



House of Commons
Committee of Public Accounts

**Legal Services
Commission: Legal aid and
mediation for people
involved in family
breakdown**

Fifty-first Report of Session 2006–07

*Report, together with formal minutes, oral and
written evidence*

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The Committee of Public Accounts

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The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the Internet at <http://www.parliament.uk/pac>. A list of Reports of the Committee in the present Session is at the back of this volume.

Committee staff

The current staff of the Committee is Mark Etherton (Clerk), Philip Jones (Committee Assistant), Emma Sawyer (Committee Assistant), Pam Morris (Secretary), and Alex Paterson (Media Officer).

Contacts

All correspondence should be addressed to the Clerk, Committee of Public Accounts, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general enquiries is 020 7219 5708; the Committee’s email address is pubaccom@parliament.uk.

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Summary

People undergoing divorce or separation will often need professional legal advice. For people on low incomes, legal aid is available to meet the cost of such advice, and it can also pay for professional help with alternative ways of resolving disputes, such as mediation. The Legal Services Commission (the Commission), a non-departmental public body sponsored by the Ministry of Justice, is responsible for administering legal aid in England and Wales.

Family disputes that are resolved through mediation can be cheaper, quicker and, according to academic research, less acrimonious than those that are settled through the courts. Full or partial agreement was reached in 59% of mediated cases examined by the National Audit Office. Yet of the 149,000 family disputes supported by legal aid which were completed in the period October 2004 to March 2006, only in 29,000 cases did the parties attempt mediation. The majority (120,000) were completed through court proceedings or bilateral negotiations through solicitors. The National Audit Office survey of recipients of legal aid found that 33% said they had not even discussed mediation as an option with their solicitor or adviser and, of those, 42% said that they would have been willing to use it.

A major shortcoming in the Commission's effort to increase the use of mediation has been the absence of a financial incentive for solicitors and other advisers to promote mediation to clients who might otherwise choose a court-based route. The Commission has proposed a number of changes to address this issue including a fixed legal aid fee rate to replace the current hourly fee rate and a requirement for clients to consult a mediator before being eligible for further legal aid funding. The Commission will, nevertheless, have to work with solicitors and other advisers to encourage them to promote mediation to their clients. The Commission also needs to improve its management information systems, to monitor more closely solicitors' rates of referral to mediation and client satisfaction with mediation services provided. The Commission should be prepared to intervene to improve access to mediation and raise standards of service as necessary and highlight the benefits of mediation in its own publications and guidance for members of the public.

Some 78% of the population live within 5 miles of a professional mediator, but in some parts of the country travelling time to reach a mediator may be much longer and hinder take-up of such services. The Commission planned to pilot a telephone service but recognised that clients might prefer face-to-face consultation.

In any family breakdown children are usually the most vulnerable party and warrant special consideration. The Commission has encouraged mediators, clients, solicitors and advisers to take account of children's wishes and has piloted consultation with children when plans are being made to secure their future wellbeing.

On the basis of a report by the Comptroller & Auditor General,¹ the Committee examined the Legal Services Commission about the shortcomings of the current system for referring clients to mediation, and the actions the Commission has in train to increase referrals to

¹ C&AG's Report, *Legal aid and mediation for people involved in family breakdown*, HC (2006-07) 256

and take-up of mediation services, to improve the quality of mediation offered, and to strengthen the Commission's oversight of solicitors and mediation providers.

Conclusions and recommendations

1. **In around a third of cases, solicitors had not discussed the option of mediation with clients involved in cases of family breakdown.** Under proposals out for consultation, the Commission intends that all clients seeking legal aid for representation in court are first assessed, by a professional mediator, on their suitability for mediation. The Commission should require mediators to maintain records of referrals and attendance, and of the decisions taken at these assessment meetings, evidenced by the mediator and client.
2. **Of the 148 people surveyed who commented on the quality of the mediation they received, 67 (25%) were dissatisfied.** The Commission does not have sufficient information on the quality and effectiveness of individual mediators' work to be confident it is getting maximum value from legal aid funding, and that members of the public are achieving the potential benefits. The Commission should:
 - a) carry out regular user satisfaction surveys;
 - b) incorporate measures of mediator performance into its quality assurance procedures including the proportion of cases in which agreement is reached;
 - c) seek agreement from the UK College of Family Mediators, Law Society and Bar Council to share information about the quality of service provided by solicitors and mediators when funded by legal aid;
 - d) revise its leaflets and online guidance to ask clients to copy to the Commission all complaints made to the complaints services of those professional bodies about legal aid funded work; and
 - e) in mediators' contracts include scope for financial penalties to be applied to the poorest performers including provision, ultimately, for contracts to be terminated.
3. **Fee rates have acted as a financial disincentive for solicitors to refer clients to mediation.** The new fixed fee scheme proposed by the Commission should give solicitors more incentive to refer clients to mediation. The Commission needs to evaluate the effectiveness of the new scheme after one year of its operation, to check whether it has increased the take up of mediation, encouraged earlier referrals to mediators, and led to faster resolution of cases.
4. **On average, a referral to court funded by legal aid costs around £930 more than a mediated case.** In response to the National Audit Office survey of recipients of legal aid, 33% said they had not been told about mediation and, of those, 42% (or 14% of the total) said they would have been willing to try it, representing potential savings of up to £10 million a year. Mediation will remain voluntary, but the Commission should set solicitors and other advisers a target for the number of cases it expects to be resolved by mediation rather than referred to court, and review the target annually thereafter. Whilst mediation will remain voluntary, the Commission's

guidance and information should highlight its benefits and this material should be made widely available, in public places such as libraries and surgeries.

5. **In some areas there is limited local access to mediators.** Pending the development of additional capacity and in view of the potential savings from mediation, it would be cost effective for the Commission to pay reasonable travelling costs to clients living in areas with restricted access to mediators.
6. **The Commission's management data on mediation referral and take up rates is poor, reducing the scope for comparison between suppliers.** The Commission is currently developing a new supplier management database which will be implemented in October 2007 for solicitors undertaking family work and in April 2008 for mediators. The Commission plans to develop a client database to accurately identify clients across all schemes, including mediation. Meanwhile, it should use the supplier database to record variations in rates of referral to and take up of mediation, identify and investigate significant outliers, and, where necessary, take remedial action.
7. **Children are not routinely consulted during the mediation process.** Academic research carried out in Australia found that 80% of parents whose children were consulted as part of the mediation process felt that the children benefited 'a great deal' from it. The Commission should build on its previous child-consultation pilot scheme, with a presumption that children should be consulted during mediation as appropriate to their age and level of understanding.
8. **The perceived costs of mediation may deter parties who are not legally aided, even though the cost of a mediation, if successful, is likely to give a substantial saving compared with the cost of a contested court case.** Full or partial agreement was reached in 59% of mediated cases examined by the National Audit Office. The Commission should investigate the cost and benefits of helping to fund mediation for both parties in cases where only one party is currently entitled to legal aid, as a way of incentivising the non-legally aided party and potentially making overall cost savings from reducing the number of cases coming to court.
9. **The Commission submitted a supplementary memorandum to the Committee, proposing far-reaching changes to legal aid for family breakdown, six days after publication of the Comptroller and Auditor General's Report—and just four days before giving oral evidence to the Committee.** Departments should alert the National Audit Office in good time to any changes that may affect the analysis in the Comptroller and Auditor General's Report, so that the National Audit Office can advise the Committee on any implications for its Report.

1 Potential benefits of mediation

1. Mediation is cheaper, quicker and, according to academic research, a less acrimonious means of solving family disputes than through the courts. Legal aid can cover the costs of an independent professionally trained and accredited mediator to help parties involved in family breakdown reach an agreed settlement. The National Audit Office found that, where mediation had been attempted, full or partial agreement was reached in 59% of cases. The Legal Services Commission agreed that the potential benefits of mediation should encourage more people to resolve disputes through this route, and that it was something the Commission needed to promote.²

2. The Legal Services Commission spends about £300 million a year on legal aid for family breakdown to people who are eligible on grounds of low income and disposable capital, and where the Commission is satisfied of the merits of their case. This might include initial advice; subsequent legal services including help resolving disputes by negotiation between solicitors, issuing proceedings or obtaining a consent order to give force to an agreement which has been reached (services described by the Commission as ‘general family help’); and ultimately legal representation in court. There is a cap on the cost of initial advice that may be given, but no limit on the potential cost of subsequent representation in court.³

3. On average, the cost of legal aid in mediated cases was less than half that for cases when mediation was not used. The average cost of legal aid in non-mediated cases was estimated at £1,682 compared with £752 for mediated cases (**Figure 1**), representing an additional cost to the taxpayer of some £74 million a year. The National Audit Office estimated that if 14% more cases went to mediation around £10 million a year could be saved from the legal aid budget.

Figure 1: Legally aided mediation cases tended on average to cost less than those where mediation had not been tried

	Average funding per person of cases in which mediation has been tried	Average funding per person of cases when mediation has not been tried	Average "saving" of mediated case on non-mediated case
	£	£	£
Cases involving children issues (e.g. residence of children, contact with them)	726	1,746	1,021
Cases involving financial issues (e.g. dividing a property between a separating couple)	711	1,510	799
Cases involving children and financial issues	785	1,743	958
All cases	752	1,682	930

Source: National Audit Office analysis of Legal Services Commission data, (figures have been rounded).

² C&AG's Report, paras 1, 1.3 and 3.6; Qqs 23, 33, 56

³ Qq 25, 26, 29

4. Mediation can be quicker than other means of resolving disputes. The National Audit Office found that, on average, mediations took 110 days. Over 95% of mediations were complete within nine months and all were complete within twelve months. The average elapsed time between applying for other legal help with family breakdown cases and the date of the final bill was 435 days, and only 70% of these cases were complete within 18 months.⁴

5. The Commission believed it should be promoting mediation because it could help people avoid going to court and, on the basis of available research, mediation could be advantageous particularly if there were children involved. The Commission thought that mediation should remain voluntary and would not force people to mediate, but it nonetheless recognised that there were ways in which people's reluctance to participate could be overcome. Mediation could be organised in different ways, for example by using staggered mediation or organising different waiting areas, approaches which made mediation more favourably received by couples.⁵

6. In practice, most people were likely to walk into a solicitor's office in the first instance when experiencing breakdown in a relationship, and would not necessarily be familiar with the role of mediators or their qualifications. Many mediators were also solicitors and, for those who were not, part of their training was to understand the legal process around relationship breakdown. In all cases, in order to do legally-aided family work all mediators had to be specifically trained and registered to work under the UK College of Family Mediators or through one of the solicitors in the Law Society's family mediation panel.⁶

⁴ C&AG's Report, para 1.7

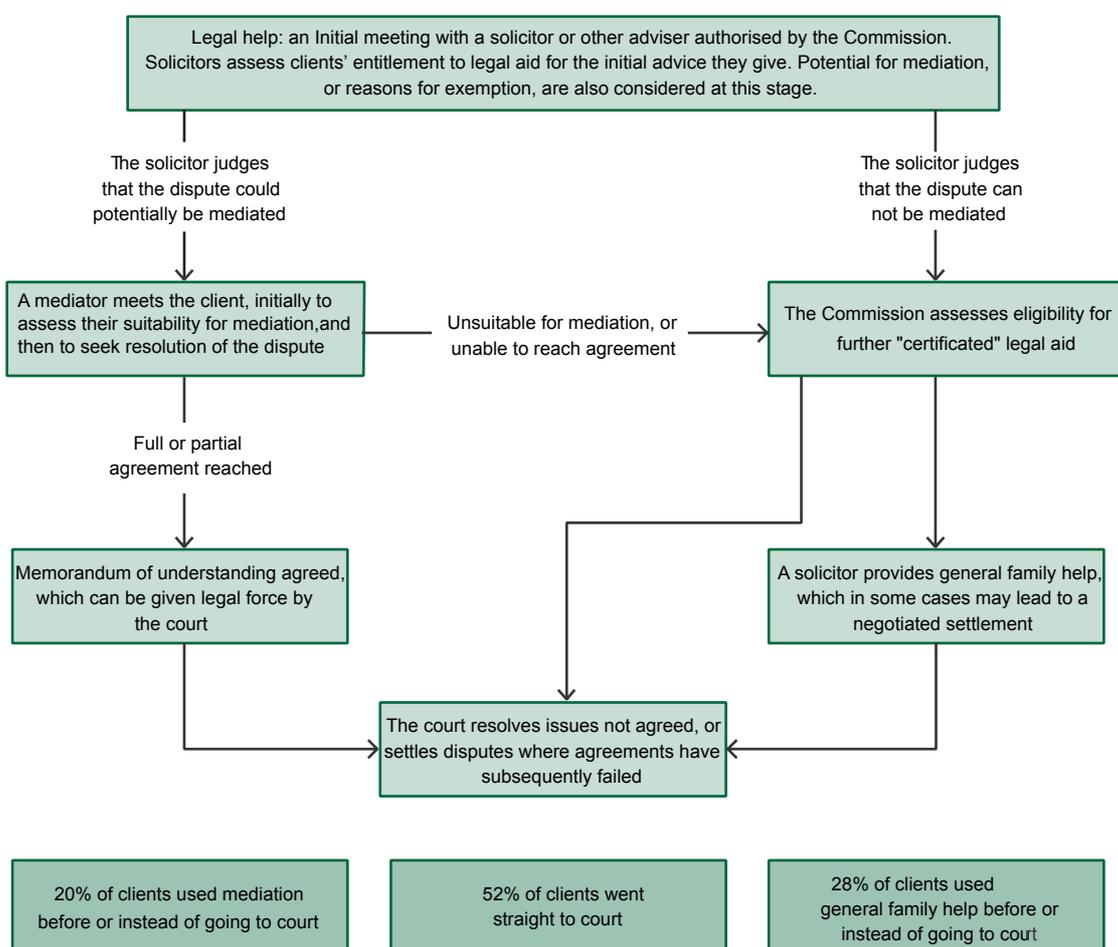
⁵ Qq 4, 34, 56

⁶ Qq 4, 35–36

2 Barriers to take-up

7. Despite the fact that the Commission's current policy was for people in receipt of legal aid to attempt mediation in the first instance, unless there was a good reason why they should be exempted, only 20% of people funded by legal aid for family breakdown cases had used it. (Figure 2). Two thirds of clients who responded to the National Audit Office survey recalled discussing mediation with their solicitor. Of the clients who had not discussed mediation and so did not try to use it, 42% said they would have tried mediation had it been explained to them.

