. Where interpreters are needed, up to four hours of joint family dispute resolution is provided free of charge because more time is needed in such cases" (p. 211).

provider. The same fee policy applies to parties who return to mediation for up to two further occasions in a two-year period (p. 204). Additionally, all preparatory sessions, assessments, parent education classes etc. are free of charge.

The Attorney General's Department funds the Centres under the Family Relationship Services Program (FRSP). Generally, the Department of Families, Housing, Community Services and Indigenous Affairs administers the FRSP under a business partnership with the Attorney-General's Department (Winkworth & McArthur, 2008, p. 9). From 1 July 2006 to 30 June 2009, government provided just over AUD \$148, 468, 000 to FRCs, most of it for FDR (Pidgeon, 2013, p. 228).

#### **4.2.4 Process**

The family dispute resolution sector in Australia is extensive and well established, offering a diverse array of services and a range of dispute resolution models from facilitative to advisory and therapeutic (Cooper, 2007, p. 235). In Australia, the legislation does not mandate any particular practice model for mediation. However, according to Cooper & Field (2008) most FDRPs working in FRCs use the facilitative mediation model in their practice (p. 164). Bouelle (2011) describes the aim of the model as being able "to avoid positions and negotiate in terms of the parties' personal and commercial needs and interests instead of (their) legal rights and duties" (p. 44).

FDRPs play an educative role in the process. Under reg. 63 of the Family Law Regulations 1984, FDRPs are required to explain what is expected of the parents and remind them of their obligation to make decisions in the best interest of their children. FDRPs also emphasize the importance of seeking legal advice and provide information on relevant community and professional resources that parents can access (i.e. child support agencies) (Brandon & Stodulka, 2008, p. 197).

Most recently, in response to evaluations of the 2006 reforms that outlined a high presence of family violence and safety concerns of FDR users, the Australian Government funded the Co-ordinated Family Dispute Resolution (CFDR) Pilot Project. This project was implemented in five locations.<sup>11</sup> Brisbane Women's Legal Service designed the model with funding from the Attorney General's department (Kaspiew et. al, 2013, slide 8). Unlike other FDRs, the CFDR involves a mediator, a domestic violence worker, a men's support worker, a women's support worker, and a lawyer. The CFDR emphasizes a focus on intake and risk assessment, as well as collaboration amongst service professionals (Kaspiew et. al, 2013, slide 10). The pilot showed that although there was great appreciation of access to legal advice and therapeutic support, participants expressed frustration over the length and the emotional intensity of the process (Kaspiew et. al, 2013, slide 18).

---

<sup>11</sup> The locations selected for the CFDR Pilot Project included: Brisbane, Telephone Dispute Resolution Service (Relationships Australia); Perth (Legal Aid Office); Hobart (Relationships Australia); Newcastle (Inter-relate); and Western Sydney (Unifam).

#### 4.2.5 *Screening Protocols*

The discretion of family dispute resolution practitioners to certify a case unsuitable for mediation is essential (Parkinson, 2013, p. 206). Under the Family Law Regulations, prior to a family dispute resolution, practitioners must be satisfied that:

- The parties have undergone a satisfactory assessment, and
- Consideration has been given to whether the parties have the ability to freely negotiate, while giving weight to a number of factors stipulated in the Regulations (Winkworth & McArthur, 2008, p. 19).

Screening and assessment tools used in the Family Relationship Centres have been developed for the purpose of addressing issues of domestic violence and child abuse (Parkinson, 2013, p. 206). Winkler & McArthur (2008) submit that the screening and assessment framework is based on “formal knowledge-based expertise” to comply with “policy operational structures... within a wider policy and operational structure”, in order to most effectively assist clients addressing issues that impact family relationships (p. 9). A training program, “AVERT”- aimed at further developing professional skills in this area- has also been developed by Relationship Australia, in collaboration with the Attorney General’s Department<sup>12</sup> (Parkinson, 2013, p. 20).

#### 4.2.6 *Outcomes*

There have been various positive effects of mandatory mediation since the 2006 legislative amendments (Rhoades, 2010, p. 183). There has been a sharp decline in applications for parenting orders before the courts (Kaspiew et. al, 2009, p. 304) and a corresponding growth in the number of family law clients presenting to dispute resolution programs (Nader, 2009, para. 3). The success of mandatory family mediation has influenced the 2011 *Civil Procedures Act* to make changes to require parties to civil law disputes to attempt to resolve their disputes through dispute resolution processes prior to litigation (Lee & Lakhani, 2012, p.339).

Figures from the Family Court and the Federal Magistrates Court show that applications fell from 20,350 in 2006-07, to 17,265 in 2007 – 08. The figures included matters concerning children and property. Applications had peaked at more than 23,000 in 2003-04, and showed a slight decline thereafter. The biggest drop then came in the year the mediation requirement began (Nader, 2009, para. 3). Kaspiew et. al (2009) found this number dropped to 14,549 between 2008-09 (p. 305). Semple & Bala (2013) speak to this comprehensive evaluation, which concluded that the drop in court filings was largely attributable to the adoption of mandatory mediation (p.23)

Although a recent government review of the 2006 reforms indicates high levels of satisfaction among FDR service clients, many of those who attend FDR have high levels of conflict and complex support needs (Kaspiew et. al, 2009, p. 21). Some of the surveyed parents reported

---

<sup>12</sup> More information on the AVERT Family Violence training package can be found at: <http://www.avertfamilyviolence.com.au/about-avert/>

being pressured into reaching an agreement. The data shows that satisfaction is strongly linked to how well family dispute resolution practitioners can manage questions of family dysfunction (Kaspiew et. al, 2009, pp. 93, 110). The research also found that around one quarter of all referrals to FDR were not suitable for mediation. These cases were “screened out” of the service because of family violence concerns, suggesting the absence of an effective triage by lawyers can lead to substantial resource burden on FDR programs (Kaspiew et. al, 2009, pp. 105- 108). More recent research demonstrates that the vast majority of FDR clients engage with a lawyer prior to or during the mediation process (Kaspiew et.al, 2009, p. 109).

### 4.3 California

The shift toward mandatory family mediation to solve family law problems began in 1939 with the enactment of the Conciliation Court Law<sup>13</sup> (Zeps, 2007, p. 241). This marked the first initiative in California that recognized the importance of counseling and conciliation to safeguard the family unit and protect the rights of children (Lee & Lakhani, 2012, p. 340). In 1981, California became the first state in the U.S. to mandate parents with custody or visitation disputes to participate in family mediation either prior to, or concurrent with, the court hearing (Ricci, 2004, p. 399). Section 4607 of the California Civil Code, which came into force on 1 January 1981, described the purpose of mediation as a way to “reduce acrimony that may exist between the parties; develop an agreement assuring the child close and continuing contact with both parents, that is in the best interest of the child, consistent with sections 3011 and 3020 (Family Code sections); and to effect a settlement of the issue of visitation rights of all parties that is in the best interest of the child” (CAL CIV. CODE, 4607; CAL FAM CODE s. 3161; Edwards, 2007, p. 122).

The enactment of the early mandatory statutes was met with mixed responses from the public. Deis (1985) writes that support for the mandatory family mediation legislation was received from a wide range of groups such as the PTA, the League of Women Voters, Parents Without Partners, United Way, fathers’ groups and family service agencies. However, opposition came from Legal Aid due to the cost increase of filing fees (for motions, divorces and marriages) that were to be used to fund the mediation programs (pp. 156- 157).

Today, mandatory family mediation for child custody and visitation is largely regarded as a positive feature of the California family justice system. Ricci (2004) argues that the inclusion of mediation in the marital dissolution process has been a significant step in the movement towards “family self-determination or private ordering” and gives parents more “control of their lives during and after separation” (p. 39). Additionally, Germane et. al, (2013) reveal that the vast majority of custody arrangements between parents emanate from mediation conferences with few cases actually going to court (p. 178).

---

<sup>13</sup> The Conciliation Court Law was repealed and reenacted in 1980 as Cal. Code Civ. Proc. §§ 1740-72, along with Civil Code § 4607, a new provision relating specifically to mediation of contested child- custody matters; see Cal. Stats. 1980 ch. 48. In 1982, another provision was added for mediation of visitation disputes; see Civil Code § 4351.5

### 4.3.1 *Regulatory Framework*

Mandatory family mediation is supported by a number of legislative and legal statutory provisions including California's Civil Code, Family Law Code and the Rules of Court. Mandatory family mediation for child custody and visitation disputes was first documented in 1980 within California Civil Code's section 4607 (a), which stated:

In any proceeding where there is an issue of custody or visitation with a minor child, and where it appears on the face of the petition or other application for an order or modification of an order for the custody or visitation of a child or children that either or both issues are contested, as provided in Section 4600, 4600.1 (general child custody statutes) the matter shall be set for mediation of the contested issues prior to or concurrent with the setting of the matter for hearing (CAL. CIV. CODE s. 4607).

In 1982, a new provision, section 4351.5 of the California Civil Code, was included for the mediation of visitation disputes. In 1984, legislation enhancing the mediation process was passed under section 4607 (b) of the Civil Code, which requires all Superior courts to provide mediation services and to ensure a mediator was available to the parties (Deis, 1985, p. 153; Ricci, 2004, p. 403). In addition to the court-based mediation, the legislation provides room for parties to seek out private mediators, so long as mediators meet certain minimum requirements outlined in section 1815 and 1816 of the Family Code<sup>14</sup>, and receive training from an "Eligible Provider"<sup>15</sup> (Morris, 1986, p. 174).

In 1994, the California Civil Code was repealed and replaced by the California Family Code, sections 3155-3177, and later by sections 3160-3192 of the Family Code. The repealed sections of the Civil Code are now the California Family Code sections 3170 and section 3175. It is under section 3170 that child custody and visitation disputes are required to go through mediation before being taken to court (Lee & Lakhani, 2012, p. 340).

The legislative shifts created both a statewide Office of Family Court Services and identified resources for the funding of research (Edwards, 2007, p. 116). The Office was officially established in 1986 within the California Administrative Office of the Courts. In 2000, the Office of Family Court Services was integrated into the Center for Families, Children & the Courts (a division of the Administrative Office of the Courts) (Edwards, 2007, p. 116). Since the enactment of mandatory mediation, California courts have been able to evaluate the

---

<sup>14</sup> Minimum qualifications for court-appointed mediators are specified in the California Family Code section 1815 (1), which defines the education and experience required for "counselors of conciliation". These qualifications include "a master's degree in psychology, social work, marriage, family and child counseling, or other behavioral science substantially related to marriage and interpersonal relationships; at least two years of experience in counseling or psychotherapy, or both, preferably in a setting related to the areas of responsibility of the family conciliation court and with the ethnic population to be served; knowledge of the court system of California and the procedures used in family law cases; knowledge of other resources in the community that clients can be referred to for assistance; knowledge of adult psychopathology and the psychology of families (CAL. FAM CODE, s. 1815).

<sup>15</sup> Under s. 1816 of the Family Code and 5.210 of the Rules of Court, mediators must receive training from, "eligible providers" including "Administrative Office of the Courts and may include institutions, professional associations, professional continuing education groups, public or private for-profit or not-for-profit groups, and court-connected groups" (CAL. R. CT. 2007, s. 5.210)

mediation process and strengthen mediation provisions throughout the state. As a result, problems have been identified and additional legislation has strengthened standards of practice for mediation in the state (Edwards, 2007, p. 117).

#### **4.3.2 *Service Providers and Referral to Mediation***

In California, the majority of courts hire mediators as court staff. In many of these counties, a special unit of the court called Family Court Services provides mediation and other services for parents. In smaller counties, the court contracts with private mediators to provide mediation services (Edwards, 2007, p. 123). Alternatively, when parties turn to private mediators, they tend to seek out lawyers and other professionals in the community who can provide dispute resolution services to them. In such cases, a fee is usually applied (Ricci, 2004, p. 402).

Guidelines have been developed that provide standard mediator qualifications. These guidelines are outlined and made mandatory in the Rules of Court (Edwards, 2007, p. 125). Section 5.210 outlines standards for how mediation should be conducted and provides methods of dealing with parents who have unequal power in their relationship (CAL. R. CT, 2007, s. 5.210). Additionally, s. 5.210 outlines the requirement of continuing education for court-appointed mediators. Under this section, mediators must participate in continuing education sessions that cover a number of subjects including family dynamics, substance abuse, domestic violence, child abuse, and certain aspects of custody law (Edwards, 2007, p. 126; CAL. FAM CODE s. 1816; CAL. R. CT 5.210, 5.230). These standards are intended to address the pressing challenges of providing high-quality mediation services in the face of rising caseloads, steep increases in clients without attorneys, significant numbers of clients with serious problems, and the rise of non-English speaking clients (Ricci, 2004, p. 402).

