

Proposals for the Reform of Legal Aid in England and Wales

Ministry of Justice Consultation Paper

Family Mediation Council Response





## Executive Summary

The Family Mediation Council comprises six professional member organisations which each independently represent and regulate professional family mediators in England & Wales: ADR Group, College of Mediators, FMA, The Law Society, NFM, and Resolution. Our major concerns with the Green Paper can be summarised as follows:-

1. **Voluntariness** - Parties must not be railroaded into mediation. The Green Paper's removal of any publicly funded paid-for alternative/s represents absence of choice and absence of voluntariness for the divorcing and separating public. This also represents an abandonment by the State of its obligation to provide publicly funded representation for the adjudication of disputes where adjudication is the most appropriate option;
2. **Domestic abuse** - The paper's offering towards family disputants facing domestic abuse is naïve and uncoordinated.
3. **Need for adequate funded legal advice** - The removal of Level 2/Family Help (Lower) public funding for solicitors supporting parties through mediation and implementing mediated settlements (typical unit payment rates a firm of solicitors can receive by way of Level 2/Family Help (Lower) by the side of mediation of £221-370 outside London/£256-429 in London) and its replacement with an unexplained undocumented fee of £150 for the same work is irrational, and inadequate; further, it fails to acknowledge and continue the effective partnerships currently operating between mediators and solicitors producing lasting, effective, *implemented*, mediated settlements.
4. **Need for appropriate access route into mediation** – *The main access route to mediation has been provided by solicitors' referrals. If this is to be effectively removed there will be no adequate substitute.* There is no evidence to suggest that the proposed telephone gateway into public funding will operate adequately or at all as a sole access point and route into mediation; existing telephone access points into family mediation have had only very limited impact to date.
5. **Financial eligibility** - The Green Paper is irrational around some of its proposed changes in financial eligibility, such as abolition of capital passporting for the current passporting benefits, which is likely to financially exclude those having no access to other funding or services. It also creates elaborate uncosted administrative requirements, including a lack of proportionality in seeking to apply a statutory charge equivalent in both contested property and non-contested mediations, when the fees involved are small compared to the likely costs of collection. It also removes a current driver for parties to choose mediation.<sup>1</sup>
6. **Increase in number of litigants in person** - The reforms appear to have a minimal effect on mediation, creating 3,300 only new publicly funded mediations : no data is supplied to underpin this assessment. If this is correct, there will surely be highly significant consequences for the rest of the Family Justice System, particularly in terms of a substantial increase in litigants in person.
7. **Timing issues**- no reasons are given for the need to press forwards with legal aid changes now when an interim report on the wholesale reform of the Family Justice System is imminent from the Family Justice Review, and the new provisions of the 2010 Family Procedure Rules and Pre-Application Protocol have yet to take effect as at 06 April 2011.

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<sup>1</sup> The Law Society and Resolution do not endorse the view set out in this Response as regards the statutory charge applying to mediation costs, and will be addressing the statutory charge in their own Green Paper responses.



# Proposals for the Reform of Legal Aid in England and Wales

## Ministry of Justice Consultation Paper

### Family Mediation Council Response

#### A. Introduction

1. The Family Mediation Council is composed of the professional organisations (“member organisations”) which represent and regulate professional family mediators in England & Wales:-

- ADR Group
- College of Mediators
- FMA
- The Law Society
- NFM
- Resolution

2. Its aims and objectives are to:-

- i) Support the member organisations in their co-operative development of mediation and ADR;
- ii) Provide maintenance and development of professional and training standards as a means of ensuring public confidence in and awareness of family mediation;
- iii) Provide the profession of family mediation as a whole, the member organisations, mediation services and mediators with one unified body with which to make representations to government and other national interests, undertake negotiations over any matters which may concern the constitution, conduct and/or working conditions of members of the profession and to give information regarding family mediation to the media;
- iv) Prescribe and maintain a set of professional practice and training standards common to all the member organisations, to which all members of the member organisations must adhere, and which the member organisations themselves must regulate and monitor.

- v) Provide the member organisations with a forum for collaborative and cooperative discussion and policy-making;
  - vi) Arrange that appropriate information regarding mediation, mediation services and mediators is collated and available in an accessible form or forms.
3. This response is drafted by way of offering to the Ministry of Justice (MoJ) not merely a mediation perspective on its Green Paper, but further, an appreciation of the difficulties likely to be experienced by those seeking to resolve their family disputes after implementation of the changes contemplated by the Green Paper, but who currently have available to them the whole range of publicly funded family dispute resolution services. This Green Paper Response does not seek to address the underlying political imperatives as perceived by the Coalition Government as drivers for legal aid reform, although our response will offer some critique where FMC considers that the logic or reasoning underpinning the proposed reforms leaves something or even much to be desired.
4. The first of these aspects relates to the Green Paper’s argument that people bring disputes to Court “too readily”<sup>2</sup>. One of the express purposes of the reforms is to “stop the encroachment of unnecessary litigation into society”<sup>3</sup>.
5. To say this is to ignore the choices open to those involved in a family dispute. There are a whole range of interventions available to those so involved, from direct negotiation through ADR and into the realms of heavyweight litigation. This is the Family Dispute Resolution Continuum (see Figure One below).<sup>4</sup>