Figure 2: Resolving family disputes using legal aid funding



Source: National Audit Office

Note:

About half of those who have initial legal help (285,000 people in 2005–06) receive no further legal aid funding. The percentages shown relate only to people who receive legal aid for mediation or further legal advice and representation.

8. Difficulties in increasing the numbers attempting to resolve their disputes through mediation were partly a consequence of the way the legal aid system in family breakdown cases was designed, and partly because some people felt they had not received sufficient information about mediation as an option. The Commission proposed to change its processes so that, in future, it would require all clients to have a discussion with a mediator, either face to face or by telephone, before they would become eligible for legal aid to proceed to the next stage in legal proceedings. However, the Commission accepted that there was a need for clients to be given better, more accessible information in plain language. The initial conversation with a mediator needed to be helpful, and to happen at the right stage in legal proceedings and in a location where people felt comfortable. It was also necessary for there to be incentives in the legal aid system for clients and solicitors to use mediation where it was appropriate, voluntary and mutually agreed.⁷

9. The role of solicitors is more widely understood among members of the public than that of mediators. The Commission plans to make its leaflets on the benefits of mediation available in places such as citizens' advice bureaux, Relate offices and doctors' surgeries. It was also looking to pilot, later in the year, a new telephone advice service for family breakdown similar to the service provided for other sorts of legal advice.⁸

10. The Commission had not routinely gathered the views of clients about mediation, although this would inform positively the way that the Commission handles cases. The Commission pointed to cultural issues that would also need to be overcome, which had also surfaced in the National Audit Office survey of recipients of legal aid. Mediators surveyed by the National Audit Office similarly pointed to people being poorly informed about mediation as one of the main reasons why they were reluctant to try it. The issues to be overcome included a belief that family breakdown could only be resolved by the legal system. One of the reasons why people did not attempt mediation was because of an engrained view that only a solicitor would defend an individual's interests and that a mediator might not do that. There was also a fear that a mediated solution could not be made as enforceable as an agreement made in court.⁹

11. The Commission agreed that there was more it could do to explain to people how mediation actually works, what the potential benefits are, and its success rate. All mediators were trained to reach agreements that made sure, for example, that the more powerful partner did not impose a disadvantageous settlement on the weaker one. The Commission also funded "legal help with mediation", which enabled people who were in a mediation process to consult their solicitor on any legal issues arising from the sort of settlement that was being discussed. The Commission accepted that there was scope to publicise more widely the benefits and process of mediation, as well as encouraging solicitors to promote mediation as an effective way forward.¹⁰

12. Unwillingness of one of the parties to participate in mediation was cited by solicitors as the most common reason for non-referral. In 2005 it accounted for 13% of all cases. The

⁷ Qq 2, 4, 13, 18

⁸ Qq 8, 10, 34

⁹ Qq 34, 35, 37, 101, C&AG's Report, paras 2.6, 2.8

¹⁰ Qq 35, 101

National Audit Office recommended that the Commission should assess the cost-effectiveness of funding both parties, where only one party is currently entitled to legal aid. The Commission agreed to explore that possibility because it might still cost less than if the case were to proceed to court. Mediation is compulsory in some other countries, but the Commission reiterated that mediation would continue to be voluntary. Making mediation compulsory had already been discussed in Parliament as part of the proceedings on the Children and Adoption Act 2006 and rejected.¹¹

13. Some 78% of the population live within five miles of a professional mediator, but there were parts of northern England, Wales, East Anglia and the south west where the distance to the nearest mediator's office is at least 15 miles. The Commission acknowledged that there were some parts of the country, in particular in parts of Devon, North Wales and the Isles of Scilly, where there were gaps in provision and where it was difficult to access mediation services. Rather than paying excess travelling costs to clients, the Commission believed it was better to increase provision so as to ensure access to mediation near to where people live, and the Commission was looking to improve coverage over the next year.¹²

14. The National Audit Office found that 33% of the recipients of legal aid they surveyed had not explored the option of mediation as a way of resolving their dispute with their solicitor or adviser. The Commission was now planning to change the system so that clients would have to discuss their case with an independent mediator before they would be eligible for legal aid to pay for further legal proceedings.¹³

15. The Commission was planning to introduce new contractual arrangements for solicitors which should incentivise greater use of mediation. It was introducing a system of separate fixed fees for initial advice, negotiation and full representation. The new system should create a stronger incentive for solicitors to encourage early settlement because, at each stage, solicitors would receive the same payment for cases resolved quickly through mediation as those which took longer. Savings could also be achieved by the Legal Services Commission if a smaller proportion of cases required full representation in court.¹⁴

¹¹ C&AG's Report, paras 2, 2.1; Qq 17, 38, 71, 80, 82

¹² C&AG's Report, para 2.11; Qq 11, 19, 22

¹³ C&AG's Report, para 2.7; Qq 8, 12

¹⁴ Qq 7, 9, 47, 106

3 The role of the Commission

16. The Commission's ability to oversee legal aid for family breakdown cases had been hampered by weaknesses in its management information. It was not, for example, monitoring the differences in solicitors' rates of referral to mediation. Nor was it able to explain why the proportion of mediated cases failing to reach agreement varied so widely, from 22% to 52% among the ten largest firms of mediators.¹⁵

17. The Commission used three separate databases to record the cost of legal aid and help with mediation, but because they could not be linked together it was unable to trace recipients of legal aid through the whole process and assess the total legal aid they had received. The Commission was planning to introduce a new database system which would allow it to trace a client through the whole legal aid process and compare, for example, the relative costs of mediation and legal help.¹⁶

18. The Commission submitted a memorandum to the Committee shortly before appearing before the Committee to give oral evidence, detailing changes the Commission proposed to make to legal aid for family breakdown, and how it would respond to the recommendations in the National Audit Office Report¹⁷ With effect from October 2007, the Commission intends to change the system of client referral to a mediator. In future, all clients will be referred to a mediator before proceeding to the next stage of legal aid funding, and mediators, rather than solicitors, will assess whether the use of mediation is appropriate.¹⁸

19. The Commission intends to introduce tighter monitoring of contracts with solicitors and mediators. It plans to monitor the number of clients and couples seen, what proportion attempted mediation, and how many failed to reach agreement through mediation and reverted to the court. With this information, the Commission will be able to apply sanctions to organisations which perform poorly on referral to mediation, or on reaching mediated agreements. The Commission would also be monitoring the number of referrals solicitors were making to individual mediators, and the proportions of successfully and unsuccessfully mediated cases. This sort of monitoring would guard against any risk of collusion between solicitors and mediators that might lead to abuse of the new system.¹⁹

20. There were no plans to make it compulsory, after the initial assessment, to participate further in mediation and the Commission expected that there would be some cases where mediation would not be appropriate. As part of its family strategy consultation, the Commission was seeking views on whether cases involving domestic violence should

¹⁵ Qq 3, 92

¹⁶ Qq 93–94

¹⁷ C&AG's Report, paras 1, 1.3, 3.6; Qq 8, 23, 33, 56; Ev 13

¹⁸ Qq 3–6, 12; Legal Services Commission, *Legal Aid Reform: Family and Family Mediation Fee Schemes*, March 2007

¹⁹ Qq 15, 51, 105

continue to be automatically exempt from mediation or whether its use should be considered by the mediator together with the relevant individual or couple.²⁰

21. The National Audit Office found that in almost 7,700 cases out of 57,000, “existing proceedings” had been cited as a reason for not attempting mediation. Cases were automatically exempt from mediation if a court date had been scheduled within eight weeks. The Commission has now proposed, subject to consultation, to reduce this period to four weeks.²¹ In all cases, however, an applicant for legal aid would be required to participate in an assessment meeting with a mediator before legal aid for representation in court would be granted. The Commission was also attempting, in its new proposals, to introduce more flexibility so that clients can use mediation at different stages in the legal process rather than at only one point.²²

22. Some 25% of respondents to the National Audit Office’s survey commented negatively about their mediator. The Commission acknowledged the need to improve mediators’ skills, to monitor the amount of work that mediators do and the outcomes they achieve, and to have a more diverse range of mediators available. The Commission intends to produce performance information on the quality of mediation services provided, including feedback from clients, and there was the potential to make some of that information available to clients when they were choosing a mediator. In addition to their initial training, professional mediators undertaking legal aid work were subject to an ongoing requirement to meet a set of competencies. One important element was that mediators had to undergo specific training on domestic violence screening and assessment although, in the context of overcoming resistance to greater take-up of mediation, the Commission recognised that this was an important point it had not publicised as much as it should.²³

23. The Commission was undertaking a separate contract review with solicitors and was looking only to contract with those legal aid lawyers who became preferred suppliers. Those solicitors would need to meet minimum quality standards judged on the basis of feedback from clients, peer review and case assessment of their work.²⁴

24. Beyond some limited pilot testing, the Commission had taken no specific action to bring children’s views into the mediation process. Academic research carried out in Australia found that 80% of parents whose children were consulted as part of the mediation process felt that the children benefited ‘a great deal’ from it.²⁵ The Commission acknowledged that children were the party most affected by family breakdown, but in practice it had not until comparatively recently actively promoted the benefits of mediation from the child’s perspective. The Commission’s pilot had found there were slightly better outcomes for all concerned in cases where the child’s views were sought in the course of

²⁰ Qq 17, 104

²¹ Q 79

²² Qq 85, 111

²³ C&AG’s Report, para 3.14; Qqs 20–21, 29, 35, 37, 98, 102

²⁴ Q 103

²⁵ *Child-Inclusive Divorce Mediation: Report on a Qualitative Research Study*, Jennifer McIntosh. *Mediation Quarterly* 2000, volume 18, Pt 2

mediation. To take this issue forward, the Commission had now requested a meeting with the Children's Commissioner.²⁶

25. The National Audit Office found that for mediation work undertaken between October 2004 and March 2006, the average cost of each case was £611 for work done by not-for-profit organisations, and £463 in the case of solicitors and for-profit organisations. Under the current fee regime not-for-profit organisations receive an annual grant as well as a fee per case, meaning that it is possible for them to receive an annual payment regardless of whether they have done any work. From October 2007, however, the Commission intends to introduce the same contracts and fixed fees for all organisations.²⁷

²⁶ Qq 32, 67–70

²⁷ C&AG's Report, para 3.5; Qq 7, 15, 46, 54, 65, 95, 99

Formal minutes

Monday 9 July 2007

Members present:

Mr Edward Leigh, in the Chair

Mr Richard Bacon

Mr David Curry

Mr Ian Davidson

Mr Philip Dunne

Ian Lucas

Mr Austin Mitchell

Mr Don Touhig

Draft Report

Draft Report (Legal Services Commission: Legal Aid and mediation for people involved in family breakdown), proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 25 read and agreed to.

Conclusions and recommendations read and agreed to.

Summary read and agreed to.

Resolved, That the Report be the Fifty-first Report of the Committee to the House.

Ordered, That the Chairman make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned until Wednesday 10 October at 3.30 pm.]

Witnesses

Monday 12 March 2007

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Carolyn Regan, Chief Executive, and **Richard Collins**, Executive Director for Policy, Legal Services Commission

Ev1

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The reference number of the Treasury Minute to each Report is printed in brackets after the HC printing number

Oral evidence

Taken before the Committee of Public Accounts

on Monday 12 March 2007

Members present:

Mr Edward Leigh, in the Chair

Mr Richard Bacon
Helen Goodman
Mr Sadiq Khan

Mr Austin Mitchell
Mr Don Touhig
Mr Iain Wright

Sir John Bourn KCB, Comptroller and Auditor General, and **Tim Burr**, Deputy Comptroller and Auditor General, and **Janice Lawler**, Director, National Audit Office, were in attendance and gave oral evidence.

Marius Gallaher, Alternate Treasury Officer of Accounts, was in attendance.

REPORT BY THE COMPTROLLER AND AUDITOR GENERAL:

LEGAL AID AND MEDIATION FOR PEOPLE INVOLVED IN FAMILY BREAKDOWN (HC 256)

Witnesses: **Carolyn Regan**, Chief Executive, and **Richard Collins**, Executive Director for Policy, Legal Services Commission, gave evidence.

Q1 Chairman: Good afternoon and welcome to the Public Accounts Committee. Today we are considering the Comptroller and Auditor General's Report, *Legal Aid and mediation for people involved in family breakdown*. We welcome Carolyn Regan, Chief Executive of the Legal Services Commission. Would you like to introduce your colleague?