#### **4.3.3 *Costs***

California law requires that the courts provide mediation free of charge (Ricci, 2004, p. 403). State law can limit the scope of court-based mediation to issues of custody, visitation and other issues that pertain solely to children and parenting. Private mediators, in contrast, have the flexibility and freedom to mediate all issues, unless the court has referred a case to them for a specific reason (Ricci, 2004, p. 403).

Legislation regarding public funding for mediation is under section 1852 of the Family Code. Section 1852 (b) states:

Money collected by the state pursuant to subdivision (c) of Section 10365 of the Health and Safety Code, Section 70674 of the Government Code, and grants, gifts, or devises made to the state from private sources to be used for the purposes of this part shall be deposited into the Family Law Trust Fund (CAL. FAM CODE, s. 1852).

The legislation outlines that funding “shall be disbursed for purposes specified in this part and for other family law related activities” (s. 1852, (d)), and that the Judicial Council is to administer the funding, with power to delegate the administration of the fund to the Administrative Office of the Courts (s. 1852, (e)).

Despite general support for funding family mediation, California courts have difficulty maintaining adequate funding to sustain their mediation services. According to Edwards (2007), some mediation services can only offer the parents an hour or even less to resolve their differences (p. 127). Others comment that this is insufficient time to devote to the mediation process, as it does not provide the opportunity for parents to express their views fully in order to reach a lasting resolution (Ricci, 2004, p. 403).

#### **4.3.4 Process**

In California, the purpose of mediation is more than the facilitation of a self-determined agreement on child custody or visitation. It is marked by a focus on the child's "best interests" (Ricci, 2004, p. 402). The purposes of mediation are set out in section 3161 of the Family Code which is to minimize acrimony between the couples, form a close and continuing connection between the child and the parents and to agree to visitation rights of the parties (Lee & Lakhani, 2012, p. 341).

The California court-based mediator is expected to facilitate the development of a parenting plan that "protects the health, safety, welfare and best interest of the child and that optimizes the child's relationship with each party" (CAL. R. CT., s. 5.210 e). Additionally, section 3180 of the Family Code articulates that in certain circumstances the mediator can interview the child (CAL. FAM CODE s. 3180). The mediator is responsible for helping the parties to create an agreement that addresses each child's current and future developmental needs. As mentioned, the mediator standards of practice are outlined in the California Rules of Court section 5.210. This section provides an extensive list of expectations for the active involvement of the mediator, although discretion of the process is ultimately left to the local courts (Germane et. al, 2013, p. 178).

As noted above, in the California courts, two distinct mediation models are employed: the "confidential, or "non recommending model", and the "recommending" model (Ricci, 2004, 398). Morris (1986) explains that the recommending model provides local courts the option of requiring mediators to make a custody or visitation recommendation to the court for an investigation or restraining order (p. 751). If the mediation session fails to produce an agreement, the mediator may recommend that a custody investigation be conducted. After the investigation and evaluation are complete, the case may go to trial on the custody issue (Germane et. al, 2013, p. 178). The confidential model upholds the principle of confidentiality and the details of the mediation stay with the parties and the mediator (Ricci, 2004, p. 402).

These two mediation models continue to develop in parallel, and continue to create controversy. The model chosen by any particular court reflects the influence of the local court's history and its legal culture (Ricci, 2004, p. 402). An evaluation of custody visitation mediation revealed that clients in non-recommending mediation sessions were more likely to provide positive feedback, as they articulated they felt less rushed or pressured during the session (California Center for Families, Children and the Courts, 2004, p. 11). Today, the majority of mediation programs provide recommending mediation, but nearly half of the mediations conducted in the state are in courts that use confidential, non-recommending models (Edwards, 2007, p. 127).

### 4.3.5 *Screening Protocols*

When addressing cases involving domestic violence, the Judicial Council has adopted a statewide protocol for mediation, including special provisions dealing with mediation where there has been domestic violence training for mediators and others involved in the child custody determination process (Edwards, 2007, p. 117).

Standards for addressing cases with domestic violence fall under California Rule of Court s. 5.215, and are also adopted in Family Code sections 211, 1850 (8) and 3170(b) (CAL. R. CT., 2007, s. 5.215). These legislative standards outline the responsibilities and procedures for such matters as referrals, developing safety plans, and providing accessible services and support for victims of domestic violence (s. 5.210).

### 4.3.6 *Outcomes*

In California, the court process has changed greatly over the years. Today, few cases get to trial, as most settle at some point during the pre-trial proceedings (Edwards, 2007, p. 121). Since 1991, California's Administrative Office of the Courts has been collecting information from parties and mediators involved in court-based child custody mediation. Data is collected through the Statewide Uniform Statistical Reporting System (SUSRS)<sup>16</sup> (California Center for Families, Children and the Courts, 2004, p. 1).

Evaluations from a 2008 study showed that mediation participants reached complete agreement in 43% of the sessions, and at least partial agreement in 50% of cases (p. 3). The study also indicated a high presence of domestic violence in cases, as more than half of the families reported a history of physical violence (California Center for Families and the Courts, 2010, p. 11).

Although California's case shows relatively low settlement rates, participant satisfaction rates were quite high. For example:

- 89% of California family mediation participants agreed that the mediator helped them “focus on our children’s interests”;
- 87% of participants agreed, “Mediation is a good way to come up with a parenting plan”;
- 88% of participants expressed a willingness to recommend mediation to friends (Center for Families and the Courts, 2010, p. 21).

Most recently, a 2012 study indicated that California Family Court Services (FCS) conducted 2,045 mediations in a one-week study period, suggesting that FCS conducts more than 101,000 mediations per year (California Center for Families, Children and the Courts, 2012, p. 1).

---

<sup>16</sup> SUSRS is mandated by Family Code s. 1850 and is an authoritative source of state-level data on contested child custody issues. It is the only large-scale ongoing data collection in the court related to court based child custody mediation.

## METHODOLOGY

**5.0** Three methodological approaches were undertaken in the design of this research, those being: jurisdictional scan, one-on-one semi-structured interviews, and online surveys.

The use of multiple research methods is based on the concept of triangulation, which is the idea that the phenomena under study can be understood best when approached through a variety or a combination of research methods (Hastings, 2010, p. 1538). According to Stake (2010), triangulation can reduce the likeliness of misinterpretation as it brings forth multiple perceptions to clarify meaning and can “verify the repeatability of an observation or interpretation” (p. 454). Hesse-Bieber & Levy suggest that the use of triangulation in qualitative research can lead to convergence in research findings which can serve to “enhance the validity of research results” (Hesse-Bieber & Levy, 2011, p. 51).

### **5.1 Population of Interest**

To gain an understanding of the family law system and insight into the experience of family mediation, experts in the BC family law system were selected as potential participants. Members of this participant pool were expected to provide first hand accounts of their professional experiences in the family law system and speak to the validity of family mediation as a suitable means for achieving justice.

Because a large portion of the research in mandatory family mediation was drawn from the experiences of Australia and California, it was also deemed beneficial to interview experts from reputable organizations and professions from those two jurisdictions. The hope was to gain insight into the ongoing operation of mandatory family mediation in Australia and California and to learn from the design and successful implementation of the model.

In order to achieve a balanced representation of the family law system, the family law experts recruited as participants in this report represent a variety of fields, including the legal, administrative, academic and advocacy professions.

### **5.2 Sample**

Participants were recruited based on their experience and/or expertise in the field of family law and/or family mediation. When seeking participants from BC, expert sampling occurred primarily with individuals who attended BC’s Third Justice Summit, as the client made email contact information available. When seeking participants from the international jurisdictions, participants were recruited through snowball sampling or through online searches based on their publications or work in that jurisdiction. Recruitment for participants occurred in April 2014 through email and phone recruitment scripts.

Once recruited, BC participants were categorized into five groups; 1) family lawyers; 2) family mediators; 3) lawyer/mediators; 4) administrators within the family law system; and 5) academics with legal backgrounds in the family law system. The nature of work in the family justice system meant that there was some overlap between participant groups. For example, many advocacy workers identified as family lawyers or academics and answered the research questions from their various professional perspectives.

Emails were sent to seven BC participants to participate in the interview, with five interviews being conducted. Twenty-two surveys were circulated, with a total of nine surveys completed and returned. A total of three interviews were conducted with experts from Australia and California (two interviews from California and one from Australia).

### **5.3 Instruments**

The research involved three approaches to gather data, which were approved by the University of Victoria's Human Research Ethics Board. The approaches were:

- Jurisdictional scan;
- Individual interviews;
- Online survey.

Questions used to guide the interviews for BC professionals were applied to the surveys. A separate set of interview questions was designed for Australia and California, as the goal was to elicit different information and perspectives from these participants (specifically, to gain insight into model design and implementation strategies). All interview and survey questions were informed by input from the client to ensure that participants understood the nature and intent of the research and to curtail any misunderstandings that could result regarding the Ministry's intention, namely that such regulation would be coming into force following the study.

#### **5.3.1 Jurisdictional Scan**

The jurisdictional scan was intended to review and analyze Australia and California's experience with mandatory mediation and to draw out key themes. The data was researched and obtained electronically through the University of Victoria library database or was accessed through clients or research participants who provided internal documents and resources. The jurisdictional scan explored the following research questions:

1. Through what process should the question of mandatory mediation be explored?
  - What has been learned from jurisdictions with mandatory mediation in place?
  - What elements are integral to the design and implementation of mandatory mediation (including the advantages, disadvantages, supports and barriers)?

Key search terms that surfaced from the jurisdictional scan included family law, dispute resolution, mediation, mandatory or compulsory mediation, divorce and/or separation, screening and family violence.

Certain features regarding model design and implementation also developed from the jurisdictional scan, and served as the basis for illuminating relevant research themes when constructing the interview and survey questions and informing the recommendation section of this paper. These features included preliminary screening procedures, dispute resolution process requirements and accreditation, and government involvement/subsidization.

### **5.3.2 Interviews**

A semi-structured interview process that involved asking a mix of open-ended and closed ended questions was used. The interviews were set up to gain insight into how family dispute resolution is practiced and to gain expert views on issues associated with mandated family dispute resolution.

The interview questions discussed family dispute resolution model features, screening techniques, mediator responsibility and government involvement/possible subsidization. A series of interview questions were prepared as discussion points, but the participant was encouraged to add any comment or additional perspectives where possible. This format provided the opportunity to the interviewer to deviate from the standardized interview questions and ask the participant additional questions, as needed, depending on the direction of the conversation.

During the interviews, participants were asked a total of 21 questions. The questions asked are shown in Appendix E to this paper. A total of five interviews were completed with professionals in BC, and a total of three interviews were conducted with professionals living in California and Australia. All interviews were conducted using Skype and were recorded using the Call Recorder software. Advance planning and consent offered a wide enough time frame to schedule interviews for a time most convenient for participants. The length of the interviews was between 30 - 45 minutes long.

### **5.3.3 Surveys**

Online surveys were conducted by sending a survey link to a range of participants from different family law professions and locations throughout BC. Identical to the interview process, the purpose of the survey was to gain insight into how family dispute resolution is applied and determine what the best model of family dispute resolution if it was mandated. The survey questions discussed family dispute resolution model features, screening techniques, mediator responsibility and government involvement. The rationale for circulating a survey in addition to the in-depth interviews was to reach a greater number of professionals in the family justice system.

The same 21 questions used in the interviews were used in the survey. Identical to the interview questions, the surveys focused on the operation of existing programs, and more specifically, on model design and implementation strategies to a mandatory family mediation process. The questions asked are shown in Appendix E to this paper.

The survey was put together using Fluid Survey software. Participants were emailed a link with instructions to complete the survey. The email instructions also explained the nature of the research and encouraged the participants to contact the interviewer if there were any concerns or questions.

## **5.4 Data Analysis**

The qualitative data analysis process used in was thematic analysis. Thematic analysis is the most appropriate method of data collection to use to answer the research questions posed in

this report. This form of analysis offers the most flexibility to identify, analyze, and report patterns within data, and provides a rich, detailed, and complex account of the data (Braun & Clarke, 2006, p. 82). With this form of analysis, there is an attempt to theorize the significance of the data to show patterns and their broader meanings and implications (Patton, 2002). Typically, this form of analysis requires the researcher to relate the data to the literature, and themes are applied based on key findings (Braun & Clarke, 2006, p.84).

In deductive thematic analysis, these patterns and themes are pre-determined (Patton, 2002). The data gathered through this research project was themed according to the results of the jurisdictional scan, which examined the experiences of Australia and California. From this, themes were predetermined, and informed the construction of the interview and survey questions to be asked to family justice professionals in BC.

## **5.5 Limitations**

While the methodology was appropriate for the research goals, a few limitations exist including: small sample size (only 17 respondents in total), purposive sampling method, and limitations to the nature of the survey and interview questions.