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<sup>2</sup> Ibid para 2.8

<sup>3</sup> Ibid para 2.11

<sup>4</sup> Note the availability of Other Hybrid Processes such as Med-Arb or Family Group Conferencing

FIGURE ONE

DO NOTHING

- Direct Negotiation (without representatives)
- Indirect Negotiation (through representatives)
- Hybrid Negotiation (such as Collaborative Law)
- Mediation
- Early Neutral Evaluation
- Non-Binding Arbitration
- Binding Arbitration
- Mini Trial/Private Adjudication<sup>5</sup>

LITIGATION

5. This FMC Response is only concerned with the types of family dispute where publicly funded mediation is already available as follows, and where the Green Paper suggests public funding for legal representation may be withdrawn<sup>6 7</sup>:-
- Private Law Children matters;
  - Financial Relief ancillary to Divorce and Civil Partnership Dissolution;
  - s14 Trusts of Land and Appointment of Trustees Act 1996 applications between cohabitants (or other unmarried family members);
  - Applications for Financial Provision for Children under Schedule 1 of the Children Act 1989;
  - Matters of Inter-Spousal and/or Child Maintenance;
  - Matters around the merits of Divorce and Civil Partnership Dissolution;

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<sup>5</sup> Otherwise “Rent-a-Judge”.

<sup>6</sup> For this reason Child Abduction and International Family Matters are not addressed in this Response.

<sup>7</sup> FMC notes and deplores that the Green Paper appears silent on the specific preservation of public funding for legal representation in the face of Domestic Abuse both for matters under s14 of the Trusts of Land and Appointment of Trustees Act 1996 and applications for financial provision for Children under Schedule 1 of the Children Act 1989, for which there seems no logical basis. These at present form a significant part of family mediators’ portfolio of work and this response has been prepared on the basis that these areas of work will remain susceptible to public funding for mediation.

- Decisions about any other aspects of Relationship Breakdown (including Emotional and Communications matters);

For the remainder of this Response, the term “family disputes” refers to the above list of disputes in the absence of further definition.

6. It is open to any party to a family dispute to decide for him or herself where to pitch a first attempt at Family Dispute Resolution (FDR) , nevertheless, one key element is that it is only at the very highest, complex and most expensive level of intervention that a reluctant party can be compelled to engage in the FDR process- an application to court<sup>89</sup>. In the absence of such a court application, a disengaged Respondent can frustrate any attempt at a less high-conflict FDR process- entry to which is dependant upon consensus on the part of the parties- by simply refusing to engage with that process. Further, and sadly, where parties are in dispute, agreement as to the applicable FDR process tends only sometimes to be readily forthcoming, and never from the disengaged.
7. The second of these aspects relates to the voluntariness of mediation, one of the four core mediation principles: mediation being
  - Voluntary;
  - Confidential;
  - Impartial, and with
  - Decision making resting with the participants.

Since the 1996 beginnings of s29 of the Family Law Act 1996 and the linked Legal Services Commission Funding Code Provisions requiring those applying for public funding to resolve family disputes where publicly funded mediation was available to attend a meeting with a mediator to consider mediation, there has arisen a throughput of some 15,000 family mediations per year where one or both parties have been publicly funded. In no single one of these cases has mediation been compulsory- all that has been compulsory is the attendance by parties seeking public funding at a meeting with a mediator to consider mediation.

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<sup>8</sup> Except for matters of child maintenance which are typically currently resolved through the Child Support Agency where the Respondent to an application will not engage in any other FDR process, although changes to this are the subject of new current consultation in the DWP Green Paper “Strengthening families, promoting parental responsibility: the future of child maintenance” CM7990 January 2011.