Carolyn Regan: Thank you. This is Richard Collins, who is the Executive Director for Policy at the Legal Services Commission.

Q2 Chairman: Perhaps we can start by looking at paragraph 2.5 of the Report. My question, based on that paragraph, is why does the Commission continue to fund Legal Aid for people who simply choose not to even attempt mediation? Clearly, many people do not make the effort.

Carolyn Regan: The issue is partly the way in which the system is designed and partly the fact that we are trying to introduce both information for clients and incentives for solicitors to move from the current system, under which some people say that they do not get information about mediation.

Q3 Chairman: That leads on to my next question. Do you think that we should crack down on solicitors who neglect their duty to tell people about mediation? Clearly, a lot are not pushing mediation. It is against their interests to do so, is it not?

Carolyn Regan: I think that we should be monitoring the solicitors' differing rates of referral to mediation. In the new contract for solicitors, which comes in later this year, everything will go via mediators and mediators will make the decision with the client about whether to continue the mediation process.

Q4 Chairman: Before it goes to solicitors?

Carolyn Regan: Most people, as you know, walk into a solicitor's office when they are in a relationship breakdown. We will now say that they should have a discussion with the mediator before proceeding to the next stage. Ideally, that will be mediation, but in some cases couples will resort to court.

Q5 Chairman: Of course, some couples will resort to court. However, given that we could save £74 million if we got more people into mediation, what will happen? Under the new arrangements, will the solicitors have to refer people for mediation?

Carolyn Regan: They will.

Q6 Chairman: Or at least offer them the opportunity and explain it properly?

Carolyn Regan: Everyone will have to go via mediation, and there will be a discussion with an independent mediator about the next stage. The mediator will then decide with the client about how to pursue the case. All of that will be in the new contract, and reflected in the fees that we pay family lawyers from 1 October.

Q7 Chairman: But what worries me is that they will be sitting in a solicitor's office, and solicitors are bright and personable people—[HON. MEMBERS: "Hear, hear."] I am a barrister, not a solicitor.

Will it still be financially disadvantageous for them if their clients go to mediation? Presumably it will be, so solicitors will have all sorts of ways in which to steer people back into the clutches of the law courts, will they not?

Carolyn Regan: As of October, we will be paying solicitors a fixed fee. That means that those cases that are resolved through mediation and sooner than going to court will effectively include a reward for

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greater efficiency, so there will now be an incentive for solicitors to pursue the mediation route. In fact, the new contract for solicitors will reflect those new fees. The new fees are currently out to consultation.

Q8 Chairman: Of course we are grateful for your memorandum submitted on 8 March.¹ However, although it may be helpful, it also makes our work more difficult because it makes the National Audit Office Report somewhat out of date. I take it that paragraph 2.6 of the NAO Report about solicitors who do not even discuss the option of mediation with clients is now otiose. That is not going to happen, is it?

Carolyn Regan: It is not going to happen in the new system. Let me just pursue that for one moment. There is also an issue about making current information available to clients in places other than solicitors' offices where they might go. We are looking to revisit the leaflets and written information and to make them available in places such as Citizens Advice Bureaux, Relate offices and GPs' surgeries.

Q9 Chairman: While it is great that you have submitted your memorandum, what I cannot understand is why you jumped to do so only when this hearing was about to take place. In this world of Gershon efficiency savings, when £74 million is at stake, why have you been so slow to take action to crack down on solicitors who clearly have not been referring adequate numbers of people for mediation? Why has it taken so long? Surely, there is nothing new about this.

Carolyn Regan: The Report is helpful in that it builds on a trend that has been developing over the last five years. In 1997–98, when we started with mediation, there was no Legal Aid funding for mediation at all. This is a continuation of a trend that we want increased, partly because it has a good success rate, and partly because, as you said, it is cost effective.

The latest raft of things that you received on 8 March is very much part of the whole reform programme for Legal Aid. That includes fixed fees, not just for family solicitors, but other Legal Aid solicitors. It is about developing work in progress and ensuring that a supply of high quality mediators is available across the country for clients.

Q10 Chairman: Is there a problem with a lack of understanding among clients about mediation?

Carolyn Regan: It is certainly not as widely known as what is involved when you walk in to a solicitor's office. If you talk to clients around the country, you will find that there is further work to do in order to promote information on mediation: what is it and how do you find it? We are looking also to pilot telephone advice, which we provide for other forms of legal advice. We are looking to introduce that later this year—as a pilot. We are not sure whether people will use it, but we think that it is worth pursuing.

Q11 Chairman: Why do you not agree to pay the reasonable travelling costs of those who want to go to mediation if the journey is more than 45 minutes?

Carolyn Regan: Instead of paying the travelling costs, we would look to ensure that there is access to mediation nearer to where people live. As you know, access is not as good in some parts of the country as it needs to be, and we are looking to expand that over the next year.

Chairman: Okay, I shall pass you over to Sadiq Khan now.

Q12 Mr Khan: May I first declare an interest? I am a solicitor and a firm in which I was an equity partner did a lot of family work, although I never did. I am just skimming through your March memo, so if I ask questions to which you have given answers already, I apologise in advance.

May I ask you about the new plans that you talked about and which will come into effect shortly? Why cannot solicitors be required to send clients to mediation before they can do any substantive work on the case?

Carolyn Regan: In the future, there will be a requirement that the client has a discussion with the independent mediator.

Q13 Mr Khan: Sent to them by the solicitor?

Carolyn Regan: Referred by the solicitor. That is right. And that could be a face to face or telephone discussion before the case proceeds.

Q14 Mr Khan: So the client sees you as a solicitor, and before you can do any substantive work, you must send them to a mediator?

Carolyn Regan: You must have a conversation with a mediator, which in some cases will be over the telephone.

Q15 Mr Khan: What is to prevent you from referring all your clients to mediator X, with whom you have very good and cordial relations and who might well say to the client, “Actually, I cannot help”?

Carolyn Regan: We will be looking at a number of things, following the introduction of the new contracts with solicitors and not for profit organisations. We will introduce the same contract for everyone, regardless of whether they are a solicitor or a not for profit organisation. We will look at referrals to mediation, the levels of people coming back from mediation wanting to continue down the court route and of those who come to a resolution at the mediation stage.

Q16 Mr Khan: Inevitably, mediation will be a waste of time for some clients.

Carolyn Regan: Yes.

Q17 Mr Khan: How will you avoid unnecessary costs being incurred in those cases by requiring solicitors to refer clients to mediation?

¹ Ev 13–16

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Carolyn Regan: There will always be two or three things—

Mr Khan: Domestic violence is an obvious example.

Carolyn Regan: I will touch on domestic violence. The mediation will continue to have to be voluntary between the two parties, and one of the recommendations relates to parties who are not legally aided if there is a couple in which one person is and the other is not. That will continue to apply. As part of the consultation on the family fee schemes, we are also seeking views on whether domestic violence should be an automatic exception, as it is at the moment, or whether it should be for consideration by the independent mediator and the relevant individual or couple. That is currently out to consultation. Other exceptions will also occur, as they currently do, if both parties are totally opposed for whatever reason.

Q18 Mr Khan: A number of years ago, one of the requirements that the Legal Services Commission placed upon solicitors doing clinical negligence work was that, before public funding could be given, they had to go through the complaints mechanism organised by the trust. That was one of the questions asked in a public funding application, if you recall. A lot of solicitors were worried that that would send people to a complex mechanism, rather than getting them to a solicitor sooner rather than later. How has it worked out in its early years?

Carolyn Regan: Obviously, we want to continue the train of cases being resolved as quickly as possible. We do not want to put any unnecessary delay in the process, and we need to bear in mind the fact that 90% of relationship breakdowns are resolved without recourse to a solicitor, court or anywhere else. It partly goes back to giving clients better, more accessible information in plain English; ensuring that their conversation with the independent mediator is helpful, at the right time and in the right place—whether they want it on the phone or face to face—and continuing to build incentives into the process for clients and solicitors to use mediation where it is appropriate, voluntary and signed up to.

Q19 Mr Khan: How many suppliers of family advice are there?

Carolyn Regan: There are, I think, about 3,000. You will know that that has declined in the past few years; but, interestingly, the number of clients has increased. We are keen to continue to measure the number of clients, rather than the number of suppliers.

Q20 Mr Khan: Is it still a deliberate—I must be careful how I phrase this. Are you still keen to reduce the number of suppliers even further from the current level?

Carolyn Regan: There has been some reduction, either because people have not passed the peer review, which is part of the quality audit mechanism, or they have withdrawn from that particular speciality of law of their own volition. If there were concerns about quality, we would not continue, over time, to have a Legal Aid contract with someone.

Q21 Mr Khan: So are you keen to reduce the number of 3,000 to even fewer?

Carolyn Regan: Only if they do not meet the quality standards and cannot provide the data that we need from the new contract being introduced, or if there are any other concerns.

Q22 Mr Khan: Are there any advice deserts for family work?

Carolyn Regan: For family work, there are some gaps—I would not call them deserts—that we need to address in access to mediation in parts of Devon, north Wales and the Isles of Scilly. We need to consider those places.

Q23 Mr Khan: What has been the response to you on proposals to change the funding regime?

Carolyn Regan: These proposals need to be considered in the context of all the changes to legal aid across family, civil and criminal work. The scale of the reform programme and the pace of some of the changes are causing concern for some suppliers. The revised family fees that you have in front of you, which we published at the beginning of March, have generally been well received.

Q24 Mr Khan: By not for profit and private organisations?

Carolyn Regan: By both, but I am talking specifically about solicitors. On not for profit organisations, there has been a trend in the past five to 10 years of working with them on quality standards, training and capacity building. That has largely been welcomed and these changes have, as you know, been signalled for some time.

Q25 Mr Khan: Within the Legal Aid budget, is there a hard cap for the amount spent on family law?

Carolyn Regan: There is no hard cap. We currently spend about £300 million.

Q26 Mr Khan: So if by some quirk of fate three times as many clients required help this year, your expenditure could go up by three times as much.

Carolyn Regan: It could go up, subject to those people meeting the merit and the means test and taking those as read.

Q27 Mr Khan: What control mechanism do you have to make sure that it does not increase by three times as much?

Carolyn Regan: The control mechanism is partly what I was saying about the number of people who resolve their disputes without recourse to law; partly changing the incentive, so that there is now a presumption to mediate, rather than automatically to go to court; and partly looking at the move towards fixed fees across the whole of Legal Aid, which will change from the current system of paying on an hourly basis.

Q28 Mr Khan: You will appreciate the concern among those practitioners and the clients of those practitioners who do not do family work and/or

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criminal work that the family budget and/or the criminal budget is sucking money away from other areas of law where public funding is required.

Carolyn Regan: The Legal Aid bill on the civil side has increased over the last few years in response to demand. One has to look at the total expenditure across Legal Aid and all the changes from the current system of paying people on hourly rates to make sure that the incentives are in the right place to resolve cases early and to pay fixed fees—those kinds of things. I am very aware of the concerns among some suppliers: not all, but some. I come back to the point about making sure that the number of clients continues to increase in line with demand.

Q29 Mr Khan: My time has run out, but I have one final question. Although mediation is cheaper and quicker, how can we ensure that mediators do not rip off the LSC, like it is alleged solicitors do?

Carolyn Regan: We will be monitoring the amount of work that mediators do and their outcomes. The ultimate response to that would be a contract sanction, effectively moving the work away.

If I can go back to a previous point about the potential for managing demand, there is a cap on the legal help amount, but not on the court representation.

Q30 Helen Goodman: My first question is for the NAO. Arguably the people who are most affected by divorce are the children, because they are the most vulnerable. Decisions are taken for them. Obviously as they are younger it is a more significant life event for them. Why did you not interview any children in doing this piece of work?

Janice Lawler: We did not interview children directly, but we used research on mediation in which children's views were taken on board.

Q31 Helen Goodman: Yes, but research with respect to children does not address the question of whether mediation or going through solicitors is better. You did not look at a pool of children whose parents had gone for mediation and a pool of children whose parents had gone via solicitors, did you?

Janice Lawler: That would be very difficult to arrange. In terms of analysing those views, we took on board the research that is available so far that would reflect those views.

Q32 Helen Goodman: I wonder whether I could ask you about this issue of child inclusive divorce mediation. This may be more a question for Mr Collins. Appendix 3 looks at experience overseas. Are you planning to make child consultation a requirement, or to encourage it in any way, in the new scheme?

Carolyn Regan: I will ask Mr Collins if he knows the answer to that question.

Richard Collins: We have no plans for that—that is the straight answer to that question.²

Q33 Helen Goodman: I see. Fine. Now I would like to go back to paragraph 1.8. Again, this is a question for the National Audit Office. The opening sentence in paragraph 1.8 says that, “The mediators we surveyed perceived advantages of mediated outcomes”—and so on. That is then taken as evidence that mediation is a better system than going through solicitors, but they would say that, wouldn't they? What is the independent evidence for that?

Janice Lawler: The independent evidence includes our own analysis, which shows that mediation is cheaper and quicker, and the evidence that it is the less acrimonious route is from consultation with other bodies. We have obviously taken on board the views of mediators, but we have also taken on board independent academic research.

Q34 Helen Goodman: Thank you. I accept that mediation is cheaper and quicker, but we must be concerned about the long term outcomes, must we not? At the same time, we have the Child Support Agency coming up in front of us, and it is quite clear that, when settlements are not agreed between partners or former partners, it can increase costs to the public purse. Therefore, I wonder whether you could say if you believe that mediation is advantageous, and if so, why?