The small sample size can be attributed to the choice of methodology. For example, interviewing can be a time intensive approach that requires more effort and time to administer than other methods. Surveys, although often regarded as more convenient method for participants, can also be time consuming. Considering that many of the selected participants are senior professionals in their field, it is quite likely that there was very limited time available to make the survey a priority. Although, the sample size may not accurately reflect all of the voices relevant to the question of mandatroy mediation, the length and thoroughness of the interviews and surveys that were completed provided ample information and insight in answering the research questions.

Additionally, the purposive sampling method to recruit participants may make it difficult to generalize results. However, the selection of the sample group, and also the nature of the interview and survey questions are primarily intended to seek out information that can be used in the construction of recommendations. Therefore, the ability to generalize to the greater population was not the goal of this research.

Another limitation to the research is connected to the nature of interview and survey questions and how this affected the comparability of the data. First, since each participant had unique specialties, some questions were not relevant to all participants. In these circumstances, participants were not always able to answer the same questions. This made it difficult to compare participant answers. To minimize the effect of this limitation, the questions were sometimes modified to accommodate to the participant's knowledge or experience in the family justice system. In this way, the participant was still able to provide insight into the general themes and features of a potential mandated family dispute resolution model.

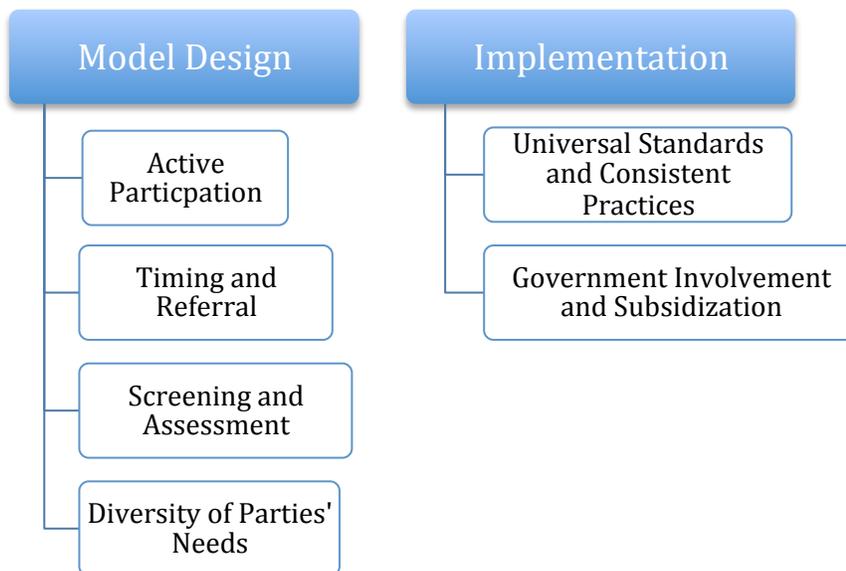
## FINDINGS AND DISCUSSION

**6.0** The data used to support this research project consists of a total of five interviews and nine surveys with various professional groups affiliated with the family justice system in BC. Of these professional groups, three identified as lawyers, three as mediator/lawyers, three as academics, two administrators, and three as ‘other’. For the purpose of this report, findings from the interviews and surveys will be combined, as the questions used for these two instruments were identical (See Appendix E). Additionally, three interviews were conducted with family justice professionals from Australia and California (two respondents from Australia and one respondent from California). A total of seventeen responses were recorded.

In line with the goal of the research, each respondent group identified concerns and considerations that they perceived to be relevant to the issue of mandatory family mediation to respond to the research question(s): Through what process should the question of mandatory mediation be explored?

- What lessons have been learned from jurisdictions with mandatory family mediation in place?
- What elements are integral to the design and implementation of mandatory mediation (including the advantages, disadvantages, supports and barriers)?
- What steps should be taken in examining the questions and developing a model?
- Who should be involved?

The findings fell within two response categories: model design considerations and implementation considerations. Six interrelated themes emerged from a thematic analysis. The themes are as follows: ‘active’ participation in mediation, flexibility in the referral and timing of mediation; extensive screening and assessment; diversity of parties’ needs;; universal standards and consistent practices; and, government involvement/subsidization.



## 6.1 MODEL DESIGN CONSIDERATIONS

### 6.1.1 *Active Participation in Mediation*

The desirability of meaningful party engagement and active participation in reaching a resolution was confirmed as a prominent theme in the findings from the respondent interviews. Put another way, the preferred model has parties working to make their own decision, it does not have a neutral “mediator” make decisions for them. As highlighted in the jurisdictional scan, California currently employs two models of mediation: non-recommending and recommending. The two respondents from this jurisdiction were consistent in reporting that the recommending model limits the process in that parties are not “given a real opportunity to mediate” and the process is “not real mediation”. One participant reported that for [mandatory] mediation to be valuable, it must be *truly* outside and different from litigation and it must be confidential. Interview findings from the two Californian respondents indicated that too many parties to recommending mediation believe that they will ultimately continue on to litigation, so the free mediation session is, therefore, not entered into with an expectation or intention to resolve the issues.

In Australia, legislation requires that parties must demonstrate that they have made a ‘genuine effort’ (a term not legislatively defined) to resolve their dispute through mediation (Rhoades, 2010, p. 183). Parties involved in mediation must produce a certificate and provide it to the court if they were unable to successfully resolve the issues. A respondent reported that although there is broad acceptance that mediation must take place before court, there is still a degree of ‘party autonomy’ as parties ultimately decide if they will participate in the process. When, despite the fact that there may be implications that affect them in court, a party refuses to attend the mediation session or does not demonstrate a ‘genuine effort’, there is no authority or mechanism to compel them to attend. The Australian respondent suggested that without a mechanism to ensure active participation and to require a ‘genuine effort’ from participants, many parties are inclined to “bypass mediation” and proceed straight to court.

Findings from the BC interviews and surveys revealed that mediation is the preferred family dispute resolution process to be mandated (compared to, for example, collaborative law or arbitration). As for the form that mandated mediation could take:

- 12 respondents suggested that mediation should be mandatory for parties involved in *all* proceedings where relief is claimed under the *Family Law Act* or the *Divorce Act*;
- 3 respondents indicated they were unsure when it should be mandatory;
- 7 respondents suggested that the mandated form of attendance should involve one single mediation session with a pre- family dispute resolution meeting with each participant separately in order to prepare parties and ensure that the process is valuable;
- 3 respondents reported that mediation information sessions should be the only required form of attendance;
- 1 respondent suggested that a combination of an information session, a pre-family dispute resolution meeting, and a mediation session should be mandated;
- 2 participants reported that no form of attendance should be mandated.

To ensure parties are prepared and meaningfully engaged in the process, respondents made the following suggestions:

- 12 respondents suggested that the mediator should play an active role in preparing and educating the parties by discussing the process and stressing importance of independent legal advice;
- 13 respondents noted the importance of reviewing with the parties the ‘agreement to mediate’ which outlines the process and associated costs as well as the importance of the mediator having the discretion to end the process;
- 11 respondents felt that mediation is more likely to be productive if there were a mechanism which would require pre-mediation exchange of information;
- 13 respondents agreed that counsel should be entitled to attend and that other persons (including friends and advocates) should be permitted to attend mediation provided that consent is given from the mediator and other parties.

Overall, the findings in the literature, jurisdictional scan, interviews and surveys were consistent in revealing that mediation is the preferred family dispute resolution process and that it will frequently lead to lasting decisions that work for the parties (compared to court-ordered outcomes). Mediation is often regarded as the favourable family dispute resolution process as it typically aligns itself with the notion of ‘party empowerment’ and is the best way to manage the often challenging emotional dimensions of separation. Findings from the jurisdictional scan, the interviews and surveys relating to the ‘cost effectiveness’ and ‘time efficiency’ benefits of mediation support this claim. As discussed in the literature review and implied in the findings, mandatory mediation may be seen as compromising the voluntary intent of mediation and can thus evoke in participants a sense of distrust or resentment of the program. Adding ‘safeguards’ (such as legal counsel or representation, pre- family dispute resolution meetings or information sessions) may enhance trust and support for the program, and prevent misuse or party disengagement.

This theme relates to the need for a certification system that ensures compliance and proves participation in mediation before reaching the court. Challenges regarding party engagement and participation experienced in Australia and California reflect a lack of consistent language or definition regarding ‘active participation’ or ‘effort’, along with a limited understanding of the implications of non-participation. This has resulted in mediation being regarded as ‘secondary’ to the court processes.

### **6.1.2 Flexibility in Referral to and Timing of Mediation**

Setting up a solid mediation referral mechanism was seen as important by those interviewed and surveyed. Australia’s Family Relationship Centres (FRCs) are regarded as a successful entry point for many families. Data from the jurisdictional scan and interviews clearly indicate that the increase of funding for FRC’s has led to a significant increase in client intake for family dispute resolution (Kaspiew et. al, 2009, Table 4.11, p. 76). The Australian respondent noted that the support from legal practitioners, the government and the court has led to the integration of FRCs into the family law system. This support has also generated increased public acceptance and increased trust in mandated family dispute resolution. The interview findings revealed that with FRCs in place, a shift in public support to mandated family dispute resolution has occurred. For example, there appears to be an understanding and

acceptance by the public that the program and practitioners involved are there to help people and that staying out of court will serve their best interests.

Additionally, in Australia parties are required to attend at least one family dispute resolution session prior to making an application to the court. There is an understanding that family situations are often dynamic and complex, therefore, the common goal of family dispute resolution is to simply help parties work out parenting arrangements for the short-term with an understanding that parties may return should the arrangements change or need to be updated. This approach is based on research from Australia which has found that the “earlier parents can be involved in negotiating a compromise to their disputes, the more likely it is that the dispute will be resolved” (Parkinson, 2013, p. 205).

In California, s. 3170 of the Family Code requires that parties disputing child custody matters participate in mediation. The primary ‘point of entry’ or ‘referral service’ to mediation is through a unit of the Family Court Services, which provides mediation free of charge. The legislation also provides room for parties to seek out private mediators instead of using court-based mediators, but the onus is on the parties to contract and pay for private mediation services. One interview respondent reported that court based free mediation service is dominating the field and has resulted in a suppression of private community based mediation.

Findings from California revealed that having the court as the primary point of entry has generated increased demand for mediation services, which the courts are struggling to meet due to recent budget cuts. Data from the jurisdictional scan found that courts have difficulty maintaining adequate funding to sustain their mediation services. It was found that funding cutbacks meant that the majority of court based mediation services now only offer the parents an hour to resolve their dispute (Edwards, 2007, p. 127). Findings from the interviews revealed that the one-hour time frame is insufficient to address the issues involved for the majority of mediations and, therefore, limits the quality of service provided to the parties.

In BC, eight respondents suggested that referral to the mediation process should take place before an application is made to court. These respondents reported that mediation should occur “earlier rather than later”, but noted that often families are not equipped with the skills or motivation to resolve their issues at the early stages of their dispute, so that timing of mediation should be carefully considered and be flexible enough to accommodate variations in readiness from family to family.

Four respondents indicated that referral should be made before an actual court date is set. Respondents who were of this view also noted that the actual mediation should occur no earlier than 90 days after the filing of the first response claim, and no later than 90 days before the date of trial.

With regards to the referral and timing of mediation, the data consistently revealed that a “one size fits all” approach may not be suitable for family disputes. Findings indicated a need for flexibility and trust when considering the appropriate avenue, service, and timing for entering into family mediation.

### 6.1.3 *Extensive Screening and Assessment*

Data from Australia and California reinforced the importance of extensive screening and assessment protocols. California's Rule of Court (specifically Rule 5.210 and 5.215), along with the Family Code (s. 211, 1850 (8) and 3170 (b)) shows that a certain standard of screening is required prior to mediation.

Developed by the California Judicial Council, the rules surrounding screening and assessment are applied throughout the State. One respondent from California commented that unlike many other mediation programs, there is no automatic "out" for parties involved in domestic violence. Instead, the screening process is thorough and allows the party to feel safe and listened to. Processes to address situations involving domestic violence include: pre-mediation separate sessions, the involvement of support persons within the process, and the development of a safety plan. With these additional supports in place, one respondent suggested that mediation is "safer" than going before a judge because the parties are prepared for the mediation process by highly trained practitioners.

Findings from Australia revealed similar structures with regards to screening and assessment for family violence. Under the Family Law Regulations, practitioners throughout Australia must ensure that parties have undergone a satisfactory assessment and also be confident that parties have the ability to negotiate freely (Reg. 25). The primary service provider, Family Relationship Centres (FRCs), requires that all staff undergo extensive training in screening for violence and skills to work with people who have experienced violence or abuse. This training is federally funded and consistent with policy. One respondent from this jurisdiction commented that nearly 85% of parties that access services through FRCs have domestic violence related issues. This respondent commented on the importance of the former program entitled the Coordinated Family Dispute Resolution (which has recently lost funding) and noted that although practitioners are skilled in working with parties who have experienced domestic violence, it is still sometimes quite challenging to support the high and diverse needs of these families in mediation.