<sup>9</sup> And see Figure One above

8. In her Family Law article Marian Roberts<sup>10</sup> remains very clear that a party's "informed unwillingness to mediate" (which is dramatically distinct from a mere *disinclination* to mediate) remains an appropriate analogue for mediation suitability, i.e. anyone who "has heard about mediation from a mediator"<sup>11</sup> and who does not wish to mediate is *per se* unsuitable for mediation.<sup>12</sup>
9. There have been a number of other initiatives over the years to assist family disputants (including privately funded family disputants), into mediation, namely:-
  - i) The Law Society Family Law Protocol<sup>13</sup> was perhaps the first into the arena after s29 of the Family Law Act 1996 and the LSC Funding Code, committing all solicitors at the outset of every new family dispute and throughout the life of the case to canvass the suitability and cost-effectiveness of ADR- but this had nothing like the impact of s29 and the Funding Code, and to date, there has been far more publicly funded mediation in England and Wales than privately funded mediation.
  - ii) In Court/Court-Referred mediation under the President's Private Law Programme<sup>14</sup>, arranging for mediators to be present at court on first directions appointments in private law children matters so as to be able to offer information about mediation, a mediation information and assessment meeting and possibly even some early mediation for disputants at court as an alternative to s7 and s37 reportage<sup>15</sup> and judicial determination<sup>16</sup>;
  - iii) The provisions in the new Family Procedure Rules requiring the court to encourage "the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such

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<sup>10</sup> *Family Law* (2010) Vol 40; pp 661-666

<sup>11</sup> A phrase attributable to Mary Banham-Hall

<sup>12</sup> See also the research of Hazel Genn et al (2006) 'Twisting Arms: Court referred and court linked mediation under judicial pressure'; *Ministry of Justice Research Series* 1/07 May. This finds that the motivation and willingness of the parties to negotiate and compromise are critical to success in mediation.

<sup>13</sup> First published in 2002 and now in its Third Edition (2011)

<sup>14</sup> Now to be incorporated in FPR 2010 Practice Direction 12B (forthcoming)

<sup>15</sup> Children Act 1989

<sup>16</sup> LSC report on In-Court Mediation Pilots (with public funding for duty mediators at court from June-December 2009) and also to routine incompleteness of safeguarding as sabotaging the current effectiveness of the PLP at many if not most court centres

procedure”<sup>17</sup> and further stating that “The court must consider, at every stage in proceedings, whether alternative dispute resolution is appropriate.”<sup>18</sup>

- iv) The new Pre-Application Protocol<sup>19</sup> which provides for judicial referral of all parties at the first directions appointment to a mediation information and assessment meeting unless exemptions similar to the LSC Funding Code referral exemptions apply, or both parties have already recently attended such a meeting, whilst at the same time setting up a mechanism whereby parties will be able to access such a meeting.
10. (iii) and (iv) from the above list are, of course, as yet untested- and will apply across the board to both publicly funded and privately funded family disputants. Further, all of these initiatives continue to rely on the voluntariness of mediation- disputants are given the opportunity to hear about family mediation from a family mediator and take their own decision about mediation having heard about it and had the opportunity to ask the mediator such questions as they wish, also being thereby enabled to consider with the mediator alternative options such as
- the “mainstream” of inter-solicitor negotiation;
  - other FDR/ADR options such as collaborative law or family arbitration<sup>20</sup>; or
  - bringing court proceedings.
- Equally mediators are not required to “whistle blow” on parties who choose not to mediate, for whatever reason.
11. There are, of course, the normal financial consequences dependant upon which FDR option is selected, the publicly funded knowing that the statutory charge may apply, the privately funded knowing that the degree to which their dispute will assault their wallets will also depend upon which process they select, with mediation often the least expensive option.
12. But what the Green Paper proposals offer to publicly funded disputants involved in family disputes is different; they offer a new regime with a very

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<sup>17</sup> FPR 2010 r1.4(2)(e) SI 2010/2955

<sup>18</sup> FPR 2010 r3.2; r3.3 contains additional provision for the court to adjourn for ADR on suitable terms

<sup>19</sup> FPR 2010 Practice Direction 3A

<sup>20</sup> Forthcoming via the Family Law Arbitration Group (FLAG). CI Arb and Resolution

different take from what has gone before. It makes mediators the gatekeepers to public funding, the offer to the disputant being couched in no uncertain terms:-

“get publicly funded help via mediation or you’re on your own, on your own resources.” This is not a comfortably situation for family disputants, and it is an even less attractive position for mediators.

13. All mediators like to mediate. Most mediators love to mediate. But no mediator can work effectively with a railroaded disputant, who is mediating not by informed choice or by inclination, but in the cold knowledge that it is “mediate or else”, with no other help available if mediation is turned down-whether by the disputant, or, as can also be the case, by the mediator.
14. The new regime puts mediators in conflict with the parties who come to them to consider mediation. We know as mediation practitioners that there are many reasons why we must assess family disputants as not suitable for mediation.

These include:-

- Domestic abuse;
- Mental Health issues;
- Child Protection matters;
- Disengagement (of applicant disputant or respondent disputant);
- The subject matter of the dispute requiring an adjudicated outcome;
- Lack of Trust;
- Refusal to make full financial disclosure;
- Emotional unreadiness to mediate;
- Serious Imbalance in Bargaining Power;
- Lack of Competence

Yet disputants may wish, inappropriately, to mediate in the face of such reasons, which experienced mediators know render a particular dispute or disputant wholly unsuited to the mediation process. Mediators will now have to acquire significant expertise in explaining to distressed or angry disputants that the free publicly funded service they have come for is not available to them, and that they must withdraw to rely on their own resources to fund some other FDR process.