Carolyn Regan: From the evidence that I have seen, I would say that mediation is advantageous, but with a number of caveats. One caveat is that the process is voluntary, between the two parties, and there are different ways of organising that to meet various concerns: staggered mediation, different waiting areas, and all those sorts of things that make mediation more favourably received by couples. Also, there must be better information for clients about the benefits of mediation. Crucially, the outcome is important—that is, the percentage of cases that do not end up in court, if I can put it like that.

We should continue gathering the views of clients about mediation, which we have not done routinely. That will inform the way that we work.

Q35 Helen Goodman: Elsewhere in the Report, there are some recipients of Legal Aid who were quite negative about their experience of mediation. Obviously, different people will have different experiences, and the whole process will be a balance—I appreciate that. However, could you explain to me, since I am one of the uninitiated, who mediators are? What are their qualifications?

Carolyn Regan: They are independently trained and accredited with the UK College of Family Mediators or Law Society to undertake this work. Often, they are people starting second careers. I

² *Note by witness:* Richard Collins' response in relation to child inclusive mediation is correct but we would like to add that direct consultation with children is part of the current mediation contracting structure and we are consulting on whether difference funding arrangements should be considered for this activity.

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think that there is an issue about ensuring that we have a diverse range of mediators, and we do not currently collect information on that, so I cannot answer whether we do have a diverse range or not.

Q36 Helen Goodman: Do the mediators have legal training?

Carolyn Regan: I will ask my colleague to elaborate—I know that they have ongoing refresher courses.

Richard Collins: All mediators must have been trained, and they will be working under the UK College of Family Mediators or through one of the solicitors in the Law Society’s family mediation panel. Resolution also has its own panel. So, all mediators will have been trained. In fact, many mediators are also solicitors, so they will already have legal training. For the mediators who are not solicitors, part of their training will be to understand the legal landscape within which they will be working, so they will have an understanding of the legal process and the process around relationship breakdown, and they all have to be members of one of the organisations that I have named.

Q37 Helen Goodman: So there is no evidence—one of the reasons why people do not go to mediation is that they think they will not achieve such a good outcome as they might otherwise. Presumably, that is because they feel that a solicitor or lawyer will defend their interests quite robustly, and a mediator may not do that. What assurance will you offer to people that that is not the case, to encourage them to take the mediation route?

Richard Collins: I think that you are right. There is still quite an engrained public view that if you have relationship breakdown, you have to go to a solicitor to defend your corner. All mediators are trained to reach appropriate settlements to ensure that the more powerful party does not impose an inappropriate settlement on the weaker party, for example. That is quite important. We also provide something called “legal help with mediation”, so that if you are going through the mediation process, you can still refer back to your solicitor to check whether there are any particular legal issues arising from the sort of settlement that you are contemplating. I agree that there is still a lot more for the commission and the Government to do more widely to publicise the benefits and the process of mediation.

Carolyn Regan: I should like to add a supplementary point, which is that as well the original training, there is an ongoing requirement for mediators to meet certain competencies. Crucial to that is training on domestic violence screening and assessment, which is a fairly key piece of information that we probably do not publicise as much as we could.

Helen Goodman: Thank you.

Q38 Mr Touhig: Mediation fails simply because one of the partners has been bloody minded, yet you say that you do not believe that there should be compulsion to go to mediation. Why?

Carolyn Regan: My understanding is that that has been debated in Parliament. The voluntary nature of mediation means that it is more likely to succeed if both parties agree to it in the first place. We also seek to avoid building in unnecessary delays in going to court where that is the ultimate conclusion. It works better when both parties have agreed to it and we do not want to put into the process any unnecessary delays, but we want incentives for people to have mediation where it is appropriate.

Q39 Mr Touhig: In some parts of the world it is compulsory. Have you been to those places to study that? Have you done work on whether it is successful or otherwise in those parts of the world?

Carolyn Regan: I have not personally been there or anywhere else to study Legal Aid systems, but I have read the evidence from the NAO Report. I know that it is compulsory in some other countries, but as I said that is a matter for Parliament.

Q40 Mr Touhig: I appreciate that, but you would be in a position to advise Ministers and Parliament if you thought there should be a change in the law.

Carolyn Regan: At this stage, I would say let us try the new route of the new contract, with fixed fees for solicitors and referral to a mediator where a representation order is applied for. Let us see first whether that boosts the number of couples going to successful mediation.

Q41 Mr Touhig: We have been going for half an hour at this sitting and it is clear that you do not favour compulsion at this stage. I am somewhat confused, because you said to the Chairman that people will have to go via mediation, yet in answer to my colleague, Mr Khan, you said that it was voluntary. Which is it?

Carolyn Regan: Just to clarify, there must be a referral to a mediator before a representation order is applied for. Currently, that is an application to the Legal Services Commission.³

Q42 Mr Touhig: Right. But if there is no danger of any physical violence from one party to another, mediation would be a good course and you propose to keep that under review?

Carolyn Regan: Yes, correct.

Q43 Mr Touhig: And have you got a timetable to say that you have reviewed it for a year or two years?

Carolyn Regan: I would suggest that we review the application of the new system in a year’s time and come back to you with a report about the number of people who have gone to mediation and the outcome in terms of success rates.

Q44 Mr Touhig: And will you consider compulsory mediation in that review?

³ *Note by witness:* My response to this question is further clarified in Richard Collins’ response to Question 85. However, we wish to make clear that there is a difference between compulsory consideration of mediation through assessment meeting and/or willingness test and compulsory mediation *per se*.

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Carolyn Regan: We will certainly consider it. In terms of the Report in a year's time, I was thinking that we would consider the new system, which comes in at the beginning of October, and how it is operated.

Q45 Mr Touhig: Okay. Mediation is perceived as an additional cost. To most people, perception is more real than fact. It is not fact, mediation is not more expensive. What are you doing to dispel the perception that it is more expensive?

Carolyn Regan: That is for discussion with mediators and solicitors because the legal aided clients are less interested in that.

Q46 Mr Touhig: Yes, but you—or we, the taxpayer—are footing the bill.

Carolyn Regan: Absolutely. It is partly funding family law on fixed fees rather than on hourly rates; partly making sure that we only work with preferred suppliers and solicitors who meet our quality marks and compliance with requirements; and partly making sure that those solicitors continue to provide high-quality Legal Aid and have viable businesses.

Q47 Mr Touhig: Yes, I can understand that, but I am still not clear what you are doing to dispel the perception that mediation is more expensive than the alternative.

Carolyn Regan: Our initial discussions between sending out the revised family fees and the new contract with the Law Society and with Resolution, which represents the family lawyers, is that they accept that we are putting in the right incentives which would help them to look at their behaviours.

Q48 Mr Touhig: Do you accept that there is the perception that it is more expensive to go via mediation?

Carolyn Regan: There is that perception.

Q49 Mr Touhig: Right, so will you be monitoring to see whether that perception has been reduced or not in a year's time?

Carolyn Regan: Yes; I am sorry I wasn't answering that clearly. We will look at that as part of our one year review.

Q50 Mr Touhig: Right. The Report shows that in many cases the parties are not aware that they can go to mediation. Do you blame solicitors for that?

Carolyn Regan: I do not blame anyone, but I would like to find a way of increasing the number of people who go to successful mediation.

Q51 Mr Touhig: You said in answer to the Chairman that you would be monitoring that. How do you propose to do it? Will you set up a monitoring unit to monitor the advice that solicitors are giving?

Carolyn Regan: We are not going to set up a separate monitoring unit, but part of what we will be doing when solicitors and not for profit organisations are on the same contract is much closer contract monitoring of the number of clients and couples that

they see, and what percentage go to mediation and then taking some action against the ones that have very low referral rates.

Q52 Mr Touhig: Mr Khan sought to dispel the myth that solicitors rip people off in these matters, but if you do not monitor this effectively, we are not really going to know, are we?

Carolyn Regan: Part of what we will do with the new contract is to monitor it effectively and to make sure that we have a conversation with those firms that are clear outliers.

Q53 Mr Touhig: We have touched on your monitoring several times. Do you have a plan that you could submit to us, which says, "This is what we will be covering on all the things we want to monitor from the time we introduce the new scheme"?

Carolyn Regan: Yes, I could let you have that.⁴

Q54 Mr Touhig: Have you had discussions with the Law Society about solicitors' perceived failure to advise clients?

Carolyn Regan: We have had many discussions with the Law Society.

Q55 Mr Touhig: Do you find them any good? Do they actually crack the whip or are they just a waste of time?

Carolyn Regan: Some are more helpful than others—

Mr Touhig: I mean the Law Society.

Carolyn Regan: In terms of the discussions? I think that the revisions we issued the other week have generally been welcomed by the Law Society and others. Just as a PS to that, we have very productive discussions with Resolution, which represents the family lawyers, and is a more specialist group.

Q56 Mr Touhig: The number of people seeking to resolve a dispute by mediation is only one in four compared with those who take the other route. We know it is cheaper to go via mediation; it saves time. Is not that a great incentive to push very hard for more and more people to seek to resolve these matters through mediation?

Carolyn Regan: It is a great incentive and it is also something we need to promote with the clients because the outcomes in terms of avoiding court cases are very good for them.

Q57 Mr Touhig: You submitted the action plan to us. Why did you not show it to the NAO and discuss it with them?

Carolyn Regan: We have been in discussion with the NAO about the action plan.

Q58 Mr Touhig: That is not the advice that we have got. You do know about it, do you? That is not what we were told.

⁴ Ev 16–17

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Janice Lawler: I do not have every detail of it.

Q59 Mr Touhig: So you are aware of it.

Sir John Bourn: Certainly, yes.

Q60 Mr Touhig: And you had some discussions about what is intended?

Janice Lawler: We had discussions about the recommendations in our Report. I don't think we were aware of the details of the action plan's points.

Q61 Chairman: Can I stop you now? We have got to get this absolutely right, because in the briefing you tell us that the Commission had not made a document available to the National Audit Office, nor discussed its contents in advance. Sir John, I think that that raises an important point with regard to the future and how this Committee operates. It makes our work difficult, does it not, if Departments are going to submit at the last moment before a hearing, after you have published the Report, a reply to your own Report. Do you feel that we should try to dissuade Departments from doing that in future?

Sir John Bourn: The difficulty arose in this case because the NAO Report was published in June 2006, so that is quite a long time before the Committee had been able to put it into its programme. I think that it is not unreasonable—indeed, from our point of view, it is encouraging—that the Department had made some initial moves in response to our recommendations. But I agree with you, Chairman, that we need to have better arrangements in such cases with Departments, either by way of updating our Report or in conjunction with providing you in good time with some analysis of what has taken place since we produced the Report. The Committee would then be able to have a meeting.

Q62 Chairman: That is a very important point because this was submitted only on Thursday 8 March, was it not?

Sir John Bourn: From the Department, but of course our Report was published in June 2006.

Chairman: I apologise. Carry on, Mr Touhig.

Q63 Mr Touhig: I appreciate the point that the Chairman makes. Clearly the advice that we have is that you seem to be in the dark about this memo, and I was trying to explore why you were in the dark. The work that you do is quite useful and valuable, and I wondered whether you are trying to pull one over on the NAO.

Carolyn Regan: My understanding is that, having received the Report, we had some discussions. We do not have an agreed action plan yet, but obviously that is our objective.

Q64 Mr Touhig: On the fee structure, where not for profit organisations were providing mediation services, you would pay them whether or not they did any work. Is that not a waste of taxpayers' money?

Carolyn Regan: We are changing that again as of October this year, so that solicitors and not-for-profit organisations will be paid the same fixed fees for the work that they do.

Q65 Mr Touhig: But the Report makes it clear that you pay organisations that do not do any work. How much do you pay them? How much have you spent?

Richard Collins: You are right. At the moment, we have two different ways of paying for this work. We pay not for profit organisations what you might describe as a core funding amount, and then in addition by the case. The reason that we did that was that, in effect, there was no mediation industry in this country. There were lots of organisations providing mediation that we could use.

Q66 Mr Touhig: Can you tell us what it is costing?

Richard Collins: I have not got the precise amounts, but I can provide you with a note.⁵

Q67 Mr Touhig: I have one final question, because my time is up, and it follows on the point made by my colleague Helen Goodman, who spoke about how important it is that children are at the heart of all this. That is important in terms of trying to mediate when a marriage breaks down and trying to see what is best for the children and so on. What work have you done to try to ensure that the views of children are taken into account in these matters? We now have Children's Commissioners throughout the country, and they have done some research and reports. What work have you done?

Carolyn Regan: Following the discussions on this Report, I have requested a meeting with Professor Al Aynsley-Green, the Children's Commissioner, specifically to take forward that issue. I am not aware that we have done anything specific in terms of children's views.

Q68 Mr Touhig: Will you take account of the views of the other Commissioners in the United Kingdom as well? That would be helpful.

Carolyn Regan: Absolutely. I will do that. I have started from one point, but we need to do that.

Q69 Mr Touhig: It would be helpful if you could give us a note on that when you have had those discussions.

Carolyn Regan: Of course.

Q70 Mr Touhig: Helen Goodman makes a very important point. We can lose sight of the fact that children are often harmed most when their parents divorce.

Carolyn Regan: Absolutely. I shall provide a note.