All of those interviewed and surveyed agreed that mediator programs must undertake a thorough screening process to detect power imbalances, domestic violence and abuse, and assess whether mediation is appropriate. The BC Ministry of Justice Family Services Division has employed sophisticated screening and assessment protocols to determine if domestic violence is present within the families in dispute and to determine if it is safe to proceed to mediation. The *Notice to Mediate (Family) Regulation* contains specific exemption clauses that prevent cases from moving to mediation when it is unsafe to mediate; it is urgent that a party gets to court; or where it is found impractical or materially unfair to compel a party to attend.

Fourteen respondents agreed that the concerns anticipated by the exemption clauses listed above are valid reasons not to participate in mediation. Five respondents added that families who had previously mediated the same issues should not be automatically excluded or exempted from mandatory mediation. These five respondents reported that previous participation in mediation does not preclude families from benefiting from a second attempt at mediation in a current dispute.

As mentioned earlier, screening for violence and power imbalance is standard practice in mandatory mediation programs. BC standards, particularly the model in s. 4.3 of the Family Justice Services *Manual of Operations*, require that practitioners screen for violence and power imbalance and in such cases seek appropriate avenues to address these issues (BC Ministry of Justice Family Justice Services Division, 2014, p. 34). Additionally, the *Family Law Act* (2013) s. 8 requires all family dispute resolution practitioners to meet a high standard of training in domestic violence screening and assessment (BC Ministry of Justice, 2013, p. 3).

While there seems to be full consensus on the importance of expert and mandatory screening for violence and power imbalances in mandatory mediation programs, there is a difference of opinion, in both the literature and in the findings of this research, about whether to screen families in these situations “out” of mediation or whether to cautiously proceed to mediation with safeguards built in.

Those who support mediation in cases of family violence argue that with a high level of mediator training and with a proper design and implementation strategy, a mediation process can be created that is safe for the parties. In fact, one respondent asserted that mediation might be the *best* process to deal with family violence as it may be the most accessible way to resolve disputes due to cost effectiveness and time efficiency. Another respondent commented on the significance of mandatory screening, noting that if screening is done well, and if the parties are suitable, that mediation will yield positive results.

But others are not convinced that mediators should be intervening in situations of domestic violence. Violence and abuse can take many different forms, and a mediator’s ability to accurately screen for, and identify, the different types of violence and abuse in these highly complex situations is suspect (Beck et. al, 2010, p. 633). Another respondent noted that mandating a victim of family violence into mediation simply creates another barrier to justice. To this respondent, mandatory mediation in situations where there has been family violence forces the victim into territory where they feel unsafe and voiceless.

The importance of extensive screening and assessment protocols for violence or power imbalances is evident throughout much of the literature, interviews and surveys. Findings from the interviews and surveys confirm that the use of existing screening assessment protocols would be crucial in a proposed mandatory family mediation model. Despite general consensus on this fact, there was still apparent disagreement with how (and if) a mediator can design a mediation process to ensure the safety and wellbeing of the parties where there has been violence.

#### **6.1.4 Diversity of Needs**

The concern about parties ‘falling through the cracks’ was highlighted in the findings from the jurisdictional scan, the interviews and the surveys. One Australian respondent reported that a large challenge for the mandatory family dispute resolution program is assisting those clients who are not suitable for mediation, but who also do not necessarily have the skills and financial supports to go to court. This respondent commented on the space between the mediation providers and the court and suggested that this “gap” might contribute to parties not having their legal concerns addressed. Findings from this jurisdiction indicate that the program, although universal and consistent, addresses this issue by drawing on local resources

to ensure that the needs of the community are met. For example, government funding goes into hiring indigenous liaison officers to ensure services match the cultural and linguistic needs of parties. Furthermore, mediation in Australia is often contracted to local agencies/practitioners that are aware of the local cultural needs and can provide relevant services.

In California, Rule of Court section 5.210 includes a provision that requires court-based mediators to participate in continuing education and training initiatives. This requirement is intended to address the pressing challenges of providing high-quality mediation services in the face of rising caseloads, but also to ensure that services reflect the diverse needs of parties around issues such as substance abuse, domestic violence and non-English speaking processes (Ricci, 2004, p. 402). One respondent from this jurisdiction commented on how the racially, ethnically, and linguistically diverse makeup of court staff throughout California, matches the diversity of families in the system.

The findings from BC suggest that a mandatory mediation model would need to reflect the various needs of families, such as literacy and language deficits, and should also take into consideration the need for accommodation in matters such as hours of operation, child care, flexibility in referral and timing of mediation (see Finding 6.1.2). One respondent commented, when referring to current family justice initiatives, that responses to party needs ought to be more active and less passive. The needs and barriers experienced by families are numerous and a ‘human point of entry’ that is visible, active and understood in the community should be provided to ensure that family needs are identified and relevant services can then be made available. Despite identifying that family needs are diverse and multifaceted, two respondents commented on how challenging it is to measure these needs, and further, to measure and know what services are irrelevant and ineffective. One respondent reported that family circumstances and dynamics are constantly changing and that services are often struggling to meet changing needs of families. This contributes to the challenge in verifying what is working and what is not working for families.

In the larger discussion surrounding access to justice for families, much is reported about the need for services to overcome (and address) the diverse linguistic, cultural, financial and literacy barriers. The literature suggests that access to family justice is sometimes challenging as parties require “a degree of stubbornness and a sense of entitlement as well as solid reading, writing and problem solving skills” to navigate the system and seek out relevant services (McEown, 2009, p. 33). Data from the interviews and surveys raised the question of parties “falling through the cracks” in a mandatory mediation regime and suggested that measures be taken to address this concern. Findings regarding the question of client diversity and challenges align with much of the literature surrounding access to family justice, which focuses on ensuring that services are client-centered, inclusive and culturally relevant (Action Committee on Access to Justice in Civil and Family Matters, 2012).

## **6.2 PROGRAM IMPLEMENTATION CONSIDERATIONS**

### **6.2.1 *Universal Standards and Consistent Practices***

Programs that are considered “universal” and have a “common gatekeeper” were highlighted as important throughout the data. These terms, as defined by participants, refer to the need for

universal standards and consistent practices across jurisdictions and the importance of establishing a central coordination role (or common gatekeeper) to ensure that the “same standards would always apply”.

Data collected from the interviews with the two Californian respondents suggests that the legislative compromise that put two different mediation models in place has resulted in inconsistent standards and mediation practices throughout the state. It was reported that this has led to an overall increase in the number of services and resources used. The interviewees indicated that the California “two model” approach has led to a split system that has deviated from the mandate to keep parties out of court, and has undermined the financial incentive (i.e. reduced court time and lower costs) for going through mediation.

In the case of Australia, the literature shows that the 2006 rollout of both the FRCs, along with the mandatory family dispute resolution regulation, has led to a consistent approach to mediation throughout the country. The government’s consistent approach to mediation and its willingness to take on the “common gatekeeper” role has helped promote the success of the mandatory mediation model. Pidgeon (2013) demonstrates that the government in Australia has encouraged consistency through the implementation of common mediator competency standards, the provision of national training packages and the establishment of federal regulation to cover all regional areas (p. 231).

Findings from BC respondents reveal that the current *Notice to Mediate (Family) Regulation* is “largely unknown and not understood” by the parties and legal professionals. Interviews and surveys reported that this confusion around the *Notice to Mediate (Family) Regulation* could be attributed to the fact that it is not applied throughout every region of the province, nor does it apply to both the Provincial and Supreme Court. The findings indicate that to be successful in BC, a mandatory mediation program must achieve a consistent standard of practice throughout the province. This means that various service providers, from government to court and private sector agencies, would have to adhere to universally accepted, applied and regulated standards.

It is expected that a clear and understandable mediation model that is implemented in a consistent way will also make it easier for stakeholder groups, within and outside the formal justice system, to understand and to interact with the program. This enhanced collaboration and cooperation with various partners involved with the family justice system in BC would benefit a mandatory mediation program immeasurably. Distinct roles amongst the partners could be assigned (as happens in Australia with the FRCs) that would draw upon a wider and deeper range of expertise, thus improving the overall design and delivery of the program. Drawing partner agencies from across the province into the program would also serve to make the mediation program more widely known and understood throughout all the regions of BC.

As demonstrated in Australia and California, having a consistent standard of mediation practice seems to draw more consistent government funding. Consistent levels of government funding throughout all regional areas (where the amount of support is determined by the population size) might help to ensure that all regions in BC are receiving a uniform standard of service and support.

## 6.2.2 *Government Subsidization*

The question of dealing with the cost of a mandatory mediation program was a consistent concern across jurisdictional scans, interviews and surveys. In Australia, the government provides funding for many of the community-based mediation service providers, at least to the extent that mediation is free of charge for the first hour and fees thereafter are assessed through a means-test<sup>17</sup> (Parkinson, 2013, p. 211).

Mediation provided by the courts in California, although free of charge, is limited in scope and time. It is only available for child custody issues and interviewees said that significant budget cuts in recent years have made it difficult to provide adequate services to maintain court based mediation services. This in turn affects both the quality of service and public confidence in mediation. One respondent reported that the newly imposed time pressures (due to increased mediator workload) have resulted in a situation where mediators are less likely to meet separately with spouses, which is not only affecting the productivity of the mediation process, but also poses a problem in cases where domestic violence may be present.

Findings from the BC interviews and surveys revealed varying opinions about who should pay for mediation.

- 8 respondents suggested that even with government subsidies, a sliding scale mechanism still ought to be put in place, and that parties should contribute financially as much as they can;
- 3 respondents suggested that the mediation is more effective if the parties pay for all or some of the service. These respondents reported that compliance is greater and participation is much stronger when parties pay an active role in paying for all or some of the service. For example, one respondent reported that parties are apt to take the process more seriously and yield better results when they are responsible for payment. Another participant echoed this, highlighting the importance of parties having an invested stake in the process.

The question of government funding for family mediation is a difficult practical, political and legal question. On a practical level, problems in the current fiscal environment mean that the prospect of new or additional funding for such a program is slight. Yet, the literature, interviews and surveys all suggest that, ideally, a formula needs to be developed that allows the government to assist in funding the service while at the same time developing mechanisms for parties to contribute financially. To legally require families to participate in a process arguably means that provisions should be in place that make it financially viable for them to do so. Concern was raised about how low-income parties, who may have limited means (including limited time available), will participate in mediation. It was suggested that provisions should stipulate how participants can either access subsidized government services or receive assistance with mediation fees. This also implies a question about how a legal aid funding model might integrate into the mandatory mediation program and how this might affect the parties involvement. A further resource question that needs to be considered is

---

<sup>17</sup> The government provides funding for the first hour of mediation. The various FRCs throughout the country then assess the fees, which are means-tested. People who earn under 50,000/year do not pay fees. People who earn over \$50,000/year do pay fees, but the fees are quite minimal (\$60.00 for a 3 hour session).

whether or not there are a sufficient number of skilled family mediators available to provide the service.

## RECOMMENDATIONS

**7.0** This section suggests possible approaches and key elements for a mandatory family mediation program pursuant to the BC *Family Law Act*, section 9. The suggestions in this section are based on the information found in the jurisdictional scan, interviews and surveys, while answering the following research question(s):

1. What would mandatory mediation look like within the framework created by the BC *Family Law Act*?
  2. What steps should be taken to initiate and implement effective mandatory mediation within the BC family court system?
- What elements are integral in the design and implementation of mandatory mediation regimes (including, what are the advantages, disadvantages, barriers, and supports)?
  - What lessons have been learned from jurisdictions with mandatory family mediation in place?
  - Through what process should the question of mandatory mediation regulation be explored?
    - What steps should be taken in examining the questions and developing a model?
    - Who should be involved?

### 7.1 MODEL DESIGN RECOMMENDATIONS

This section will outline the recommendations regarding what a mandatory family mediation could look like. It responds to the research question: What elements are integral to the design and implementation of a mandatory mediation model?

#### 7.1.1 *Scope, Nature, Timing and Duration of Mediation*

The following suggestions respecting model design are subject to three preliminary points:

First, it is recommended that BC explore a mandatory mediation model for family matters. There is sufficient experience and understanding in BC and other jurisdictions to be confident that a mandatory model will, if properly implemented and supported, meet the legal needs of separating families more effectively and more efficiently than the current system.