Less experienced mediators may even be placed *in terrorem* by violent or angry disputants who will not take no for an answer and who may continue by insisting that they are entitled to and will therefore be delivered of publicly funded mediation services.

15. This is new for mediators, and it will be new for the public funding reliant divorcing and separating public. It is perhaps a key principle of the Green Paper on which the Coalition Government is likely to find key alliance between publicly funded mediators and publicly funded mainstream lawyers unexpected and surprising. Organising public funding so as to impose improper pressure on family disputants to mediate with no other public funding option open is equally as bad for lawyers and mediators as it is bad for the disputants we all serve. Effective choice of process has been removed for disputants, with the consequence as identified in the Green Paper's own Impact Assessment of potential increase in criminality and decrease in social cohesion<sup>21</sup>. This is bad *realpolitik*.
16. Throughout, the Green Paper appears to adopt a strange unwillingness to acknowledge that there are many circumstances where the state has an obligation to provide a judicial solution to a family dispute, where there is an important adjudicative responsibility in respect of issues that require determination: that is to say when adjudication is the most appropriate intervention.<sup>22</sup>

Examples include:

- where there are irreconcilable conflicts of interest;
- where immediate decision-making is necessary;
- where there are serious disparities of power and/or capacity;
- where there are issues of public importance that require an authoritative ruling

Mediation should not have unrealistic or inappropriate demands placed upon it or be used for purposes for which it is not intended.

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<sup>21</sup> Impact Assessment MoJ028, paragraph 35(ii) makes reference to “persons seeking to resolve issues by themselves, a deterioration in case outcomes, reduced social cohesion, increased criminality, a domino effect of reliance on other public services, and increased levels of payment out by other government departments.”

<sup>22</sup> Law Com 192 1990 para7.24 endorsed the great value of mediation but warned that this encouragement should not fudge the adjudicative responsibility.

17. Mediators and the FMC, like The Law Society<sup>23</sup>, support the principle that litigation should be regarded as a last resort, and that wherever appropriate, people should be encouraged to make use of other means of resolving their disputes. However, as a matter of principle, we believe that the approach of taking large areas of public funding out of scope, or (as in the case of family law) restricting scope to assistance with mediation only (barring heavyweight domestic abuse), is wrong.

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<sup>23</sup> Law Society Response to this Green Paper

## **B. Domestic Abuse**

### ***B1 What is Domestic Abuse/Domestic Violence?***

18. The operation of the Green Paper reforms within a domestic abuse context give real cause for concern. As set out in the Green Paper, domestic violence justifying public funding for family disputes is narrowly defined, and very differently from the Association of Chief Police Officers' definition of domestic violence:

The shared ACPO<sup>24</sup>, Crown Prosecution Service and Government definition of domestic violence is "Any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults, aged 18 and over, who are or have been intimate partners or family members, regardless of gender or sexuality." Family members are defined as mother, father, son, daughter, brother, sister and grandparents whether directly related, in-laws or step-family.

19. The Green Paper suggests that public funding for other than mediation will only be available for family disputes

- Where the LSC or the applicant is funding (or the applicant has been a LIP in) ongoing domestic violence or forced marriage proceedings brought by the applicant, or there have been such proceedings in the last year and an order was made arising from the same relationship;
- Where there is a non-molestation order, occupation order, forced marriage protection order or other protective injunction in place against the applicant's ex-partner (or in the case of forced marriage, against any other person);
- where the applicant's partner has been convicted of a criminal offence concerning violence or abuse towards their family (unless the conviction is spent).

20. These exemptions together represent a very different level of domestic abuse from that most frequently encountered by mediators and those considering mediation. There also appears an absence of integration as between what may

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<sup>24</sup> [http://www.acpo.police.uk/asp/policies/Data/Domestic\\_Abuse\\_2008.pdf](http://www.acpo.police.uk/asp/policies/Data/Domestic_Abuse_2008.pdf)

entitle or disentitle a family disputant to publicly funded assistance as opposed to what may render such a family disputant suitable for the assistance actually funded and available: there existing a veritable maze of entitlement. Consider the following table:-

<b>Level</b>	<b>Of Domestic Abuse</b>	<b>Publicly Funded Mediation Available</b>	<b>Publicly Funded Representation Available</b>
<b>0</b>	None	Yes	No
<b>1</b>	Minor DA: situation assessed by mediator as suitable for mediation	Yes	No
<b>2</b>	More serious DA (but no DA proceedings): mediator assesses situation as unsuitable for mediation	No	No
<b>3</b>	Solicitor exempts from mediation referral <sup>25</sup> , allegation of DA against a potential party resulting within the past year either in police investigations or the issue of civil proceedings (but no order)	No	No
<b>4</b>	Ongoing DA proceedings, with an injunction in the past 12 year, or the other party has an unspent conviction concerning DA towards the family.	No	Yes

Where Domestic Abuse exists at levels 2 or 3, the family disputant cannot access publicly funded assistance of any nature- the abuse is sufficient to rule out mediation but not at such a level as to trigger the availability of publicly funded legal representation. There might equally be a risk that parties will seek and obtain public funding for domestic violence proceedings, by exaggerating or even inventing behaviour, and on the strength of this obtain public funding for other issues.