Q71 Mr Mitchell: Why do they not make mediation compulsory? We seem to be saying that mediation is advantageous only if it were voluntary, but I see from paragraph 1.10 that in New Zealand—always the sign of a good society with far better provisions

⁵ Ev 17–18

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than we have—Australia, Norway and some parts of the US and Canada, mediation is compulsory. In Sweden, 90% of parents settle disputes over custody and access either on their own or through mediation or counselling. Why do not we do that in cases where there is a dispute over kids?

Carolyn Regan: We do not do so for a number of reasons. I understand that it was discussed previously in Parliament as part of proceedings on the Children and Adoption Act 2006. The reasons given for not making mediation compulsory were that it would be a potential infringement of the Human Rights Act 1998, that support for mediation should remain a voluntary activity and that there was the need to put the right incentives in the right place to ensure that levels of mediation increase from those we have now and closer monitoring to make sure—

Q72 Mr Mitchell: The real reason we do not do so is because it would harm the lawyers. Do you or the National Audit Office have statistics about whether compulsory mediation works effectively in the countries that have adopted it? What are the statistics on that?

Carolyn Regan: The NAO might be able to answer that.

Janice Lawler: The extent of the research is what we have provided in the appendices. If you have a system where you have to mediate, clearly there will be a higher success rate.

Q73 Mr Mitchell: For mediation?

Janice Lawler: Yes.

Q74 Mr Mitchell: So, in statistical terms it is justified?

Janice Lawler: Yes.

Q75 Mr Mitchell: Okay. So why do we not have such a system?

Richard Collins: I think that we do not because the Government and Parliament have decided that we should not.

Chairman: That is a very honest answer.

Q76 Mr Mitchell: Stop there. That is fine.

In its comments on the latest submission, the National Audit Office asks whether under the proposed revised contracts and fees schemes for solicitors it will be more advantageous for solicitors to refer clients to mediation than for them not to do so. What is the answer to that?

Carolyn Regan: The answer is that before a representation order is granted they have to refer to mediation. It is not an optional extra.

Q77 Mr Mitchell: I noticed that you said that the Law Society welcomed the proposals—such a response always makes me suspicious.

Carolyn Regan: If I can clarify that point. What the Law Society has welcomed is the revised family fees that we published. Discussions with specialist lawyers through Resolution have indicated that they support this incentive for cases to go to mediation.

Q78 Mr Mitchell: Is that strong enough to obviate lawyers' instinctive desire to fight and their vested interests in fighting?

Carolyn Regan: It is early days because, first, we only issued revised proposals at the beginning of March so people are considering the impact on their future practice as we speak and, secondly, proposals do not come into effect until October so we need to give them some time to see how they work out in practice.

Q79 Mr Mitchell: Why do so many people not go to mediation? The table in part two, page 12 of the Report shows that some cases reached court for fear of violence. Of course, that is understandable. However, the number of cases citing existing proceedings as a reason for not referring to mediation is about 7,600 and the number of cases where the other party is unwilling to attend is about 7,400. That shows that one party can effectively exercise a veto.

Carolyn Regan: Can I go back to your first point, which was that sometimes people say no to mediation because the case has already been listed for a court hearing? One of the other suggestions in the consultation document from the beginning of March is that we change the case from being listed in eight weeks time to being listed in four weeks time to encourage a greater number of people to seek mediation. That is under discussion. The second point was about making sure the right incentives are in the right place.

Q80 Mr Mitchell: Should one party be able to exercise a veto?

Carolyn Regan: One of the suggestions in this Report is that we should consider paying for mediation for the other partner who does not get Legal Aid. That is something that we will look at, but obviously I am not authorised to agree to that.

Q81 Mr Mitchell: So you think that the other party should be given some incentive to participate.

Carolyn Regan: That is a recommendation in the Report, which given that—

Q82 Mr Mitchell: Would that be costly?

Carolyn Regan: It would cost

Mr Mitchell: But would it be costly?

Carolyn Regan: It might cost less than the alternative, which is going to court. We need to look at that.

Q83 Mr Mitchell: That should seriously be considered. Since your evidence came in, we have received representations from the Family Mediators Association⁶ and National Family Mediation⁷, which say that the proposals are a retrograde step. A particular concern is that the loss of the exemption from the statutory charge for legal help with mediation removes a major incentive to parties to elect for mediation. Why have you done that?

Carolyn Regan: I do not know. I have not seen the comments.

⁶ Ev 20–21

⁷ Ev 21–23

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Q84 Mr Mitchell: Those organisations say that it is: “a worrying indicator of a lack of will on the part of the LSC to support realistically the option of mediation” for those involved in family breakdown. You have been very naughty.

Carolyn Regan: I am afraid that I do not know the answer to that question, but I can come back to you on it.

Q85 Mr Mitchell: Okay. Another considerable concern is the proposal to change the point at which solicitors are required to refer publicly funded couples to mediation, from the initial request for legal help—clearly, that would be valuable—to just before court proceedings are issued; in other words, when battle lines have been drawn. That is a mistake, surely, not on their part but on yours.

Carolyn Regan: No. We are saying that before a representation order is applied for—before people get to that stage—there has to be a conversation, called a willingness test, with a mediator, and then an assessment meeting. So mediation actually comes earlier in the process.

Q86 Mr Mitchell: Let me pursue the point. The organisations say that the proposals have the potential to be disastrous for mediators, the respective parties and the public purse.

Carolyn Regan: I am not sure why they are arguing that.

Q87 Mr Mitchell: The gentleman behind who usually nods before you do is not nodding.

Carolyn Regan: He is not nodding.

Q88 Mr Mitchell: So you do not accept the representations?

Carolyn Regan: No, I do not.

Q89 Mr Mitchell: It would be well worth looking at them.

You mentioned the requirement now to go to mediation. The requirement under the proposals seems very soft if all people have to do is ring a mediator, who is probably hurrying to get home. He cannot deal with such matters on the phone. Surely both parties have to sit down with a mediator.

Carolyn Regan: The first point is to have a conversation about whether mediation is appropriate.

Q90 Mr Mitchell: But a conversation on the phone is no use at all.

Carolyn Regan: But straight after it would come an assessment meeting with both parties, so on the assumption that people—

Q91 Mr Mitchell: The gentleman behind has nodded, so that must be right. Okay, so the situation will be more serious than ringing NHS Direct.

Carolyn Regan: I could not compare the two.

Q92 Mr Mitchell: Why are there such variations in performance between mediators, or mediation attempts? They vary from 22% failure to 52% failure. Why are there such wide variations?

Carolyn Regan: We do not really know at present. We need much better data to monitor performance. I think that that goes back to your previous point about having a conversation with the mediation representative bodies, in the light of what you just read out, to find out what their concerns are.

Q93 Mr Mitchell: On a *priori* terms, as we lawyers say, intrinsically, it must be better to go to mediation first. You do not have data of the quality to allow you to evaluate the effectiveness of mediation as opposed to lawyers. I note that you have three separate databases to record the cost of Legal Aid and help with mediation. They cannot be linked together, so you cannot trace recipients of Legal Aid and measure the total Legal Aid that they receive from the whole system, and therefore you cannot trace the benefits of one system as opposed to another one. Why are you in such a mess?

Carolyn Regan: Our databases are not ideal, and I would not pretend that they are. We are operating with three at the moment. They were developed incrementally as new information was required. We are bringing in a completely new database for suppliers that will be able to trace a client through all different parts of Legal Aid.

Q94 Mr Mitchell: So you will be able to say whether one process of mediation or one mediator is more successful than an alternative one.

Carolyn Regan: We will be able to do that sooner when we look at the outcomes

Q95 Mr Mitchell: I have one final question about not-for-profit organisations. I see that they get a kind of retainer fee, irrespective of the number of mediation cases that they do. Why is that? Who are these people? Is it a retainer fee for other services, to which is added an extra fee for mediation? Why is it on that basis?

Carolyn Regan: My understanding is that the payment is on a historical basis and will be phased out from October when everyone—solicitors and not-for-profit organisations—will be paid the same fixed fee.

Q96 Mr Mitchell: On performance?

Carolyn Regan: Yes, on performance and for cases that they undertake and the clients who they see.

Q97 Mr Mitchell: Who are the not for profit organisations? Citizens Advice?

Carolyn Regan: Yes. Citizens Advice and Relate, as well, with which we have three contracts in different parts of the country.

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Q98 Mr Mitchell: Right. So you do not have performance figures for the new system of payments to say whether their mediation services are adequate?

Carolyn Regan: We will be looking at that. There is the potential to make that information available to clients when they choose a mediator.

Mr Mitchell: That would be useful. I am thinking of having mediation myself. Thank you.

Q99 Chairman: Mr Mitchell's point is covered in paragraph 3.5 on page 17. I accept that you have now said that it will change, but it is still interesting to note that that paragraph reads: "Figure 6 shows that for mediation work undertaken between October 2004 and March 2006 the average cost of each case was £611 for work done by not-for-profit organisations and £463 in the case of solicitors and for-profit organisations." That raises one question: why?

Carolyn Regan: That goes back to a previous answer about ensuring the right capacity in the mediation world and that it is equipped for these new challenges. It will effectively disappear in October when we implement the new fixed fees for everyone.

Chairman: All right. Thank you.

Q100 Mr Wright: May I just clarify something mentioned earlier? Sir John, the NAO completed and finalised the Report in June 2006. Is that correct?

Sir John Bourn: I made a mistake there. It was later, and of course the publication date of the Report was March.

Q101 Mr Wright: That is fine. I shall hang my questions on the three principles in paragraph 3.15: "the willingness of the two parties to commit to the process, engagement of experienced and skilled mediators, and support for the process from the client's solicitor." On the first principle, I was struck by what is written in the box at the top of page 13: "When there are two people who can't stand each other no amount of talking will resolve matters."

Let me think about my own marriage: if I phoned Mrs Wright this evening and said to her, "I am sorry, but I would like a divorce," I do not think that any amount of mediation would help—to be honest, she would want to see my head on a pole in Parliament Square. Is it not true that, in many cases, divorce is so acrimonious that mediation is not appropriate?

More importantly, is it not also true that the culture in this country is such that those matters are resolved by the legal system? For example, paragraph 2.6 reads: "Some of the comments suggest that one of the biggest obstacles to be overcome is an expectation among many people that divorce and separation can be settled only through traditional legal routes." How on earth can you change the legal system? In answer to earlier questions, you hinted that greater publicity would be needed, but is that really good enough?

Carolyn Regan: I think that better, clearer information is one part of it. You are right to refer to the hidden cultural issues. Part of the answer is to ensure that people know what mediation is, how highly skilled and trained mediators are and about their successful outcomes in avoiding the courts. It is partly about publicising what mediators do and what skills and training they have had, and partly about ensuring that solicitors promote them as an effective way forward.

Q102 Mr Wright: That answer brings me to the second principle—the engagement of experienced and skilled mediators. Paragraph 3.14 mentions that one in four people made negative comments, and some of the examples are very damning. People said that: "the mediator had not been good at his or her job, had been rude, unsympathetic or inexperienced, had not been impartial, made the client feel pressured and was unfair." Again, how on earth are you going to change that sort of thing? To take up the point that you raised with Mrs Goodman, what on earth are you going to do to improve skills and experience and to make people feel comfortable on what is, in any case, a stressful occasion?

Carolyn Regan: Part of what we will be doing with mediators is monitoring their performance in terms of the quality of service that they offer, and part of that will need to involve feedback from clients. Over time, if we find that X mediator gets particularly bad feedback from the clients that they see, we would want to follow that up with a conversation and, ultimately, take a contract sanction and not contract with them.

Q103 Mr Wright: That is a good point. Paragraph 3.13, which Mr Mitchell mentioned, shows that there are wide variations in the proportion of cases that fail to reach agreement. The memo that you have provided says that you will provide: "enhanced monitoring and performance management systems that will recognise mediation providers who are achieving the best outcomes for clients". With the greatest respect, that is a bit bland. Could you put more meat on the bones and tell us about the actual processes and systems that you will put in place?

Carolyn Regan: What we are looking to do, as part of all this, is to contract only with those Legal Aid lawyers who become preferred suppliers. That means that they have to meet certain quality standards and give feedback on clients' views and that we would audit their work through peer review and case assessment. We would be looking at the outliers on key performance indicators, such as mediators who do not reach the same level of agreement as other mediators with a similar client mix or solicitors who have very low ongoing referral to mediation, given the new system. If we found that someone was a complete outlier, we would then have a conversation with individual firms

Q104 Mr Wright: Okay. The third principle is support for the process from the client's solicitor. I was struck by a quote from someone on page 13, who said, "My solicitor never mentioned mediation,

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but I did receive a letter stating that I had declined mediation.” What strengthened processes and systems have you put in place to ensure that that no longer happens?

Carolyn Regan: The new system presumes that mediation will go ahead, rather than providing for an automatic opt-out.

Q105 Mr Wright: That seems fairly soft. It still seems that the current situation could arise again.

Carolyn Regan: I think that it is much less likely to happen, partly because of the fixed fees, which reward efficiencies from the solicitor’s angle, and partly because of tighter contract management and the fact that we make sure that solicitors who become preferred suppliers show good performance in terms of their referrals to mediation. So a number of things—from how we will pay solicitors in the future to having incentives in the right place—will drive some of the changes.