Second, the question of the best design for such a model is multifaceted and complex, and exceeds the scope of this paper in two respects:

- While it is hoped and expected that the suggestions made here will be helpful, a thorough exploration of the questions of model design and implementation simply requires more time and resources than are available for this paper,
- In any event, insofar as this report subsequently recommends a high level of stakeholder input and involvement in the design of a program, the design suggestions made here are only provisional. They might best serve as a point of departure to help frame and inform discussions, in the expectation that they will be modified by future advice from the stakeholders.

Third, as the data has shown, public trust and support for mandatory mediation will be best achieved through a process that is consistent across the province. So, whatever model features

might ultimately be selected, it is important that, as much as practically possible, they eventually be uniformly applied in every registry.<sup>18</sup> That said, it is recommended that the Ministry consider implementing a model that combines features from various jurisdictions, including BC's Rule 5 process and the program developed in Alberta and referred to above (See 4.1.1).

In terms of scope of application:

- Like Rule 5, but unlike Alberta, it is recommended that a BC program be implemented, initially at least, only in the provincial court for contested matters dealing with children under the *Family Law Act* and applied to selected registries;
- Like the Alberta program, it is recommended that it first be made mandatory for self represented litigants.

On both of these points the scope and locations of the program could be expanded at a later date<sup>19</sup> when designers and decision makers have the benefit of the experience and lessons learned with a narrower and more manageable initial scope.

- BC should explore a model that would rest on regulations that provide that parties to all cases within scope be required to attend mediation before an application can be made to court.
- Similar to the practice in Rule 5 registries, the program should require that parties first attend a pre-mediation meeting which could serve the following purposes:
  - screen for safety and appropriateness for mediation;
  - refer the parties to mediation where:
    - it is safe to do so,
    - there is no urgent reason to refer the parties to court, and
    - the parties cannot demonstrate a legitimate reason for exemption;<sup>20</sup>
  - when directing parties to mediation, discuss the option of pre-mediation exchange of information, review a typical 'agreement to mediate' and, depending on the model in place, discuss the issue of paying for mediation;
  - if mediation is not safe or appropriate, perform a triage function and refer the parties for legal advice, to court or to another services in government or in the community designed to move them toward resolution;

---

<sup>18</sup> Although it would important to apply the program in all jurisdictions, like Rule 5, it may be most practical to start the roll out a pilot project basis to identify the resources and supports the program would require should it be expanded province-wide.

<sup>19</sup> Up to and including the Supreme Court, the *Divorce Act* and all parties to all contested matters.

<sup>20</sup> Legitimate reasons for exemption are discussed further below.

- if the matter is not to be mediated, consider creating a direct referral link to the courts, as implemented in the Alberta model;
  - if parties are proceeding to court, assist them in completing and filing the appropriate court forms;
  - in any event:
    - inform parents about available parenting after separation programs,
    - provide information about family law resources in the community, including legal information, and
    - discuss the role and importance of receiving legal advice prior to or concurrent with court process or mediation.
- Subject to cost considerations, mediation sessions should be mandated for at least 120 – 180 minutes. How and by whom these services would be delivered is discussed in part 7.2 below.

### **7.1.2 Trusted Screening and Referral**

It is recommended that existing screening and assessment protocols available through the Family Justice Services *Manual of Operations* and the *Family Law Act* (2013) continue to be used as the standard of screening and assessment for a mandatory mediation model and that all practitioners be knowledgeable of the protocols and adhere to the standards.

Considering that a high percentage of parties with a history of family violence opt for mediation, screening for domestic violence or abuse issues should continue to occur in all cases, as should an assessment to determine the parties' capacity to negotiate. Adequate training needs to be in place so that all mediators and intake staff can adhere to the standards set out in the legislation and properly screen and assess cases slated for mediation.

Parties should be able to seek exemption from participating and providing a certificate under certain circumstances. Legitimate reasons for exemption should be clearly outlined and defined. Such exemptions should fall under s. 37 and 38 of the *Family Law Act* or reflect the exemption clauses outlined in the *Notice to Mediate (Family) Regulation* that prevent cases from moving to mediation when: it is unsafe to mediate; it is urgent that a party gets to court; or where it is found impractical or materially unfair to compel a party to attend. Parties must either prove there is a legitimate reason for exemption prior to or following the pre-mediation session.

The “point of entry” to mediation should remain flexible, but it is recommended that, where they exist, the client use the Family Justice Centres or Justice Access Centres as the primary point of entry to mediation. This replicates the Australia model where Family Relationship Centres are used as the primary entry point to mediation. By adapting this model, the program would build off of the existing Rule 5 model, which requires that the FJC takes on a prominent role in facilitating the pre-family dispute resolution meetings and actual mediation sessions.

It is recommended that family dispute professionals, in every case:

- Apply the existing screening standards outlined in the *Manual of Operations and the Family Law Act* (2013) to the proposed mandatory mediation model;
- Honour the clauses of exemption from participation in mediation, and in such cases where is found that not appropriate after the pre-mediation session, that the family dispute professional comply with the standards outlined in s. 8 (2)(b) of the *Family Law Act*;
- Take into consideration and accommodate the mediation process to the specific needs of the parties (work hours, childcare, language and literacy). This approach may involve offering specialized services, i.e. extended hours of operation, translation and/or language services etc.

### 7.1.3 *Certificate of Non-compliance*

To ensure that the mandatory mediation program engages parties and generates ‘active’ and ‘genuine’ participation, and also that the program is not easily bypassed to allow parties to proceed straight to court, it is recommended that the client establish a certification system to address non-compliance. It is recommended that parties be required to provide a certificate to the court when they are unable to resolve their dispute through mediation. The family dispute resolution professional should issue the certificate to the parties. As mentioned, in cases where parties are exempted from mediation, they are not required to provide a certificate.

A ‘certification system’ or ‘compliance mechanism’ should:

- Identify behaviour or acts that would warrant a certificate and create a certificate system based on such acts. The model could follow Australia’s certification system where family dispute resolution professional issue certificates on the following grounds:
  - a party attended mediation but the other party refused or failed to attend;
  - a matter was considered inappropriate by the family dispute resolution professional;
  - mediation was attended by both parties and an effort was made to resolve the dispute;
  - the parties attended mediation but a party or parties did not make a genuine effort to resolve the dispute; and
  - the parties began mediation, but it was considered by the family dispute resolution professional that it would not be appropriate to continue mediation.
- Identify reasonable repercussions for non-compliance or not reaching a resolution through mediation (i.e. return to mediation, award costs to one party, proceed to court);
- Outline the standards for compliance in the program be clearly in s. 9 of the *Family Law Act* through amendments to the statute;

- Ensure that the standards for compliance and participation are universal and applied throughout the province.

#### **7.1.4 Diversity and Inclusion in Process**

The ‘one size does not fit all’ phrase applies to both the nature of family disputes, and to the diverse population of BC. The model must then continue to provide universal and consistent standards, but also be adapted to accommodate the multi-cultural, multi-linguistic reality of BC.

It is recommended then that the mandatory mediation model in BC build in accommodations to meet the diverse needs of families, i.e. language, culture and ways of understanding family conflict. This may involve the hiring of multi-cultural and multi-lingual staff, providing staff with diversity and cross cultural mediation training and offering mediation services in a variety of languages.

As emphasized in the Findings section of this report, the family dispute resolution practitioners in Australia are required to obtain basic training that will help them to effectively assist parties from culturally and linguistically diverse backgrounds. This should be the case for BC, as there could be efforts in place to develop and provide cultural sensitivity seminars for mediators.

It should be noted that offering specialized services may not be relevant or necessary in some regions in BC and should be applied only when the numbers in a region support the case for separate specialized services (such as language services).

Recommendations to address diversity include:

- Drawing on the experiences of existing services providers, i.e. Family Justice Centre or Justice Access Centre practitioners to identify client demographics, and perceived challenges;
- Consulting with community organizations that have existing relationships with individuals and families from a particular demographic to ensure the mandatory mediation program is developed in concert with pre-existing services and is relevant to the community it is serving.

## **7.2 PROGRAM IMPLEMENTATION RECOMMENDATIONS**

The following recommendations reflect the necessary level of support needed if the Ministry were to undertake the development of a mandatory mediation model. The recommendations below respond to the questions: Who should be involved and what steps should be taken in examining the questions and developing a model?

### **7.2.1 Building Government and Community Partnerships**

As demonstrated by the experiences of Australia and California, a mandatory family mediation model requires political will and support from stakeholders. There has to be, as a starting point, broad-based agreement that the proposed program has sufficient value and that it significantly advances the cause of accessible justice for BC families enough to justify the cost and effort of changing the system.

To explore and better assess the possibility of mandatory family mediation as a central piece of provincial family policy, it is recommended that the client consult broadly and deeply with stakeholders of the family justice sector, including those within and outside of the formal justice system, to develop a general understanding of the program, understand the challenges that need to be addressed, and ensure that stakeholders are clear and engaged in their role in delivering universal and consistent mediation services.

While this paper is not recommending anything nearly so extensive, the consultation process undertaken by the ministry to develop the *Family Law Act* may serve as a consultation model with respect to:

- The number and identity of stakeholders consulted,
- The depth and thoroughness of the exploration of the issues, and
- The openness of communication and high degree of transparency demonstrated by the ministry.

The importance of this consultation and development of community and government partnerships is twofold: the benefit of partnership would ensure greater collaboration and cooperation between government and all facets of the family justice system. Also, it would encourage innovation and build support for government to endorse the program, both politically and financially. The (local) frontline organizations involved in this collaborative approach could help inform the language of the policy and provide valuable information and feedback on the resources needed by non-governmental stakeholders and others in the private sector to fully comply with the standards of a proposed mandated program.

- Such collaboration could happen through consultations with key stakeholders through provincial symposiums, including but not limited to, the Justice Summit process;

### **7.2.2 Community Outreach**

Public support for, and understanding of, the mandatory mediation program is essential to its success and long-term sustainability. As such, it is recommended that once the nature of the model is determined and its implementation is planned, the client launch an education campaign using family-serving agencies, the bar, Mediate BC Society and the media to inform British Columbians about the mandatory mediation program.

It is recommended that the educational campaign be accessed throughout a variety of services, languages and organizations and also directed specifically to families and professionals who would be considered primary ‘users’ as they would likely be most affected by the change.

Specifically, it is recommended that the educational campaign:

- Ensure that the information regarding these legislative changes is laid out a clear and concise way to promote understanding to the general public and the user groups (as described above);
- Provide brochures or posters in a variety of languages to a variety of locations, including Justice Access Centres, Family Justice Centres, courthouses, counselling offices, clinics, doctor offices, community centres and other frequently used family “hot spots”;
- Provide corresponding web based information on a variety of government and stakeholder websites;
- Provide avenues for questions of content or clarification to be addressed concurrently with the educational campaign. This could involve an online chat service or hotline where families and professionals and other interested members of the public could question and learn more about the requirements.

### ***7.2.3 Government Funding and Subsidization***

The provincial government would have to be convinced that there is sufficient value in the provision of mandatory mediation to warrant the expenditure implied by an expansion of the Justice Access Centre and Family Justice Centre models. As noted above, the evidence has been sufficient to convince several other governments in other jurisdictions that it is worthwhile to fund mandatory mediation. If the funding were available, this paper would strongly recommend that the Ministry build on the Justice Access Centre and Family Justice Centre models to deliver fully subsidized mandatory mediation services across the province. This would allow the Ministry to take advantage of the established infrastructure and reputation of these services and to fully exploit their position as familiar and effective entry points into the family justice system.

Building or expanding on these existing, knowledgeable and proven provincial mediation resources would give a mandatory program a strong headstart. New funding would have to be considered for hiring, training and housing new mediators, plus increased administration and support staff at Justice Access Centres and Family Justice Centres.

In the current fiscal environment expenditures on this order may simply not be possible. In such event, alternative models include:

- Partially subsidized mediation services – on a sliding scale: the Ministry could provide free services below a certain income threshold and provide services on a sliding scale above that threshold. Above the threshold clients could contribute a proportion of the cost, up to 100%, calculated on a sliding scale formula based on the annual income of each party;
- Partially subsidized mediation services – one free session: the first mandatory meeting could be provided free to all families, and all families would be obliged to pay for subsequent mediation sessions;

- Partially subsidized mediation services – plus private sector: the amount of budget presently available for government mediation services be applied to the most needy family litigants and all remaining litigants be required to mediate in the private sector, by paying private rates. This option may necessarily imply some degree of regulation of the private mediation service provider market to ensure availability of sufficient number of mediators; adequate levels of mediator qualification; mechanisms for ongoing mediator quality control; responding to complaints about mediators; and exerting some degree of control over the cost of mediation services. Some or all of these issues could possibly be managed by existing bodies such as Mediate BC Society or, for lawyer mediators, the Law Society of BC.