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<sup>25</sup> This will be an unlikely scenario if the Green Paper reforms are implemented as published, but represents the current exemption regime under the LSC Funding Code referral system

## ***B2 Between the cracks in the Domestic Abuse Pavement***

21. The FMC has a scattergun series of concerns here:-

- What happens where ongoing civil proceedings conclude without an order or are otherwise discontinued?
- There would seem to be no public funding for legal representation on family disputes where there are ongoing criminal (but not civil) proceedings.
- There is no public funding for legal representation on family disputes where there are criminal-only proceedings which conclude without a conviction.
- What about undertakings? Will these be analogous to civil orders and trigger public funding availability? If not, there are likely to be many more fully contested hearings since if an order but not an undertaking triggers the availability of publicly funded representation on children or money, nothing but an order will suffice, with a consequential drain on Court and judicial involvement.
- Are publicly funded victims to be faced by cross-examination at court by perpetrator litigants in person?
- Equality of arms in any event suggests that whether proof of abuse is required on a balance of probabilities or beyond reasonable doubt, far too many domestic abuse situations are finely balanced, false allegations are made, and all parties require representation for a civilised society.
- The Green Paper is silent on the implications of an important change in the law which is to be implemented shortly. What will be the interface between public funding and Domestic Violence Protection Notices and Orders (“go orders”) under the Crime and Security Act 2010, piloting from Summer 2011 in Greater Manchester, Wiltshire and West Mercia?

## **C The Symbiosis: Supporting Mediation with Legal Advice**

22. The Green Paper states that there will continue to be remuneration for legal advisers to support mediation (as was initially termed “Help with Mediation”) covering:-
- legal advice between mediation sessions so that family disputants can properly use negotiations in mediation “in the shadow of the law”<sup>26</sup> by obtaining a ranging shot from their legal advisers as to where they stand with a potential mediated settlement as compared with a potential adjudicated settlement;
  - legal advice on any legal issues arising within mediation with which mediators’ codes of conduct prohibit them from assisting;
  - the drafting of a consent order for implementing the outcome of mediation, including an M1 or its equivalent in financial ancillary relief matters;
  - implementation generally (including pension sharing and any consequential conveyancing).
23. What is puzzling is that the Green Paper states that “the average amount of time spent by solicitors equated to £150 of work.” No calculations or data are referenced for this, which is even more surprising since LSC Statistics for 2008/9 give an average cost per case of £466<sup>27</sup>, and the 2009/10 statistics supply the figure of £590<sup>28</sup>. FMC and its mediators are acutely disturbed by the disconnect between previously arrived at rates and the true amount of chargeable time required on such matters, which is likely to vary between 3-12 hours depending upon the complexity of the case. Under the new fixed fee system for private law, the fee for assisting with mediation will be £466 for financial matters and £456 for children matters, figures arrived at as a result of extensive discussions between practitioner organisations, the LSC and the MoJ, based on a detailed analysis of what the cases reasonably require. Again, no indication is given as to the basis on which this careful work is now being discarded, or as to how and why this figure has been calculated. Given the previous work, with its strong evidential basis, FMC regards the production of this apparently random figure, without explanation, as irrational.

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<sup>26</sup> Mnookin and Kornhauser 1979 Bargaining in the shadow of the law. *Yale Law Journal* 88: 950-997.

<sup>27</sup> Level 2 rates can be higher than this.

<sup>28</sup> As 15.

24. What these fees currently cover is set out in the LSC Funding Code Decision Making Guidance<sup>29</sup> states:-

5. Applications to court under Family Help (Lower) can be made to obtain a necessary consent order following settlement of part or all of the dispute. Applying to the court must be justified on a private client basis. It will therefore be exceptional in relation to children issues (having regard to the no order principle) but more usual in money cases. Attendance at court will not usually be necessary in these circumstances unless attendance has been ordered by the court or in other exceptional circumstances.

6. When a client is actually participating in Family Mediation or has successfully reached an agreement or settlement as a result of Family Mediation and is in need of legal assistance, this may be provided under Family Help (Lower). However, the mere fact that a mediation session takes place will not of itself justify the provision of Family Help (Lower) nor will the referral to mediation which can be carried out under Legal Help.