Q106 Mr Wright: Page 4 of your memo says, “Solicitors will receive the fixed fee regardless of whether they make a referral to mediation or not. However, if they refer to mediation at an early stage and it resolves the dispute the firm’s profit margins on the fixed fee will be maximised.” I have two broad questions about that. First, how will heightening the profit margins of solicitors firms affect efficiency for the public purse? Secondly, what is to prevent a firm of solicitors from using its experience quickly to assess the situation and then saying, “This is going to be a fairly bog standard divorce case. This could be solved through mediation. We’ll get this one in quick and get the fat fee”—sorry, the fixed fee; that was a Freudian slip—“but we’ll make sure the clock is ticking for more complicated matters”? The solicitor is getting enhanced fee revenue on both sides, is he not?

Carolyn Regan: They are getting one fee that would encourage the efficient use of mediation. The idea is that, when cases are resolved at mediation, they will get that fee, which should encourage greater consideration of that as an option.

Q107 Mr Wright: So am I wrong in thinking that, if it is a fairly acrimonious divorce and it takes 18 or 24 months, solicitors will get only that fixed fee regardless of how long it has taken?

Carolyn Regan: That is right, and they will not in future be getting the hourly rates by which we currently pay them. That is a huge change for solicitors, it has to be said, across all legal aid.

Mr Wright: Okay, thank you.

Chairman: I believe that there are a couple of supplementaries, from Mr Touhig and Mr Mitchell.

Q108 Mr Touhig: I am grateful. I apologise, I had not read the letter from the Family Mediators Association before we started, and I pursued some questions about compulsory mediation that were better explored by my colleague Austin Mitchell, who had read it.

In the letter, the Association says that, under your new proposals, you are going to move the point at which solicitors are required to refer publicly funded couples to mediation from the time of the initial request for help to a point just before they go to court. It goes on to say: “Much of the work—such as financial disclosure—will have been done by solicitors well before the clients are referred to a family mediator”, if that is the outcome. It says that that will cost more than the current costs. Why are you moving this from the initial point of contact? If I were to go to a solicitor, he would currently initially say, “There is the option of mediation.” Now you are pushing that requirement right the way back, so my solicitor could do a lot of work and knock up some bills at the taxpayer’s expense. Why?

Carolyn Regan: I am afraid that I had not seen those specific comments, but I will follow up that conversation outside this hearing.

Q109 Mr Touhig: But is that what is happening—are you moving the point back?

Carolyn Regan: We are saying that all solicitors must refer to a mediator before a representation order is applied for. That will be done with an initial conversation and then an assessment test. We are trying to make it more flexible so that it can actually be earlier in the process. That is the conversation that I will need to have with that organisation. It can be earlier in the process instead of later if that works for the couple.

Q110 Mr Touhig: Are solicitors required to advise a couple on mediation at present?

Carolyn Regan: Yes.

Q111 Mr Touhig: And is the requirement upon a solicitor to do that immediately when a couple, or one of the parties, comes into seek advice?

Carolyn Regan: It is an option. Instead of making it a one-off, we are trying to make the system more flexible and encourage more people by saying that clients can go to mediation at different stages of the process rather than, as at present, at only one point.

Q112 Mr Touhig: The Family Mediators Association suggests that you are actually moving the time frame back.

Carolyn Regan: We are actually making it more flexible. It can come earlier in the process—

Q113 Mr Touhig: You never worked for the National Health Service, did you? This is not the doctors’ contract all over again, is it, where they got paid more for doing less?

Carolyn Regan: I worked for the NHS for a long time.

Mr Touhig: Ah.

Carolyn Regan: I had nothing to do with the doctors’ contract, may I say?

Q114 Mr Touhig: It would be helpful to us if you were to have sight of this letter. Perhaps you could reply to the Committee, and perhaps the NAO could give us a view on the point made in the letter as well.

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Carolyn Regan: I would be pleased to do that.⁸

Q115 Mr Mitchell: Actually, that was my point, too. There are two letters, one from National Family Mediation and the other from the Family Mediators Association. Both make similar points and forecast doom and disaster. I am getting used to lawyers writing to me to say that they are going to go bankrupt and be destitute, hanging around their streets with their trouser bottoms hanging out if you pursue the Legal Aid reforms that are going through. Could you evaluate the two letters and give us your answer?⁹

Carolyn Regan: I would be happy to do that. As I said, I have not had sight of either letter.

Q116 Mr Mitchell: I accept that.

The photography in NAO documents is marvellous, but in this one, it is brilliant. There is a child thinking, "If only David Cameron got in and gave us the married couples' family allowance back, I would be able to watch television in peace."

Sir John Bourn: I recognise your expertise and photographic lesson, Mr Mitchell. Thank you.

Q117 Chairman: I have to say, Sir John, that this photograph is a bit sexist, because the woman is shouting at the man, who is listening in a resigned—

Sir John Bourn: We thought of that.

Janice Lawler: We had a discussion on that and assumed that it is worse to ignore someone than to shout at them.

Chairman: As my Clerk says, these people are so poor they cannot afford shoes.

⁸ Ev 18–19

⁹ Ev 20–23

Q118 Mr Bacon: How much were these actors paid?

Janice Lawler: This is just a standard photograph.

Q119 Mr Bacon: Where did you get it from?

Janice Lawler: You download them free from—

Q120 Mr Bacon: From rowingcouples.com?

Mr Mitchell: I would have posed for it for you.

Mr Touhig: Possibly, the Law Society comes and looks at it, and you get advice from your solicitor to stop shouting at each other.

Q121 Chairman: I think that concludes our inquiry, which has been very useful, but Sir John, your Report was published on 2 March. The supplementary memorandum arrived on 8 March. Your Report found that only one in three people was made aware of the option of mediation. We now hear today that we will be cracking down on these solicitors, so that fewer and fewer people—perhaps no people—will end up at the tender mercies of Sue, Grabbit and Runne. What will you do to keep an eye on the Department now to ensure that the promises that we have received so late in the day will be carried out?

Sir John Bourn: We shall certainly do that and follow it through, as I said, and also look at the issue of the difficulties to which Members have referred, which arise when a Report is followed too soon by a supplementary memorandum from the Department. We would like to have had it earlier, so that we could have taken it into account in the Report that you had.

Chairman: Thank you very much. Thank you, Mrs Regan. We have further, private business, so if everybody else could leave as quickly as possible, we would be very grateful.

 Memorandum submitted by Mr Alan Horsell

I understand that you are in support of the National Audit Office Report that, to summarise, the legal profession do not make sufficient use of low cost mediation services in some of the many divorce cases that come before them. Whilst I agree with this, may I bring to your attention also the effects of poor quality legal representation that divorce contestants can do little about. The present redress for people of low income and ability is sufficiently difficult and ineffective to prevent them ever contemplating a complaint.

I have an employee who several years ago gained an agreement through the courts giving him a percentage of his property once his children came of age. This is a perfectly normal situation that has gone sour due to the original court not qualifying when the property value should be dated. The result is that a man of no particular wealth now has to go back and fight for the value to be set at today's date, against his ex-wife's solicitor claiming a value at the original date of the agreement some years ago. All this achieves is more money in the lawyers pockets after they did a poor job in the first place. I see no redress for situations like this.

I hope you have the opportunity to present this opinion to those interested.

8 March 2007

Supplementary memorandum submitted by the Legal Services Commission

LEGAL SERVICES COMMISSION ACTION PLAN IN RESPONSE TO THE NATIONAL AUDIT OFFICE REPORT

The Legal Services Commission (LSC) welcomes the recommendations of the National Audit Office (NAO) Report. The reform of family legal aid is at the heart of our civil reform agenda and the NAO recommendations provide further drivers for some of the reforms we propose. The LSC's five year strategy for family legal—*Making Legal Rights a Reality for Children and Families* was published on 1 March and outlines the priorities for funding family legal aid; to provide access to specialist legal advice where it can provide the most benefit for the most vulnerable, and to encourage disputes to be resolved out of court where it is safe and appropriate to do so.

The strategy also highlights the importance of whole system reform in terms of providing efficient and effective outcomes for clients within the family justice system. This means the LSC working with the Judiciary and other stakeholders in the family justice system to identify cases which must be resolved through litigation and to provide more effective alternatives for cases that can be resolved by other means.

Increasing access to mediation in private law cases is a key part of this strategy. This action plan provides further detail of the measures outlined in the strategy and focuses on three key areas:

- incentives for clients to mediate;
- incentives for solicitors to refer to mediation where appropriate; and
- incentives for mediators to take on publicly funded clients for family mediation.

INCENTIVES FOR CLIENTS

We will target the resources of the legal aid budget towards mediation and alternative dispute resolution where it is possible to do so.

This will mean:

- a revised merits test in private law contact proceedings which provides a stronger presumption to mediate or attend in –court conciliation if mediation is not appropriate;
- a review of exemptions to mediate, specifically in domestic abuse cases and cases where a court hearing has already been listed;
- a mediator to make the decision in conjunction with a client as to whether mediation can be safely attempted in cases where domestic abuse is alleged rather than the decision being taken by the client's solicitor;
- a pilot of family telephone advice through CLS Direct which will enable clients to be given information on mediation over the telephone in appropriate cases and referred to mediation directly; and
- an updated leaflet on family mediation for clients outlining what clients can expect from mediators and solicitors, reflecting the Law Society Family Law Protocol.

INCENTIVES FOR SOLICITORS

The LSC is introducing a revised contract and fee schemes for solicitors, which are currently the subject of consultation. These proposals will mean:

- financial incentives for solicitors to refer to mediation as early as possible, as they will be able to claim an enhanced fee for settlement which will include settlements achieved through referral to mediation;
- key performance indicators on the numbers of referrals to mediation undertaken by an individual firm; and
- a published LSC protocol setting out expectations of how and when to refer to mediation produced in conjunction with mediation and solicitor providers.

INCENTIVES FOR MEDIATORS

The LSC is currently consulting on new payment arrangements for mediators which are designed to create a structure that can continue to support the profession while at the same time making it more competitive and to encourage the growth of mediation. This will mean:

- aligning contracting arrangements for the independent and voluntary sectors;

- enhanced monitoring and performance management systems that will recognise mediation providers who are achieving the best outcomes for clients;
- increasing payments to allow for further time for assessment of suitability of a client's case for mediation;
- increased flexibility in contracting arrangements to allow for the provision of specialised services where appropriate; and
- increased payments for agreeing proposals in cases where there are finance and property issues as well as children issues.

RECOMMENDATIONS AND ACTIONS

The NAO Value for Money Report recommends that the Legal Services Commission:

- (i) Actively promote mediation and reflect this in the guidance and information the Commission provides online and in leaflets and information packs for solicitors and their clients, whether legally aided or not. This should include information about mediation in areas such as libraries, council offices and doctors' surgeries, where people can read about it before they enter the legal process.

The LSC will begin piloting family telephone advice through the existing CLS Direct telephone service in July 2007. This will enable clients seeking family advice to get information about mediation from trained operators. The LSC currently provides information on the availability and benefits of mediation through the Family Mediation CLS leaflet, which is available to download from www.clsdirect.org.uk and to order by calling 0845 3454345. A revised leaflet will be produced in October 2007 outlining what clients can expect from their solicitor in terms of information and advice about mediation and what they should expect from a mediation provider.

Following the fee schemes consultation, the LSC will be working with mediation lead body representatives and the legal profession to develop an agreed protocol for referrals to mediation as a national framework which will then be implemented at a local level as appropriate. The revised leaflet will reflect this agreed protocol which will in itself reflect guidance from the Law Society on best practice in family law cases.

The Commission will continue to assist the Department for Constitutional Affairs (DCA) with the Family Mediation Helpline and will work with them on other projects aimed at improving awareness of mediation and use of it more in family cases. In the last couple of months, the Commission has produced briefings on publicly funded mediation to CAF/CASS and to the President of the Family Justice Division.

The Commission holds a considerable amount of statistical data on conversion rates and successful outcomes, which we will look to circulate more widely. The findings of the NAO on the financial savings of mediation will strengthen our position in being able to effectively promote the use of mediation within the family justice system.

- (ii) Reflect in contracts between solicitors and the Commission a presumption that mediation should normally be attempted before other remedies are tried.

The LSC is committed to family mediation and are actively trying to promote wherever possible, appropriate referrals to family mediation. We are currently in the process of consulting over new proposals for family and mediation that will be introduced in October 2007, which should encourage an increased take up of mediation.

Under the revised proposals for the new Family Fee scheme (Family Help), the existing levels of service will be combined into one level of service which encourages early amicable dispute resolution and reduce incentives to resort to contested court litigation. The current mandatory referral to a mediator for consideration of mediation contained within the LSC Funding Code, will take place as now, prior to funding being granted for representation, although we will encourage flexibility so that referrals are made when it is most appropriate for the client.

Family Help looks to address the implications of the current funding arrangements, where solicitors have a financial incentive to undertake all work on the case and apply for a certificate. By paying fixed fees under Family help we are rewarding efficiency. Solicitors will receive the fixed fee regardless of whether they make a referral to mediation or not. However, if they refer to mediation at an early stage and it resolves the dispute the firm's profit margins on the fixed fee will be maximised. The proposals also include a revised merits test to be applied before clients receiving funding for representation in private law contact proceedings. This introduces a stronger presumption for clients to mediate or attend in court conciliation where mediation is not appropriate.

- (iii) Assess the arrangements that solicitors have in place for providing mediation services and review the number of cases that are resolved by this means. Solicitors who have significantly lower numbers of mediated cases should be investigated to ascertain the reasons for the low take-up and, where these prove unsatisfactory, should have their contracts curtailed.

In line with our Preferred Supplier strategy we are developing new Key Performance Indicators (KPIs) for contracted family suppliers. One KPI will monitor the number of referrals made by individual firms to mediation and sanctions will be available and imposed if solicitor firms do not make appropriate and timely referrals to mediation.