It should be noted that, like Australia, an investment in mandatory mediation should be reflected in significantly decreased demand for court resources. This should make it possible to consider transferring resources from the traditional court system to the mediation system. In this way, at least a portion of the cost of mandatory mediation should be met without new money. Beyond this general observation however, the problem of assessing the ultimate fiscal and political viability, or the operational consequences, of each of these models is beyond the scope of this paper.

### **7.3 MEASUREMENT AND CONTINUOUS IMPROVEMENT RECOMMENDATIONS**

The following recommendation addresses how to evaluate and continually improve the mandatory mediation program.

#### **7.3.1 *Program Evaluation***

With reference to Recommendation 6.1.2, regarding the desire to engage in community partnerships and collaboration across the sector, it is recommended that the client designate an evaluation group (made up of Ministry staff) to measure and identify what is working and what is not in the mandatory mediation program. The focus of the group will be to ensure that the program aligns with the ever changing dynamic of family needs/relationships and to monitor the program so that families are not ‘falling through the cracks’ and to ensure that the program is acutally providing increased access to justice.

A robust evaluation would continually assess the program’s outcome and challenges in order to identify unintended consequences and make recommendations for future improvements. By doing this, there is an increased likelihood that the program will stay current, shortcomings will be identified, and that the well being of families will be better monitored and addressed.

Specifically, the mechanism of evaluation should include:

- Continual monitoring and outgoing evaluation of the mediation program to ascertain whether the goals and aims have been achieved;

- Opportunity to make changes or to “tweak” to the program for the purpose of future improvement and program refinement.

## CONCLUSION

**8.0** Improved access to justice for families is a topic that is at the forefront of political, academic and professional debate. Working to ensure that disputes within families are resolved effectively, efficiently and at a reasonable cost are consistent themes throughout the access to justice family conversation.

The question of mandatory mediation for family disputes is a challenging and complicated topic for both the Ministry of Justice Family Justice Services Division and for all professionals in the justice system. This report provides some general themes that highlight some of the concerns and issues surrounding the design and implementation of mandatory mediation in BC, and offers some recommendations for consideration.

Family access to justice is a very large and complex problem. As the conversation regarding mandatory mediation for families evolves, additional issues, ideas, problems, themes and recommendations will emerge. It is already apparent that additional research into the implementation and active service delivery of a new model will be essential to further develop the knowledge, and to fully understand the challenges and opportunities for mandatory family mediation under s. 9 of the *Family Law Act*.

## REFERENCES

- Action Committee on Access to Justice in Civil and Family Matters. (2012). Meaningful change for family justice beyond wise words. *Report of the Family Justice Working Group of the Action Committee to Justice in Civil and Family Matters*. Retrieved from <http://www.westcoastleaf.org/userfiles/file/FJWG%20report%20Meaningful%20Change%20Consultation%20Jan%202013.pdf>
- Administrative Office of the Courts California. (2014). Custody mediation. Retrieved from <http://www.courts.ca.gov/1189.htm>
- ADR Institute of Canada. (2005). Model code of conduct for Mediators. Retrieved from: [http://www.adrcanada.ca/rules/documents/code\\_of\\_conduct2008.pdf](http://www.adrcanada.ca/rules/documents/code_of_conduct2008.pdf)
- Alberta Law Reform Institute. (1994). *Court-Connected Family Mediation Programs in Canada, Research Paper 20*. Retrieved from <http://www.law.ualberta.ca/alri/docs/rp020.pdf>
- Law Reform Institute. (1994). *Court-Connected Family Mediation Programs in Canada, Research Paper 20*. Retrieved from <http://www.law.ualberta.ca/alri/docs/rp020.pdf>
- Astor, H. (2010). Genuine effort in family dispute resolution. *Family Matters*, (84), 61- 63.
- Astor, H. (2007). Mediator neutrality: making sense of theory and practice. *Social and Legal Studies*, 16 (2). 221- 239.
- Attorney General's Department (Australia). (2008). Family dispute resolution services in legal aid commissions. Evaluation Report, December 2008. Retrieved from: [http://www.legalaid.nsw.gov.au/\\_data/assets/pdf\\_file/0016/5434/FDR-Evaluation-Report.pdf](http://www.legalaid.nsw.gov.au/_data/assets/pdf_file/0016/5434/FDR-Evaluation-Report.pdf)
- Australian Government Com Law. (2006). *Family Law Amendment (Shared Parental Responsibility) Act*. Retrieved from: <http://www.comlaw.gov.au/Details/C2006A00046>
- Australian Institute of Family Studies. (2010). Evaluation of the 2006 family law reforms finds mixed results. Media Release 28 January 2010. Retrieved from <http://www.aifs.gov.au/institute/media/media100128.html>
- Bala, N., Birnbauhm, R., Matintonson, D. (2010). One judge for one family: differentiated case management for families and continuing conflict. *Canadian Journal of Family Law*, 26.395- 450.

- Ballard, R.H., Holtzworth-Munroe, A., Applegate, A.G. & D'Onofrio, B. (2011). Factors affecting the outcome of divorce and paternity mediations. *Association of Family and Conciliation Courts Family Court Review*, 49 (16), 16- 33.
- Baron, G. (2003). Public service staff relations board mediation program. *Canadian Bar Association's Possibilities Newsletter*. Retrieved from <http://www.cba.org/cba/newsletters/ADR2003/PrintHtml.aspx?DocId=115> 80.
- Baylis, C. & Carroll, R. (2005). Power issues in mediation. *ADR Bulletin*, 7 (8). Retrieved from <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1310&context=adr>
- B.C. Reg. 127/ 98 1998 Insurance (Vehicle) Act. Retrieved from [http://www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/127\\_98](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/127_98)
- Beck, C.J.A., Walsh, M.E., Ballard,R.H., Holtzworth-Munroe, A., Applegate,A. & Putz, J.W.(2010). Divorce mediation with a without legal representation: a focus on intimate partner violence and abuse. *Family Court Review*, 48 (4). 631- 645.
- Beck, C. J. A. & Sales, B. D. (2000). A critical reappraisal of divorce mediation research and policy. *Psychology, Public Policy and Law*, 6, 989 – 1056.
- Bouelle, L. (2011). *Mediation: principles, process, practice*. 3<sup>rd</sup> Edition. Chatswood, N.S.W. LexisNexis Butterworths.
- Bowcott, O. (2014). Justice minister supports government plans for mandatory mediation. *The Guardian*, 7 January 2014. Retrieved from <http://www.theguardian.com/politics/2014/jan/07/justice-minister-supports-plans-mandatory-mediation-separating-couples>
- Boyd, S. (2003). *Child custody, law, and women's work*. Don Mills, ON: Oxford University Press
- Brandon, M. & Stodulka, T. (2008). A comparative analysis of the practice of mediation and conciliation in family dispute resolution in Australia: how practitioners practice across both processes. *A Comparative Analysis of the Practice of Mediation and Conciliation in Family Dispute Resolution*, 8 (1), 194- 212
- British and Irish Legal Information Institute. England and Wales Court of Appeal (Civil Division) Decisions, [2013] EWCA Civ. 234. Retrieved from <http://www.bailii.org/ew/cases/EWCA/Civ/2013/234.html>

- British Columbia Justice Task Review Force. (2005). A new justice system for families and children. *Report of the Family Justice Reform Working Group to the Justice Review Task Force*. Retrieved from:  
[http://www.bcjusticereview.org/working\\_groups/family\\_justice/final\\_05\\_05.pdf](http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf)
- British Columbia Ministry of Justice. (2013). Notice to mediate (family) regulation. Retrieved from: <http://www.ag.gov.bc.ca/dro/publications/ntm-family.htm>
- British Columbia Ministry of Justice. (2012). Family mediation: will I still need a lawyer? Retrieved from: <http://www.ag.gov.bc.ca/dro/publications/bulletins/family-mediation.htm#will>
- British Columbia Ministry of Justice. (2013). Family law regulation questions and answers: training practice standards for family dispute resolution professionals. Retrieved from: <http://www.ag.gov.bc.ca/legislation/shareddocs/family-law/FLARegsQAs.pdf>
- British Columbia Ministry of Justice. (2012). Notice to Mediate (Motor Vehicle)*. Retrieved from:  
<http://www.ag.gov.bc.ca/dro/publications/bulletins/ntm-motor-vehicle.htm>
- British Columbia Ministry of Attorney General Justice Services Branch Family Justice Services Division. (2002). Evaluation of the family justice registry (Rule 5) pilot project: Summary. Retrieved from  
<http://www.ag.gov.bc.ca/justiceservices/publications/fjsd/registry/Summary.pdf>
- British Columbia Ministry of Attorney General Policy, Planning and Legislation Branch Corporate Planning Division. (2000). Mandatory parenting after separation pilot: final evaluation report. Retrieved from  
<http://www.ag.gov.bc.ca/dro/publications/reports/parenting-after-separation.pdf>
- Brown, D. G. (1982). Divorce and family mediation: history, review and future directions. *Conciliation Courts Review*, 20 (2), 1- 44.
- Canadian Forum on Civil Justice. (1998). BC parenting after separation. Retrieved from:  
<http://www.cfcj-fcjc.org/inventory-of-reforms/bcparenting-after-separation-program>
- Caruana, C. (2010). Dispute resolution choices: a comparison of collaborative law, family dispute resolution and family law conferencing. *Australian Institute of Family Studies*. 12- 15.
- Casals, M. M. (2005). Divorce mediation in Europe: an introductory outline. *Electronic Journal of Comparative Law*, 9.2. Retrieved from <http://www.ejcl.org/92/art92-2.pdf>

- Center for Families, Children and the Courts. (2004). *Client feedback in California court-based child custody mediation*. Retrieved from:  
<http://www.courts.ca.gov/documents/Clientfdbk.pdf>
- Center for Families, Children and the Courts. (2010). *Snapshot Study, 2008: Summary Findings*. Retrieved from:  
[http://www.courts.ca.gov/documents/Snapshot\\_2008\\_summary\\_findings\\_FINAL\\_Oct11\\_update.pdf](http://www.courts.ca.gov/documents/Snapshot_2008_summary_findings_FINAL_Oct11_update.pdf)
- Cobb, S. & Rifkin, J. (1991). Practice and paradox: deconstructing neutrality in mediation. *Mediation Law & Social Inquiry* (35).
- Cooper, D., & Brandon, M. (2008). Non-adversarial advocates and gatekeepers: lawyers, FDR practitioners and co-operative post-separation parenting. *Australasian Dispute Resolution Journal*, 19, 104–113.
- Cooper, D.M. (2007) The family law dispute resolution spectrum. *Australasian Dispute Resolution Journal*, 18(4), 234-244.
- Deis, M. (1985). California's answer: mandatory mediation of child custody and visitation disputes. *Ohio State Journal on Dispute Resolution*, 1 (1), 149- 179.
- Edwards, L. (2006). The mediation miracle. *California Courts Review* (Spring). 17- 20.
- Edwards, L. (2007). Comments on the miller commission report: a California perspective. *Pace Law Review*, 27 (4). 101- 152.
- Field, R. (2001). Convincing the policy makers that mediation is often an inappropriate dispute resolution process for women: A case of being seen but not heard". *National Law Review*. Retrieved from:  
<http://eprints.qut.edu.au/6267/1/6267.pdf>
- Field, R. (2009). Family dispute resolution and victims of violence: potential roles for CLCs. Powerpoint presentation for Queensland University of Technology, CRICOS NO. 002313J. Retrieved from:  
[www.naccl.org.au/.../Family\\_Dispute\\_Resolution\\_Rachael\\_Field.ppt](http://www.naccl.org.au/.../Family_Dispute_Resolution_Rachael_Field.ppt)
- Field, R. (2009 ). Preparing victims of family violence for participation in family dispute resolution. Powerpoint presentation for Queensland University of Technology, CRICOS NO. 00213j. Retrieved from:  
<http://aija.org.au/Family%20Violence%2009/Papers/Field%20PPT.pdf>