7. A solicitor may attend at one or more mediation session to advise their client during the mediation process. However, this should only be considered in exceptional circumstances such as where the client has particular cultural, health or complex legal issues, so as to justify the provision of legal advice at the mediation session itself. It is most important during mediation, that solicitors only advise their own client and do not directly or indirectly intervene in the mediation by discussing matters subject to the mediation with the other party or his or her solicitor. If the client requires non legal advice or support this is not covered by the Funding Code. The attendance of solicitors needs to be agreed by both parties and the mediator before the mediation can commence.

8. Conveyancing services are excluded from the scope of the Community Legal Service by paragraph 1(b) of Schedule 2 to the Access to Justice Act. However, the Lord Chancellor has directed that where it is necessary to provide conveyancing services to give effect to a court order in any funded proceedings or to an agreement reached to settle or avoid family proceedings, then the work to implement an agreement will come within scope. Family Help (Lower) will extend to work to implement an agreement or consent order including any necessary conveyancing work.

25. Properly drafted consent orders are essential once a mediated settlement has been reached to achieve finality in divorce and/or matters under s14 ToLATA 1996. This also prevents parties returning to litigation for additional financial

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<sup>29</sup> LSC Funding Code Decision Making Guidance Section 20.12 Family Help (Lower).

provision in future years, just as in difficult and emotional private law children matters, properly drafted orders can often be important not only to maintain a framework for the parties concerned but also to ensure suitable enforcement action in the event that there is inadequate adherence to the mediated settlement. This is absolutely not work for litigants in person, nor is drafting and implementing pension sharing arrangements.

26. Further, independent legal advice or legal review of mediated outcomes operates as a *safeguard against unfairness* for the parties in mediation, existing as it does as a private and informal process where the safeguards of due process do not apply. Focussed advice on the application of legal principles is often also necessary where (for example) there are issues around:-

- the legal situation of the provision of funds from members of the extended family to help buy the family home- were these gifts or merely softloans?
- what is the weight to be given in negotiations to pension CETVs as against property and savings?
- strong views concerning children seeing new partners, or extended family;
- what is the likely judicial approach as to whether contact need be supervised/supported, or unrestricted;
- issues around potential future insolvency

27. Some mediators are also very familiar with solicitors coming into one of more mediation sessions to provide direct legal advice during the session, although this is not common across England and Wales, and tends to exist in pockets (and is the topic of an excellent current Resolution training strand).

28. More frequent is the need for parties in mediation to take advice from their solicitors on the content and merits of an interim mediation summary prior to the parties returning to mediation to go firm on their planned settlement- “greenlighting” the proposed way forwards- there being a real frustration where, when they fail to do so, parties instead identify settlements which, perfectly properly in complex situations, their legal advisers then “unpick”, due to their not having been involved at an appropriate earlier stage. This can then bring about a need to return to a mediation which has been thought to have been concluded with what is believed to be a workable and effective settlement, when it is in fact an unworkable and/or ineffective settlement due to appropriate and beneficial legal input not having been secured.

29. To be recollected is that mediators cannot give legal advice (as opposed to legal information) and will feel extremely uneasy at the prospect of mediating clients who are not supported by adequate legal advice.

30. What is operating here is an absolute and necessary partnership or symbiosis between solicitors and mediators, properly and effectively funded by the LSC since the very start of publicly funded mediation in 1997/98: to lose this would be shameful. FMC is totally against the restriction of the amount of such funding to £150, especially given that at present LSC wholly recognises the value of such work, and indeed leaves it open for the current fixed fees to be exceeded and brought onto hourly payment rates as necessary in exceptional cases.

## **D. Accessing Mediation and the Telephone Gateway**

### ***D1 The Loss of Funding Code Referrals and Solicitors as Gatekeepers***

31. The Green Paper is silent as to the future of the Funding Code referral mechanism and willingness tests in respect of mediation, but if legal aid is removed for private law, then so presumably will the funding code and willingness tests, since there will no longer be any “bite point” of transition from one level of public funding to the next. The Government’s expectation is that with the removal of public funding for litigation, a greater proportion of clients will opt for mediation, yet the Green Paper offers no evidence in support of this contention.
32. Such a loss of the current referral mechanism changes the operating procedure for entry to LSC-contracted family mediation services. FMC believes that this current system works well since a high proportion of publicly funded family disputants are able to *choose* to access family mediation and to *choose* to use family mediation to resolve their issues without recourse to any other FDR process. This, linked with the availability of funding for individualised legal advice via the successor/s to “Help with Mediation” provides an excellent service to the divorcing and separating public, with the back-up, safety net, or “Plan B” of a solicitor and legal representation to give family disputants the confidence to settle.
33. Moreover, many family disputants may be willing to attempt mediation, albeit reluctantly, when this is a prerequisite to continuing a case using public funding with the assistance and support of their lawyer, but then find that mediation is in fact a very suitable way of resolving their issues. If mediation is instead the only thing on offer, with the sole alternative (due to lack of available resources for private funding of legal representation) of proceeding as litigant in person, FMC has a heavy concern that a significant proportion of parties who currently opt for mediation will instead choose the litigation in person route. FMC suggests the MoJ ensures that it fully models (and then publishes) details as to the extent to which this is likely to occur *before* implementing the Green Paper’s proposals. It cannot be right for mediation to be not merely the “last chance saloon” but the only game in the only saloon in town.