The KPIs will be implemented in October 2007.

- (iv) Review the list of exemptions from using mediation and the way exemptions are applied;

The LSC are currently consulting on a review of the list of exemptions as part of our *Legal Aid Reform-Family and Family Mediation fee schemes* consultation published on 1 March 2007.

The consultation and the NAO findings highlight the following two exemptions for review:

- Where family mediation proceedings are already in existence and the client is a respondent who has been notified of a court date, which is within 8 weeks of the date of notification.

The proposals out for consultation propose reducing this time limit to 4 weeks. The reduction will be dependent on the outcome of the consultation. We will implement the shortest possible period appropriate where a respondent client is notified of a court date to maximise the potential use of mediation.

- Where the applicant has a reasonable fear of domestic abuse from a potential party to the mediation and therefore is unwilling and in fear of participation in mediation with them.

It is proposed that the mediator, rather than a solicitor, will make the assessment of a client in determining whether domestic violence should automatically prevent mediation, when the new Family Fee Scheme (Family Help) is introduced in October 2007. This change is subject to consultation.

All mediators receive domestic abuse screening and assessment training whereas solicitors do not. There is no reason why any client in fear of participating in mediation should be in fear of participating in a separate assessment meeting.

Mediators are also able to provide clear reassurance within an individual assessment meeting as to how mediation operates, including putting forwards a number of useful strategies which can be provided to underpin and deliver for the parties a safe mediation environment, even where there has been domestic abuse, thereby addressing a clients fears and rendering mediation suitable and possible.

This may include co-mediation, the use of separate waiting areas; staggered arrival and departure times and the use of shuttle so that the clients need not be in the same room at any stage in the mediation process.

- (v) Assign a unique identifier to track individuals across its three separate databases from start to finish of their cases. This would enable them to produce management information on the number and cost of mediated and non-mediated clients in receipt of legal aid.

The Commission are currently developing a new supplier management system to replace existing systems. The family module of the system will be introduced in October 2007 and the mediation module will be implemented in April 2008. The new system will put in place the functionality to store a "unique" client identifier. We will use this to match up contracted work to certificated work as we currently record these fields on our client computer system.

In the longer term, our existing system will also be replaced and under the LSC's "Organisational Transformation Programme" there are plans to have a client database, which would allow clients across schemes to be properly identified.

- (vi) Extend the provision of mediation to areas of the country that are not well covered either by supporting extension of the existing provision of outreach services or by providing reasonable travel expenses to those living in areas with less access to a mediator.

We consider that coverage of 78% of the population living within five miles of a mediation service, 21% of the population living within 5–15 miles and less than 1% having to travel more than 15 miles is acceptable given the number of times a client would expect to seek mediation services. We will continue to keep this level of access under review and seek to improve this where it is poor.

The revised mediation fees currently out for consultation propose increases in funding for assessment meetings and for agreed settlement proposals, as well as allowing greater flexibility in contracting arrangements. It is hoped that these will act as an incentive for mediation providers to continue to offer services and where possible to expand services.

- (vii) Incorporate into the quality assurance regime it applies to mediators undertaking legal aid work, measures such as the proportion of cases where agreement is reached, and the proportion of cases which do not return to court, and apply sanctions to poor performers,

We have developed the Mediation Contract Management Review Criteria (CMRC), a tool which will provide Reports on individual services' performance. It will look at conversion rates and outcomes for services compared regionally and nationally. It will be fully implemented in early 2007. This tool will allow the Commission to work with suppliers to improve performance and justify sanctions where it is appropriate.

- (viii) Revise the funding structure for mediators so that fees for not- for-profit and commercial mediators will be brought into line.

There are historical reasons behind the distinction in remuneration rates between the two sectors. When we introduced publicly funded family mediation there was no national network of suppliers, no application of a standard quality assurance measure and no data or experience to base costs on. By necessity meeting the overall objective had to be taken in stages.

Firstly, it was to develop a quality assured national network and secondly, introduce permanent contracting arrangements. It was necessary to provide considerable support to the voluntary sector, many of whom were not familiar with contracting as a source of funding, to enable them to build the necessary capacity to take on cases.

Once capacity and quality were established, an additional phase was needed to manage the transition of the voluntary sector to permanent contracting arrangements that would be consistent with the independent contracting arrangements. This transitional phase is now ended.

In April 2007, Unified contracts will be introduced for both mediation sectors. In February 2007 we published a consultation paper which contained proposals that will align Independent and voluntary suppliers onto the same remuneration scheme.

The new fee scheme will be implemented in October 2007.

- (ix) The Commission already fund assessment meetings for both parties where only one party is currently entitled to legal aid. As part of this review of the funding structure, the Commission should assess the cost-effectiveness of funding mediation for both parties, where only one party is currently entitled to legal aid as currently the average cost of a mediated case is less than half that of a case in which mediation had not been tried.

In terms of funding private clients, this has wider issues surrounding our statutory powers, as well as potentially significant cost considerations. Any decision on this would have to be taken by the Government, in consideration of its overall available budget.

Question 53 (Mr Don Touhig): Monitoring

We have developed the Mediation Contract Management Review Criteria (CMRC), a tool which will provide reports on individual services' performance. It will look at conversion rates and outcomes for services compared regionally and nationally. It will be fully implemented mid 2007 and will be in place for the start of the new contracts in October 2008. This tool will allow the Commission to work with suppliers to improve performance and justify sanctions where it is appropriate.

The report will look at:

- Volumes by provider as well as regionally and nationally.
- Conversion rates between willingness tests and assessment meetings and assessment meetings and mediation by provider, regionally and nationally.
- A breakdown of mediation outcomes by provider, regionally and nationally. This looks at full agreements, agreements with no Memorandum of Understanding, partial agreements and breakdowns.
- The use of outreach locations.
- Average mediation length by provider, regionally and nationally.
- Average number of sessions by provider, regionally and nationally.
- Referral sources by provider, regionally and nationally.
- Use of disbursements.

MONITORING SOLICITOR REFERRALS TO MEDIATION

The LSC will introduce new Key Performance Indicators for contracted family suppliers. One KPI will monitor the number of referrals made by individual firms to mediation and sanctions will be available and imposed if solicitor firms do not make appropriate and timely referrals to mediation. We will monitor the use of APP7 exemption reasons to see if the use of any particular exemption is disproportionate.

MONITORING THE VIEWS OF CLIENTS AND PERCEPTION OF WHETHER CLIENTS CONSIDER MEDIATION IS MORE EXPENSIVE

We need to develop a benchmark for measuring this perception and for obtaining the views of clients more generally. This will be done prior to implementation of the new contracting arrangements.

Question 66 (Mr Don Touhig): Current NFP payment rates

The NFP contracts introduced in October 2004 were designed to assist this sector by incentivising an increase in the work volumes undertaken whilst at the same time providing them with a fixed guaranteed income that would not be subject to reconciliation.

The transitional contracting model consisted of three paybands, with a higher hourly rate for work done linked with the lower fixed fee element of the monthly payment and *vice versa*. It is a transitional model to support the NFP sector in working towards the same payment terms as the FP sector and it was expected that services should move up the paybands through the duration of the contract. Payband C is the one mostly closely aligned with the independent contract.

Payband A

CURRENT NFP RATES PAYBAND A

Fixed annual payment £36,000

Category of Work	Single Session		Multi Session		Agreed Proposals	
	Hours	Rate A	Hours	Rate A	Hours	Rate A
Sole All Issues Mediation	2	£88	9	£396	2.25	£99
Co- All Issues Mediation	2	£118	9	£546	2.25	£99
Sole Property & Finance	2	£88	7	£308	1.75	£77
Co- Property & Finance	2	£118	7	£428	1.75	£77
Sole Child Only	2	£88	5	£220	1.5	£66
Co- Child Only	2	£118	5	£310	1.5	£66
Willingness Test	0.5	£22				
Assessment Meeting—Separate	1	£44				
Assessment Meeting—Joint	1.25	£55				

Payband B

CURRENT NFP RATES PAYBAND B

Fixed Annual Payment £24,000

Category of Work	Single Session		Multi Session		Agreed Proposals	
	Hours	Rate B	Hours	Rate B	Hours	Rate B
Sole All Issues Mediation	2	£136	9	£612	2.25	£153
Co- All Issues Mediation	2	£166	9	£762	2.25	£153
Sole Property & Finance	2	£136	7	£476	1.75	£119
Co- Property & Finance	2	£166	7	£596	1.75	£119
Sole Child Only	2	£136	5	£340	1.5	£102
Co- Child Only	2	£166	5	£430	1.5	£102
Willingness Test	0.5	£34				
Assessment Meeting—Separate	1	£68				
Assessment Meeting—Joint	1.25	£85				

Payband C

CURRENT NFP RATES PAYBAND C

Fixed Annual Payment £9,500

Category of Work	Single Session		Multi Session		Agreed Proposals	
	Hours	Rate C	Hours	Rate C	Hours	Rate C
Sole All Issues Mediation	2	£168	9	£756	2.25	£189
Co- All Issues Mediation	2	£198	9	£906	2.25	£189
Sole Property & Finance	2	£168	7	£588	1.75	£147
Co- Property & Finance	2	£198	7	£708	1.75	£147
Sole Child Only	2	£168	5	£420	1.5	£126
Co- Child Only	2	£198	5	£510	1.5	£126
Willingness Test	0.5	£42				
Assessment Meeting—Separate	1	£84				
Assessment Meeting—Joint	1.25	£105				

COMPULSORY CONSIDERATION OF AND COMPULSORY MEDIATION

A paramount principle of mediation is that the process is voluntary. The LSC requires all publicly funded clients to compulsorily consider the use of mediation, which differs significantly from compulsory mediation. It involves publicly funded clients attending an assessment meeting with a mediator, to find out about the benefits of mediation and to determine whether the circumstances of the case are suitable for mediation. Once clients are aware of the benefits of mediation they are much more likely to actively and positively participate in mediation leading to better outcomes.

Supplementary memorandum submitted by the National Audit Office

Question 114 (Mr Don Touhig): Letter from the Family Mediators' Association

Mr Touhig referred to a letter sent to the Committee in advance of the hearing which makes representations about the Commission's consultation paper, *Legal Aid Reform Family and Family Mediation Fee Schemes—A Consultation Paper*, published on 1 March. The Commission has proposed changing the fee structure for legally-aided family work described at paragraph 1.3 and Appendix 1 of the Comptroller and Auditor General's Report. Specifically, Mr Touhig highlighted a concern that one consequence of the changes to the fee structure was that applicants would be required to consider mediation at a later stage than at present, possibly once substantial legal work had already been done, and that this would result in higher legal fees being incurred.

The Legal Services Commission published their response to the consultation and their final fees paper *Legal Aid Reform Family and Family Mediation Fee Schemes for October 2007* on 21 June 2007. The most significant way in which the final fee schemes differ from those proposed in the consultation is that fixed fees at "Level 3" (which starts from the issue of proceedings) will not be implemented at this stage. The consultation document, the Commission's response, and the final regulatory impact assessment are all published on the Commission's website, www.legalservices.gov.uk.

Because the proposed new scheme simultaneously changes the fee structure and the fee rates, and makes mediators rather than solicitors responsible for deciding whether the exemption from considering mediation should apply in cases where there is fear of domestic violence, it is difficult to predict with confidence what the impact on cost is likely to be.

There is not an exact correlation between the current fee scheme and the final fee scheme, but Figure 1 below shows how the types of legal aid described in the Comptroller and Auditor General's Report broadly correspond to the proposed fee structure. The Commission delegates authority to solicitors to establish clients' eligibility for what it calls "controlled work" (Level 1 and Level 2 work under the new fee scheme). Beyond this point an application for further funding must be approved by the Commission. Before it will approve further funding (what was described as the new "Level 3" and which will now remain as certificated work paid on hourly rates) the Commission requires clients (unless exempt) to have considered mediation. Under the new fee scheme the point at which clients must demonstrate to the Commission that they have considered mediation is when they apply for "Level 3" funding. Under the old fee scheme similar applications would have been likely to have been made for cases at the same point (the new "Level 3"), although because "Level 2" includes some previously certificated work there will have been some cases in which the Commission would have sought at a slightly earlier point evidence that mediation had been considered.

Figure 1

A HIGH LEVEL SUMMARY OF THE WAY LEGAL AID IN FAMILY BREAKDOWN CASES
UNDER THE CURRENT FEE SCHEME TRANSLATES TO THE NEW FEE SCHEME

<i>Current fee scheme</i>	<i>Proposed new fee scheme</i>
Initial legal help and advice, currently funded as “Legal Help” (“Controlled work”)	“Level 1” covers initial advice (“Controlled work”)
Further legal help and advice, currently funded as “Legal Help” or “Help at Court” (Controlled work); plus some work currently carried out as “Help with Mediation” or “General Family Help” (for which a certificate from the Commission is needed, as described at Appendix 1 of the Comptroller and Auditor General’s Report)	“Level 2” covers further legal help after initial advice (all Level 2 work will now be “Controlled work”)
All other work for which an application to the Commission for funding is currently required, including some work carried out as “Help with Mediation” or “General Family Help”, plus “Legal Representation”	“Level 3” includes several different fee rates to cover different sorts of additional work, including representation at court. The Commission will need to approve all applications for Level 3 funding, and at this point will require evidence that mediation has been considered.
Mediation work is paid at fixed rates for profit-making organisations. Non profit-making organisations receive an annual retainer and a separate fee per case.	All mediators will be paid the same fixed rate fees.