- Field, R. (2009). Supporting the participation of victims of domestic violence in family mediation. Powerpoint presentation for Queensland University of Technology. CRISOS NO. 00213J. Retrieved from: [www.adfvc.unsw.edu.au/documents/RField.pdf](http://www.adfvc.unsw.edu.au/documents/RField.pdf)
- Genn, H., Fenn, P., Mason, A. L. , Bechai, N., Gray, L. & Vencappa, D. (2007). Twisting arms: court referred and court linked mediation under judicial pressure. UK Ministry of Justice Research Series 1/07.
- Germane, C., Johnson, M., & Lemon, N. (2013). Mandatory custody mediation and joint custody orders in California: the danger for victims of domestic violence. *Berkeley Journal of Gender, Law & Justice*, 1 (1) 175 – 200.
- Goundry, S. A., Peters, Y., & Currie, R. (1998). Family mediation in Canada: implications for women's equality. *Status of Women Canada: Ottawa*, 5 – 159. Retrieved from: [http://www.oaith.ca/assets/files/Publications/family\\_mediation\\_canada.pdf](http://www.oaith.ca/assets/files/Publications/family_mediation_canada.pdf)
- Grillo, T. (1991). The mediation alternative: process dangers for women. *Yale Law Journal*, 100, 1545-1610.
- Hastings, S. (2010). Triangulation. In N. Salkind (Ed.), *Encyclopedia of research design*. Thousand Oaks: CA: Sage Publications, Inc. doi: <http://dx.doi.org.ezproxy.library.uvic.ca/10.4135/9781412961288>
- Hogarth, J & Boyle, K. D. (2002). Is mediation a cost-effective alternative in motor vehicle personal injury claims: statistical analyses and observations. *UBC Program on Dispute Resolution*. 4- 86. Retrieved from: [http://www.law.ubc.ca/drcura/pdf/Statistical\\_Analysis\\_Final.pdf](http://www.law.ubc.ca/drcura/pdf/Statistical_Analysis_Final.pdf)
- Hotzworth-Munroe, A., Beck, C.J.A., Applegate, A.G. (2006). The mediator's assessment of safety issues and concerns (MASIC): a screening interview for intimate partner violence and abuse available in the public domain. *Family Court Review*, 48 (4), 646-662.
- Hughes, P. (2001). Mandatory mediation: opportunity or subversion? *The Windsor Yearbook of Access to Justice*, 19, 161 – 202.
- International Institute for Conflict Prevention and Resolution. (2012). CPR 21<sup>st</sup> century corporate ADR pledge and international network of pledge agreements. Retrieved from <http://www.cpradr.org/About/AllCPRPledges.aspx>
- Judicial Council of California Administrative Office of the Courts. (2012). Report to the judicial council. Retrieved from: <http://www.courts.ca.gov/documents/jc-20120228-itemA11.pdf>

- Kaspiew, R., Gray, M., Weston, R., Moloney, L., Hand, K., Qu L & Family Law Evaluation Team. (2009). *Evaluation of the 2006 family law reforms*. Melbourne: Australia Institute of Family Studies. Retrieved from: <http://www.aifs.gov.au/institute/pubs/fle/evaluationreport.pdf>
- Kaspiew, R., Lynch, A., Field, R. & Lewington, M. (2013). *Coordinated family dispute resolution: findings and future directions*. Child Family Community Australia Webinar, 29 October 2013. Retrieved from: <http://www.aifs.gov.au/cfca/events/kaspiew/slides.pdf>
- Kelly, J.B. (2004). Family mediation research: is there empirical support for the field? *Conflict Resolution Quarterly*, 22 (1-2), 3- 35.
- Law Commission of Ontario. (2012). Towards a more efficient and responsive family justice system: interim report. Retrieved on November 5<sup>th</sup>, 2013 from <http://www.lco-cdo.org/family-law-reform-interim-report.pdf>
- Law Society of British Columbia. (2014). Family law alternate dispute resolution accreditation. Retrieved from: <http://www.lawsociety.bc.ca/page.cfm?cid=1476>
- Lee, Y. K. & Lakhani, A. (2012). The case for mandatory mediation to effectively address child custody issues in Hong Kong. *International Journal of Law, Policy and the Family*, 26 (1), 327-350.
- Mayer, B. (2004). Beyond neutrality: confronting the crisis in conflict resolution. Jossey-Bass.
- McEwon, C. (2009). Civil legal needs research report. Law Foundation of British Columbia. Retrieved on May 10<sup>th</sup>, 2014 from: <http://www.lawfoundationbc.org/wp-content/uploads/Civil-Legal-Needs-Research-FINAL.pdf>
- McHale, M.(2013). *Lecture on Access to Family Justice*. Personal Collection of M. McHale. University of Victoria, Victoria BC.
- Mediate BC. (2013). Standards of Conduct. Retrieved from: [http://www.mediatebc.com/PDFs/1-28-Standards-of-Conduct/Standards\\_Conduct.aspx](http://www.mediatebc.com/PDFs/1-28-Standards-of-Conduct/Standards_Conduct.aspx)
- Moloney, L. (2006). Our children come first: the heart and soul of the new family law system. *Family Relationships Quarterly*, (1), 4-6. Retrieved from: <http://www.aifs.gov.au/afrc/pubs/newsletter/n1pdf/n1c.pdf>
- Morris, L. (1986). Mandatory custody mediation: a threat to confidentiality. *Santa Clara Law Review*, 26, (3), 745 – 758.
- Nader, C., 2009. Mediation spares divided couples court pain. *The Age*, 20 August. Retrieved from : <http://www.theage.com.au/national/mediation-spares-divided-couples-court-pain-20090819-eqmk.html>

- Norway Legislation. The Marriage Act. Act No. 47 of 4 July 1991 Relating to Marriage. Retrieved from: <http://ceflonline.net/wp-content/uploads/Norway-Divorce-Legislation.pdf>
- Ontario Civil Legal Needs Project Steering Committee, (2010). Report of the Ontario civil legal needs project, listening to Ontarians (May). Retrieved from: [http://www.lsuc.on.ca/media/may3110\\_oclnreport\\_final.pdf](http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf)
- Parkinson, P. (2013). The idea of family relationship centres in Australia. *Family Court Review*, 51 (2), 195- 213.
- Pidgeon, S. (2013). From policy to implementation- how family relationship centres became a reality. *Family Court Review*, 51 (2), 224- 233.
- Provincial Court (Family) Rules. B.C. Reg. 417/48. (2013).
- R.A. Malatest & Associates Ltd. (2002). Final report: evaluation of the family justice registry (Rule 5) pilot project. *Prepared for the BC Ministry of Attorney General*.
- Ricci, I. (2004). Court- based mandatory mediation: special considerations. In Folberg, J., Milne, A. L. & Salem, P. (Eds.), *Divorce and Family Mediation: Models, Techniques and Applications*. New York: Guilford Press. (pp. 197- 203).
- Rifleman, J.D. (2005). *Mandatory mediation: implication and challenges*. Retrieved from: <http://adrr.com/adr9/jeff.htm>
- Rhoades, H. (2010). Mandatory mediation of family disputes: reflections from Australia. *Journal of Social Welfare and Family Law*, 32 (2), 183- 194.
- Riverdale Mediation Ltd. (2014). Do I Need a Lawyer? Riverdale Mediation. Retrieved from <http://www.riverdalemediation.com/mediation/family-meditation/lawyer/>
- Rosenberg, J.D. (1991). In defense of mediation. *Arizona Law Review*. 33 (3), 467- 507.
- Salem, P. (2009). The emergence of triage in family court services: the beginning of the end for mandatory mediation? *Family Court Review*, 47 (3). 371- 388.
- Semple, N. (2012). Mandatory family mediation and the settlement mission: a feminist critique. *Canadian Journal of Women and the Law*, 24 (1), 207 – 239
- Semple, N. & Bala, N. (2013). Reforming the family justice system: an evidence based approach. Association of Family and Conciliation Courts Ontario Chapter. Retrieved from <http://www.afcontario.ca/Semple%20%20Bala%20Family%20Justice%20Reform.pdf>

- Shaw, E. (2012). Family justice reform: a review of reports and initiatives. Prepared for Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters.
- Shaw, L. A. (2010). Divorce mediation outcome research: a meta- analysis. *Conflict Resolution Quarterly*, 27 (4), 447-467
- Sloan, G. & Chicanot, J. (2009). *The practice of mediation*. Victoria: ADR Education. 2<sup>nd</sup> Ed.
- Smith, G. (1998). Unwilling actors: why voluntary mediation works, why mandatory mediation might not. *Osgoode Hall Law Journal*, 36 (4), 848-879. Retrieved from: [http://www.ohlj.ca/archive/articles/36\\_4\\_smith.pdf](http://www.ohlj.ca/archive/articles/36_4_smith.pdf)
- UK Ministry of Justice. (2014). Mediation and alternatives to court. Retrieved from <http://www.justice.gov.uk/courts/mediation>
- Vander Veen, S. (2014). A case for mediation: the cost- effectiveness of civil, family, and workplace mediation. Prepared for Mediate BC. Retrieved from: <http://www.mediatebc.com/PDFs/1-52-Reports-and-Publications/The-Case-for-Mediation.aspx>
- Van Rhijin, J. (2010). Chief justice expands on proposals to redesign family law system. *Law Times News*, 7 November 2010. Retrieved from: <http://www.lawtimesnews.com/20101108898/headline-news/chief-justice-expands-on-proposals-to-redesign-family-law-system>
- Vincent, M. (1996). Mandatory mediation of custody disputes. *Vermont Law Review*, 20, 256- 297.
- Winkler, W. (2007). Access to Justice, Mediation: panacea or pariah? *Canadian Arbitration and Mediation Journal*, 16 (1), 5-9. Retrieved from: <http://www.ontariocourts.ca/coa/en/ps/speeches/access.htm>
- Winkworth, G. & McArthur, M. (2008). *Framework for screening, assessment and referrals in Family Relationship Centres and the Family Relationship Advice Line*. Canberra: Attorney- General's Department. Retrieved from <http://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyRelationshipServices/Documents/Framework%20for%20Screening%20Assessment%20and%20Referrals%20in%20FRCs%20and%20FRAL%20July%202008.p>

**APPENDIX A: INTERVIEW INVITATION TO PARTICIPATE***Invitation to Participate (Interview)***A Consideration of a Mandatory Family Mediation Model under section 9 of the BC  
*Family Law Act***

Dear \_\_\_\_\_,

You are invited to participate in a study called *A Consideration of a Mandatory Family Mediation Model under s. 9 of the Family Law Act* that is being conducted by Bethany Knox.

I am a graduate student at the University of Victoria working towards a Masters degree in Dispute Resolution. As part of my degree requirements, I am leading a project for the BC Ministry of Justice Family Justice Service Division in collaboration with Irene Robertson, Nancy Carter and Jerry McHale as my academic supervisor. The study will look at the experience of family mediation within the province and identify elements that are integral to the design and consideration of a mandatory framework.

I am writing with the hope that you will afford me approximately 45 minutes of your time to participate in a phone interview. If you are willing to participate, please contact me and we can schedule a time that works best for you.

Thank you for your time,

Bethany Knox

***(Upon Agreement)***

I am required by the University of Victoria Human Research and Ethics Board to provide an Informed Consent form outlining of the nature of the research and details regarding your participation in the interview process. I've attached this document below and require your signature before we begin the interview process.

**APPENDIX B: SURVEY INVITATION TO PARTICIPATE***Invitation to Participate (Survey)***A Consideration of a Mandatory Family Mediation Model under section 9 of the BC  
*Family Law Act***

Dear \_\_\_\_\_,

You are invited to participate in a study called *A Consideration of a Mandatory Family Mediation Model under s. 9 of the Family Law Act* that is being conducted by Bethany Knox.

I am a graduate student at the University of Victoria working towards a Masters degree in Dispute Resolution. As part of my degree requirements, I am leading a project for the BC Ministry of Justice Family Justice Service Division in collaboration with Irene Robertson, Nancy Carter and Jerry McHale as my academic supervisor. The study will look at the experience of family mediation within the province and identify elements that are integral to the design and consideration of a mandatory framework.

If you wish to participate, please follow this link:

<http://fluidsurveys.com/surveys/beth-knox/considering-mandatory-family-mediation-for-bc/>

1. Complete the survey by going through the questions and clicking the multiple-choice bubbles next to your choices providing additional comments you want to include.
2. When you are finished answering, click SUBMIT

I am required by the University of Victoria Human Research and Ethics Board to provide an Informed Consent form outlining of the nature of the research and details regarding your participation in the survey process. For your consideration, this document is attached below.

Thank you for your time and consideration,

Bethany Knox

## APPENDIX C:INTERVIEW CONSENT FORM



*Participant Consent Form  
(Interview)*

### **Considering a Mandatory Family Mediation Regulation to Bring into Force under section 9 of the *Family Law Act***

You are invited to participate in a study entitled *Considering a Mandatory Family Mediation Regulation to Bring into Force under section 9 of the Family Law Act* that is being conducted by Bethany Knox for British Columbia's Ministry of Justice Family Justice Service Division and Civil and Policy Legislation Office.

**Bethany Knox** is a graduate student in the department of Public Administration at the University of Victoria and you may contact her if you have further questions at [knoxb@uvic.ca](mailto:knoxb@uvic.ca)

As a graduate student, I am required to conduct research as part of the requirements for a degree in the Master's of Dispute Resolution program. It is being conducted under the supervision of M. Jerry McHale Q.C. You may contact my supervisor at [mjmchale@uvic.ca](mailto:mjmchale@uvic.ca)

#### **Purpose and Objectives**

The central objective of this research project is to explore and analyze the feasibility of mandatory family law mediation for British Columbia. The deliverable for this project will be a written report identifying concerns, impediments, issues and possible solutions. It will also provide recommendations with respect to the possible design and implementation of a family law mediation regime for British Columbia.