## ***D2 The Telephone Gateway***

34. The Green Paper contains no specific discussion and is silent as to how a potentially publicly funded family disputant will access a contracted mediation service and come into mediation.
35. Such family disputants will not be accessing solicitors- their most likely first port of call will be the telephone gateway, and the divorcing and separating public will quickly come to learn that solicitors cannot help them in the absence of significant domestic abuse (so as in any event to exempt them from even considering mediation), that much is clear: thus there will be no specific mechanism seeking that they are referred (or even signposted) to mediators by solicitors.
36. This represents the loss of the current system for publicly funded parties and which is being replicated for privately funded parties via the Pre-Application Protocol referred to at paragraph 9 (iv) above.
37. As for the proposed telephone gateway itself, LSC-contracted family mediators have experience both of the MoJ's Family Mediation Helpline<sup>30</sup> and of the written signposting/referral of publicly-funded family disputants by existing LSC telephone gateways<sup>31</sup>. Generally, such signposting and referrals have together formed less than 1% of many LSC-contracted family mediation services workload.
38. There is therefore no track record whatsoever of existing telephone gateways providing an effective route for volumes of family disputants accessing and commencing mediation with publicly funded mediation services. On what basis is it now suggested that a telephone point of entry for referral into mediation will actually succeed? The Green Paper is wholly silent as to this.

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<sup>30</sup> [www.familymediationhelpline.co.uk](http://www.familymediationhelpline.co.uk) although FMC understands that future funding and operation of the helpline by the MoJ is to be discontinued from April 2011.

<sup>31</sup> Such as that offered by Howells Solicitors of Sheffield

39. A significant proportion of parties eligible for public funding find accessing services by telephone difficult or even impossible<sup>32</sup>. Moreover, particularly among younger people, without access to a land line, the cost of calls may be a significant barrier. Very often, their only ICT access is to a mobile phone, and it is not uncommon for them to have no credit enabling them to make such calls. FMC further understands that there is no plan to offer the telephone gateway through a conventional dialled landline, but rather through an 0345 or 0845 style number which for many mobile and landline contracts counts as a “paid-for” call and unlikely to come within the “inclusive minutes” of a standard contract. Some mediation services already make use of freefone numbers to alleviate this difficulty for mediating parties.
40. A further concern, which may be particularly prevalent among some BME communities, although potentially an issue for many clients, is that family disputants may find it difficult to secure appropriate privacy to contact the telephone gateway from their own homes; further, if they have no mobile phone, this may operate to prevent them from accessing any help at all.
41. It may be trite, but insufficiently planned provision by way of a sole telephone gateway may lead to the system becoming overloaded with family disputants unable to get through.
42. If, nevertheless, a gateway system is to be implemented, this is likely to require multiple entry points, including e-mail, internet and face to face as well as telephone. For such a service to have value, it would also have to go beyond merely providing a list of organisations and contact numbers. If the gateway service could actually fix the appointment with the face to face provider, this would be an important service. If the gateway service also handled the means and merits tests, it would add greater value still.
43. A final concern on access and gateways- what about those responding to applicant family disputants? Is there to be any assistance for them via the telephone or any other gateway to assist LSC-contracted mediation services in engaging with them as Respondents?

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<sup>32</sup> Social welfare law – what is fair? LAG : Findings from a nationwide opinion poll survey. This indicates that people in social class DE were the most reliant on local advice centres for help on the most common types of SWL problem, and the least likely to use the internet or telephone help lines or be able to travel far to access advice.

## **E. Financial Eligibility**

### **E1 Removing Capital Passporting for those receiving passporting benefits**

44. FMC does not believe that those in receipt of passporting benefits should be subject to the same capital eligibility rules as other applicants. Such claimants are in receipt of the minimum the state deems necessary to survive.
45. There is of course a current discrepancy between passported benefit recipients and those on low incomes who are not receiving benefits. However those not in receipt of benefits may at least have some prospect of improving their financial position whereas recipients of passporting benefits are often sick or unwell, disabled, single parents and others who have little prospect of finding work and thus have far fewer opportunities to replenish any depleted capital in the future.
46. Even if there is equity in their property, benefits recipients are unlikely to obtain loans except from non-status or non-mainstream lenders at high rates of interest, with repayment of loans causing real hardship for those on such limited incomes.
47. FMC notes that the Green Paper does not propose that mediation services collect a capital contribution (whether of £100 or of any other amount) from mediating parties.