The new scheme also changes the way in which fees are calculated. The current “tailored fixed fee” scheme pays individual solicitors a fixed fee for doing different sorts of work, but the fee rate varies between different firms of solicitors. The new scheme pays fixed fees to all solicitors on new scales for particular sorts of legal work at “Level 1” and “Level 2”. There are variations for different parts of the country but, apart from exceptional cases, the same fee is payable regardless of the amount of work done. Following consultation, the Commission has deferred a decision on fees for “Level 3” work which, in the interim, will continue to be paid at hourly rates.

The proposed change does move to a slightly later stage the point at which individuals must demonstrate to the Commission that they have considered mediation. This does not mean that the point at which they are actually referred to mediation will necessarily change, or that mediation is more or less likely to succeed. In evidence to the Committee, Carolyn Regan commented that the new scheme was intended to be more flexible, and the fixed fee structure would act as an incentive for solicitors to refer clients to mediation early in the process because fixed fees will mean there is a financial incentive to seek swift resolution of cases.¹

A further change is that, in future, mediators rather than solicitors will carry out the initial assessment of whether a case is potentially suitable for mediation in cases where there are concerns about domestic abuse. As illustrated at Figure 3 in the Comptroller and Auditor General’s Report this has historically been one of the most widely used exemptions. Mediators surveyed by the National Audit Office believed that the grounds for exemption applied would not necessarily be barriers to successful mediation and it is intended that following the change use of this exemption will reduce.

The new fixed fees were calculated on the basis of average historic fees paid under the “tailored fixed fee” scheme. The Commission’s regulatory impact assessment predicted that the overall impact would be cost neutral, although some providers’ income would increase and others’ decrease. There is some regional variation in the impact predicted by the Commission. Overall, the proportion of providers whose income was predicted to decrease was 28%, but this varied from 44% in London to 0 per cent in Liverpool.²

Because solicitors will be able, under the new scheme, to do more work before clients have to make an application to the Commission, it will be possible for them to have done more work before clients are referred to mediation. But no conclusion can be drawn at this stage about whether solicitors will actually do more or less work than before. Some work that would previously have been undertaken under the “Help with Mediation” or “General Family Help” schemes will now fall within the scope of the fixed fee “Level 2” scheme. As noted at paragraph 3.9 in the Comptroller and Auditor General’s Report the Commission needs more robust management information systems to track the amount of legally-aided work from solicitors mediated and non-mediated clients require.

2 July 2007

¹ Questions 105–106; 109–112.

² The Regulatory Impact Assessment is published at http://www.legalservices.gov.uk/docs/civil_consultations/FamilyRIA_v.5_20.6.07.pdf

Memorandum submitted by the Family Mediators' Association

The Family Mediators' Association is encouraged to read today's statements by Sir John Bourn, the Comptroller and Auditor General of the National Audit Office and Edward Leigh MP, Chairman of the Committee of Public Accounts. Both statements concerned the National Audit Office review of *Legal Aid and mediation for people involved in family breakdown* published today.

The FMA welcomes the Report which sets out clearly and succinctly what family mediators have been aware of for a considerable time and highlights the benefits of family mediation to participants, their families and the tax payer.

The FMA is particularly encouraged by the NAO's recommendations to the Legal Services Commission aimed at increasing family mediation awareness and providing incentives for its use.

However, the FMA's optimism and enthusiasm for the future of family mediation has been diluted by the Legal Services Commission's updated proposals on strategy and the fee structure for public funding of family mediation, published only 24 hours ago, and which pay no apparent attention to the NAO's recommendations.

Of particular concern is the loss of the exemption from the statutory charge for legal help with mediation. This proposal removes a major incentive to parties to elect to mediate and is a worrying indicator of a lack of will on the part of the LSC to support realistically the option of mediation for those involved in family breakdown. Also of considerable concern is the proposal to move the point at which solicitors are required to refer publicly funded couples to mediation; from the initial request for legal help to a point just before court proceedings are issued. This would be potentially disastrous for mediators, prospective parties and the public purse. Much of the work—such as financial disclosure—will have been done by solicitors well before the clients are referred to a family mediator. Such work could have been done in mediation at considerably reduced levels of acrimony, time and public expense.

It is the FMA's firm hope that the NAO's recommendations will receive proper attention from the LSC and be implemented sensibly and speedily.

Deborah Turner
Chair

2 March 2007

Letter from Chief Executive, Legal Services Commission to Chairman, Family Mediators' Association (FMA)

I am writing in response to the press release date 2 March 2007³ and note the particular concerns regarding the statutory charge and mandatory referral point to mediation.

We do not consider that help with mediation and the exemption from the statutory charge for legal advice to support mediation has been a major incentive for parties to attend mediation. In 2005–06 only 28% of publicly funded clients used help with mediation. Mediation itself will still be exempt from the statutory charge and solicitors will still be able to provide the independent legal advice for clients attending mediation. The levels at which the statutory charge is applicable is subject to consultation and we will review responses through the usual consultation process.

The press release highlights some confusion as to the proposals in relation to the mandatory referral point. It has never been the case under the existing arrangements that this will take place at the initial request for legal help. The mandatory referral currently comes when an application is made for General Family Help. In *Legal Aid: A sustainable future* consultation it was proposed that the mandatory referral should come before Legal Representation was applied for to maximise the flexibility on when a referral is made. However, following representations and feedback from the profession we have revised this proposal to more closely resemble the existing arrangements. In Finance cases the mandatory referral point is the same as currently. In Children cases mandatory referral comes after the first directions appointment so that the client has the opportunity to consider a variety of options for resolving their dispute without resorting to litigation.

We are seeking to encourage appropriate referrals at a time most suitable for the client. Some clients will benefit from being referred early to mediation and for some it will be more constructive at a later stage. The proposals reflect this flexibility whilst still retaining a mandatory referral control.

The proposed Family Fee structure removes the financial disincentives for solicitors to make referrals to mediation, which has historically been an obstacle to increasing mediation referrals. By paying fixed fees under Family Help we are rewarding efficiency. Solicitors will receive the fixed fee regardless of whether they make a referral to mediation or not. However, if they refer to mediation at an early stage and it resolves the dispute the firm's profit margins on the fixed fee will be maximised and they will receive a settlement payment under level 2.

³ Ev 18

Therefore we should start to see referrals to mediation earlier in the process, when it is appropriate for clients, and we want to actively encourage this flexibility. We should see more referrals being made before the mandatory bite point, where it is appropriate to the client because of the financial benefits for solicitors in making referrals to mediation at an earlier stage.

We will also be monitoring more closely referrals to mediation by individual solicitor firms. If solicitors do not make appropriate referrals we have the ability to performance manage this and impose appropriate contract sanctions.

We are proposing some changes to the mediation exemptions to increase the number of clients who can benefit from mediation. At the moment if there is an issue of domestic violence the solicitor can automatically exempt the client from the need to consider mediation. However, mediation can still be successful even if there is a history of domestic violence. It is proposed that the mediator, rather than a solicitor, will make the assessment of a client in determining whether domestic violence should automatically prevent mediation.

We are also consulting on changing the existing exemption for respondents facing a court date within eight weeks to four weeks again to maximise the potential number of clients who can participate in mediation.

We welcome the NAO's findings that provide evidence on the value for money of mediation the profession itself has been unable to provide and we look forward to continuing to work with you for the benefit of clients.

23 March 2007

Memorandum submitted by National Family Mediation

MEDIATION: BUSINESS AS USUAL

"Family disputes that are resolved through family mediation are cheaper, quicker and less acrimonious than those settled through the courts". So states the long awaited National Audit Office (NAO) value for money Report, *Legal aid and mediation for people involved in family breakdown* published on 2 March 2007. This is something mediators have known for over 25 years. Cheaper is not necessarily best is usually the first response from the legal profession. National Family Mediation would not argue with that but what is cheaper? Is it just financially cheaper? What about emotionally cheaper? The NAO identifies this as a key benefit and in this case it is financially cheaper. It recommends that the Legal Services Commission (LSC) actively promotes mediation in the guidance and information the LSC provides online and in leaflets and information packs for solicitors and their clients, "whether legally aided or not".

At the same time as the NAO Report was published the LSC issued a consultation document "*Legal Aid Reform: Family and Family Mediation Fee Schemes*" which contains proposals to change the point at which referrals into mediation are made. It proposes that referral into mediation happens at the point when representation at court is needed. But at this stage in the process solicitors and clients will have invested a lot of time and energy into preparing for the fight, a complete contradiction to the NAO recommendations and a reconfirmation of the existing picture. National Family Mediation understands the LSC's need for a unified fee structure (although we have concerns about the impact if this on smaller providers). We have no problem with the creation of a competitive market place. However, to implement these changes before addressing the recommendations in the NAO Report seems to be putting the cart before the horse.

The NAO Report states that family mediators are only involved in 20% of those cases which qualify for public funding. This is not a level playing field upon which to compete. If the LSC addressed this imbalance and gave mediation providers the opportunity to gain a larger share of the existing market, smaller suppliers would be able to withstand the forthcoming changes and continue to offer a service. As it is, the LSC's new unified contract and the revised fee schemes will see a number of not for profit providers either withdraw from public funding work or more likely go out of business.

The NAO identifies the UK as having good coverage of mediators with less than 1% of the population having to travel more than 15 miles for a meeting with a mediator. In a year's time what will that picture be? It is ironic that on the day when the NAO report commends mediation, and recommends that this proved and successful intervention be made more widely available, the LSC publish a consultation which threatens the very viability of mediation provision.

Jane Robey
Chief Executive, National Family Mediation

12 March 2007

Letter from Chief Executive, Legal Services Commission to Chief Executive, National Family Mediation

In response to your memorandum submitted to the Public Accounts Committee hearing,⁴ I would like to address concerns you have raised relating to the mandatory referral point and the provision of NFP supply.

We recognise and support the appropriate use of mediation when it will achieve optimum benefit to the client. It is for this reason that we want the requirement of when to consider mediation to be as flexible as possible. Some clients will benefit from being referred early to mediation and for some it will be more constructive at a later stage. In exploring this flexibility, it was proposed in, *Legal Aid: A sustainable future* that the mandatory referral should come before legal representation was applied for to maximise the flexibility on when a referral is made.

However, following representations and feedback from the profession, we have revised this proposal to more closely resemble the existing arrangements. In Finance cases the mandatory referral point is the same as currently. In Children cases mandatory referral comes after the first directions appointment so that the client has the opportunity to consider a variety of options for resolving their dispute without resorting to litigation.

Solicitors are aware that their clients have to consider the use of mediation. Under the FAInS pilot, solicitors were given devolved powers so that they could make referrals to mediation when they considered it appropriate for the client. Evaluation of the pilot showed that referrals to mediation did not decrease across England Wales generally, as a result.

However, the proposed Family Fee structure removes the financial disincentives for solicitors to make referrals to mediation, which have historically been an obstacle to increasing referrals. By paying fixed fees under Family Help we are rewarding efficiency. Solicitors will receive the fixed fee regardless of whether they make a referral to mediation or not. However, if they refer to mediation at an early stage and it resolves the dispute the firm's profit margins on the fixed fee will be maximised and they will receive a settlement payment under level 2.

Therefore, we should start to see referrals to mediation earlier in the process when it is appropriate for clients and we want to encourage this flexibility. We should see more referrals being made before the mandatory referral point, at times when it is appropriate to the client, because there are financial benefits for solicitors in making referrals to mediation at an earlier stage.

The NAO recommended the alignment of fees paid to NFP and Independent mediators and this is something that we are looking to implement from October 2007. We accept that some NFP services will be detrimentally impacted as a result of this change. However, as you know, we have been working with the NFP sector for over three years in preparation for this alignment.

The current NFP contracts, which were introduced in October 2004 were designed to assist this sector, by incentivising an increase in the work volumes undertaken whilst at the same time providing them with a fixed guaranteed income that would not be subject to reconciliation.

It was a transitional model to support the NFP sector working towards the same payment terms as the FP sector and it was expected that services should move up the pay bands through the duration of the contract. Pay Band C is the one mostly closely aligned with the independent contract. The current contracting arrangements will have been in place for three years by October 2007. The profession suggested this three year period as an appropriate period of time to enable NFP providers to provide for this change.

As part of this work we also supported the sector by:

- Making available a hardship fund support services moving from the pilot to the transitional contract in October 2004. This ring fenced additional funding was available for services that could demonstrate particular financial hardship.
- Providing specially designed two day Financial and Performance Management training to all NFP service managers during the end of September and beginning of October 2004. This training included important networking aspects for the sharing of best practice, marketing, funding and structuring of organisations.
- Encouraging services to move up the pay bands by paying transitional one off payments of £5,000 and £7,500.

The Mediation Fee proposals, which are currently out for consultation, are the result of negotiations with key stakeholders including your organisation, as well as feedback and representations from individual mediation providers and our own management information.

Although the NFP suppliers will lose the separate fixed fee element of the monthly payment, the rates for work completed will be higher than those in their current transitional contract.

We believe the Family and Mediation fee scheme proposals will encourage greater use of mediation and early dispute resolution as well as making services more efficient.

⁴ Ev 19–21

We are encourage to note that the recommendations build on the trend that the LSC has been developing with mediation over the past years and the findings provide evidence on the value for money of mediation that the profession itself has been unable to provide.

23 March 2007