#### **Importance of this Research**

The research is relevant to the work and commitment of the Ministry of Justice in improving access to justice for British Columbia families. The research will focus exclusively on highlighting and providing data explaining how alternatives to the adversarial court system, namely mediation, can be more suitable for family disputes. The research will articulate the lessons learned in order to describe what an appropriate mandatory mediation model would look like for BC. The findings will help the Family Justice Services Division better understand the pros and cons as well as the issues and possibilities associated with mandated family mediation in BC.

## **Participants Selection**

You are being asked to participate in this study due to your expertise and familiarity with the nature of family disputes.

### **What is involved?**

If you consent to voluntarily participate in this research, your participation will consist of an interview lasting approximately 45 minutes. You will be asked a series of questions regarding your experience with family law matters and mediation. Audiotapes along with written notes may be used throughout the interview process.

### **Inconvenience**

Participation in this study may cause some inconvenience to you, including taking time from your workday to participate in the interview process.

### **Risks**

There are no known or anticipated risks to you by participating in this research

### **Benefits**

The benefit of your participation is to contribute information regarding family law access to justice. This information may assist developing initiatives and/or policy to enhance early intervention strategies for BC families.

### **Voluntary Participation**

Your participation in this research must be completely voluntary. If you do decide to participate, you may withdraw at any time without any consequences or any explanation. If you do withdraw from the study your data will be destroyed.

### **Confidentiality**

Confidentiality will be protected as your name and identifying information will not be recorded and associated with any part of the research. All of your information and interview responses will be kept confidential and will not be shared with anyone other than the research supervisor and client. It is noted that due to the nature of recruitment, someone outside of the research team may have had to contact you. This individual will not be notified if you chose to participate or not.

### **Dissemination of Results**

It is anticipated that the results of this study will be shared with others in the following ways

- a.) Thesis defense
- b.) UVIC Master's Thesis Website
- c.) Disseminated directly to research participants upon completion of project

**Disposal of Data**

Data from this study will be disposed of following completion of the research project. All electronic data will be deleted and all hard copies will be shredded.

In addition, you may verify the ethical approval of this study, or raise any concerns you might have, by contacting the Human Research Ethics Office at the University of Victoria (250-472-4545 or [ethics@uvic.ca](mailto:ethics@uvic.ca)).

Your signature below indicates that you understand the above conditions of participation in this study, that you have had the opportunity to have your questions answered by the researcher, and that you consent to participate in this research project.

---

*Name of Participant*

---

*Signature*

---

*Date*

***A copy of this consent will be left with you, and a copy will be taken by the researcher.***

**APPENDIX D: SURVEY CONSENT FORM**

*Participant Consent Form  
(Survey)*

---

**A Consideration of a Mandatory Mediation Model under section 9 of the *Family Law Act*.****Purpose and Objectives**

The central objective of this research project is to explore ideas and attitudes toward mandatory family law mediation for British Columbia. The deliverable for this project will be a written report identifying concerns, impediments, issues and possible mandatory mediation models. It will also provide suggestions with respect to the possible design and implementation of a family law mediation regime for British Columbia.

**Importance of this Research**

The research is relevant to the work and commitment of the Ministry of Justice in improving access to justice for British Columbia families. The research will focus exclusively on providing data explaining how alternatives to the adversarial court system, namely mediation can be more suitable for family disputes. Further, the research will articulate the lessons learned here and in other jurisdictions to describe what an appropriate mandatory mediation model would look like for BC. The findings will help the Justice Services Branch to better understand the pros and cons as well as the issues and possibilities associated with mandated family mediation.

**Participants Selection**

You are being asked to participate in this study due to your expertise and familiarity with the nature of family disputes.

**What is involved?**

If you decide to participate in the survey you will be asked to answer a number of questions online by following the link to **(SURVEY LINK)** You can respond by clicking the question and adding any written comments you might want to include. The survey should take approximately 10 - 15 minutes of your time to complete.

**Inconvenience**

Participation in this study may cause some inconvenience to you, including taking time from your workday to participate in the survey.

**Risks**

There are no known or anticipated risks to you by participating in this research

**Benefits**

The benefit of your participation is to contribute information regarding family law access to justice. This information may assist developing initiatives and/or policy to enhance early intervention strategies for BC families.

**Voluntary Participation**

Your participation in this research must be completely voluntary. If you do decide to participate, you may withdraw at any time without any consequences or any explanation. If you do withdraw from the study your data will be destroyed.

**Confidentiality**

Confidentiality will be protected as your name and identifying information will not be recorded and associated with any part of the research. All of your information and responses will be kept confidential and will not be shared with anyone other than the research supervisor and client. It is noted that due to the nature of recruitment, someone outside of the research team may have had to contact you. This individual will not be notified if you chose to participate or not.

**Dissemination of Results**

It is anticipated that the results of this study will be shared with others in the following ways

- a.) Thesis defense
- b.) UVIC Master's Thesis Website
- c.) Disseminated directly to research participants upon completion of project

**Disposal of Data**

Data from this study will be disposed of following completion of the research project. All electronic data will be deleted and all hard copies will be shredded.

**Contacts:**

Project Researcher:

Bethany Knox

Masters of Dispute Resolution candidate, University of Victoria: [knoxb@uvic.ca](mailto:knoxb@uvic.ca)

Project Academic Supervisor

M. Jerry McHale, Q.C., University of Victoria: [mjmchale@uvic.ca](mailto:mjmchale@uvic.ca)

You can verify the ethical approval of this study, or raise any concerns you might have, by contacting the Human Research Ethics Office at the University of Victoria (250-472-4545 or [ethics@uvic.ca](mailto:ethics@uvic.ca)).

**By completing and submitting this survey, YOUR FREE AND INFORMED CONSENT IS IMPLIED and shows that you understand the above conditions of participation in this project and that you have had the opportunity to have your questions answered by the researchers.**

*Please retain a copy of this letter for your reference!*

## APPENDIX E: BC INTERVIEW/SURVEY QUESTIONNAIRE



*Interview/ Survey Questionnaire  
(British Columbia)*

### Considering a Mandatory Family Mediation Regulation to Bring into Force under section 9 of the *Family Law Act*

#### Context / Introduction:

Many jurisdictions require separating parents to participate in at least one mediation session; some jurisdictions have done so for many decades. The two most recent family law access reports, including the National Action Committee Report, recommend mandatory participation in a consensual dispute resolution process, and in fact mandatory processes have been used in family law in British Columbia for some time:

- participation in Parenting After Separation programs has been mandatory since 1998,
- pre-court meetings with Family Justice Counsellors are required in “Rule 5” Registries, and
- it has been possible for one spouse to compel mediation through the *Notice to Mediate (Family) Regulation* since 2007.

All of these initiatives are widely regarded as useful and constructive ways to promote early resolution of family law disputes.

The new BC *Family Law Act* explicitly encourages family law litigants to resolve their disputes through agreements and appropriate ‘family dispute resolution’ before making an application to a court. Consistent with this policy, the Act gives the Lieutenant Governor in Council in the authority to make regulations requiring parties to engage in ‘family dispute resolution’ – i.e. a process like mediation, arbitration or collaborative practice.

If the Ministry of Justice were to consider using this regulatory power, it would be useful to canvas attitudes as to whether a different form of mandated mediation might work better than the *Notice to Mediate (Family) Regulation*. And if so, what might that new form look like and what steps would be taken to implement such a model?

Your expertise in family justice matters will shed light on these questions.

#### Questions

1. What is your current role in the family justice system?
  - a. Lawyer

- b. Mediator
- c. Lawyer and mediator
- d. Administrator
- e. Academic
- f. Other (specify):

2. How long have you worked in the family justice system?

- a. Less than 5 years
- b. 5 – 15 years
- c. More than 15 years

3. Would a different form of mandated mediation work better than the *Notice to Mediate (Family) Regulation*?

- a. Yes
- b. No
- c. Unsure

Please explain your answer:

4. If ‘yes’, then what might a different form or required participation in mediation look like? Please indicate agreement or disagreement with the following possible mediation model features:

	Feature	Yes	No	Undecided
1	What family dispute resolution (FDR) process should be mandated? <ul style="list-style-type: none"> <li>• Mediation -----</li> <li>• Collaborative Family Law -----</li> <li>• Either -----</li> <li>• Other -----</li> </ul>			
2	What form of attendance would be mandated? participation in: <ul style="list-style-type: none"> <li>• A single FDR information or assessment session</li> <li>• A single FDR session -----</li> <li>• A single mediation session plus a pre-FDR meeting with each participant separately -----</li> <li>• Other (specify) -----</li> </ul>			
3	When should referral to a CDR process take place? <ul style="list-style-type: none"> <li>• Before an application is made to court</li> <li>• Before a court date could be set for a contested matter</li> <li>• Other (specify):</li> </ul>			
4	Who should be compelled to mediate? <ul style="list-style-type: none"> <li>• Parties to all proceedings where relief is claimed under</li> </ul>			

	the <i>Family Law Act</i> or the <i>Divorce Act</i> ----- ----- Only parties to proceedings under the <i>Family Law Act</i> or the <i>Divorce Act</i> involving dependent children -----			
5	Should parties be exempted from attendance? <ul style="list-style-type: none"> <li>• If they have previously mediated</li> <li>• Where it would be unsafe to participate</li> <li>• If it is urgent that a party get before the court</li> <li>• Where a court finds that it would be impracticable or materially unfair to compel a party to attend</li> <li>• Other (specify):</li> </ul>			
6	When should mediation occur? <ul style="list-style-type: none"> <li>• No earlier than 90 days after the filing of the first response to family claim and no later than 90 days before the date of trial</li> <li>• Before filing</li> </ul> Other timeframe (specify):			
7	The mediator must undertake a screening process for power imbalance, domestic violence and abuse, and assess whether mediation is appropriate			
8	A mechanism should exist for pre-mediation exchange of information			
9	The mediator must discuss with the participant the importance of independent legal advice			
1	The mediator must review and parties sign an 'agreement to mediate' providing information about: <ul style="list-style-type: none"> <li>• the mediation process,</li> <li>• how the mediation will be paid for</li> </ul> Other (specify)			
1	The mediator should have discretion to end the process			
1	Counsel for the parties should be entitled to attend mediation			
1	Other persons may attend with the consent of the mediator and participants			
1	Other:			

5. Are there any other features you think a mandatory mediation model should have?  
Please specify:

- a.
- b.
- c.
- d.
- e.

6. How should the cost of participating in a FDR session be paid? Note that some processes may be more costly to deliver than others.

7. Are there conditions that need to be in place or barriers that need to be addressed before a mandatory FDR process could be introduced? Please specify:
  
8. Please provide any additional comments relating to the possibility of a new mandatory mediation model, what that model would look like or how it would be implemented.

## APPENDIX F: AUSTRALIA /CALIFORNIA INTERVIEW QUESTIONNAIRE



*Interview Questionnaire  
(Australia and California)*

### **Considering a Mandatory Family Mediation Regulation to Bring into Force under section 9 of the *Family Law Act***

#### **Context/Introduction :**

*The interview will include eight questions, which are organized into two categories:*

- A. *The first being the **operation of mandatory family mediation** (what is working, what is not etc.)*
- B. *The second focusing on the **design and implementation of the mandatory mediation model**, (what steps should we be considering/ what has been integral in the development of the model).*

*Also, I should note that I'm familiar with most aspects of your mandatory family mediation model- however, may not know all the details so may have to ask additional questions where fit.*

#### **What is your current role in the family justice system?**

- a. Lawyer
- b. Mediator
- c. Lawyer/Mediator
- d. Administrator
- e. Other (specify):

#### ***Operation: What would/should the model look like?***

1. How well do you think mandatory mediation is meeting its original goals and objectives? How would rank its success: not well, moderately well, very well etc.
2. What do you consider to have been important model features in the success of your mandatory mediation model?
3. What model features have proven challenging to the success of the mandatory mediation scheme? What parts of your system aren't working, are problematic, ineffective....
4. In your opinion, are there other elements that are currently not in place, but would improve the model? What would you change?

***Design and Implementation Process: What steps should be take? What should we consider?***

5. What/who has been integral in the development and implementation of the mandatory mediation scheme?
6. What were critical steps/ essential activities that were undertaken in the design and implementation of the mandatory mediation scheme?
7. What, if any, have shown up as gaps or shortcomings in the creation or implementation of the mandatory mediation scheme?
8. Please provide any additional comments.