### **E2 Assessment of Capital for non-contested property mediation matters<sup>33</sup>**

48. The Green Paper proposes a maximum capital eligibility limit (subject to an automatic property eligibility waiver) of £200,000 (£300,000 for certain pensioners), with a mechanism similar to the statutory charge to apply after the conclusion of a matter.
49. FMC wonders how capital assets, especially property and family homes- are to be valued? What will be the evidential requirement? And how is it planned that

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<sup>33</sup> The Law Society and Resolution do not endorse the view set out in this Response as regards the statutory charge applying to mediation costs, and will be addressing the statutory charge in their own Green Paper responses.

those on limited means (or passporting benefits), who may be financially eligible for public funding for mediation by reference to their income, will be able to resource the securing of such valuations?

50. The Green Paper goes on to state that

“enforcement of the charge could be postponed where it would be unreasonable for the client to repay what they owed immediately (for example, where enforcing the charge would effectively make the client homeless). As with the existing statutory charge scheme, clients would not need to make regular repayments towards this debt, although voluntary payments could be paid. In line with the existing statutory charge scheme, 8% simple interest would accrue on a deferred charge – from the point that the final bill is settled – as an encouragement to clients to repay the charge where they are able to do so.”

There does seem to be something of a “disconnect” between the administrative burden necessitated by clawing back fees by “slapping on” a statutory-type charge of this nature and a typical private law child contact dispute costing £84-293 per publicly funded mediated party. FMC also wonders why MoJ plans to create and/or apply a new administrative apparatus to collect back fees at such a level and is concerned that the costs of doing so may be disproportionate.<sup>34</sup> Such fee levels are very similar to the standard fixed Level 2 solicitor fees which LSC has to date been very content not to subject to the existing statutory charge regime.

51. FMC is further concerned that those drafting the Green Paper may not have taken adequate opportunity to consider the financial impact as a whole through the lens of the administration costs of publicly funded mediation.

52. At present, many mediators when they work with parties considering mediation do so by explaining to them that payment for publicly funded mediation (and publicly funded solicitor support for such work) operates as a grant and not as a loan, which itself operates for some individuals as a driver towards choosing mediation as a less expensive option. Accordingly, FMC wonders whether those drafting the Green Paper have considered the impact for the divorcing and separating public of removing this driver (which has been in place since the

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<sup>34</sup> In its Green Paper response the Law Society usefully states “However we would go further and say that it is unduly bureaucratic to place any charge on a property, and incur costs of registration and enforcement of a charge in respect of what is likely to be a modest capital contribution.... We therefore suggest that the implementation of a charge should be subject to a de minimis principle whereby the amount recoverable must be significantly in excess of the overall costs of administering the charge. Our view is that it is not viable to implement the charge unless the sum to be recovered exceeds £2,000 net of any interest.”

beginning of publicly funded mediation) and replacing it with the “mediate or else” approach set out in para 13 above. This does seem surprising, since to withdraw a current driver towards parties choosing to mediate of their own volition appears contrary to MoJ’s declared policy.

53. FMC accordingly opposes the introduction of the new clawback or quasi-statutory charge scheme but has no opposition in principle to the redrawing of the boundaries for capital eligibility in non-contested property matters.

### **E3 Assessment of Capital for contested property mediation matters**

54. The Green Paper proposal here is for a £500,000 absolute limit (with no equity disregard) linked with a subject matter of dispute cap of £100,000 (with a 100% equity disregard as required). So a party mediating a contested property matter will have a three stage capital means test.

- If he or she owns more than £500,000 of property (irrespective of loans or mortgages)- no public funding;
- Up to £100,000 of the equity in property can be disregarded for capital assessment purposes if it is the subject matter of dispute;
- Anything above that £100,000 is assessable, and if there is £8000 or more, then there will be no public funding for mediation.

55. As mentioned at E2 above, a mechanism similar to the statutory charge will apply after the conclusion of a matter. FMC repeats here what is set out at paragraphs 49-51 above as to the unhelpfulness of such a new approach to the mediation cause, and would again invite MoJ to note that a statutory charge type approach is likely to be too expensive and too complex administratively for a typical publicly funded mediation fee of £84-504.<sup>35</sup>

56. FMC do not otherwise oppose the Green Paper’s proposed changes as regards the assessment of capital eligibility for contested property mediation matters.

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<sup>35</sup> The Law Society and Resolution do not endorse the view set out in this Response as regards the statutory charge applying to mediation costs, and will be addressing the statutory charge in their own Green Paper responses.

## **F. Fees for Mediation and Administration**

### **Mediation Competitive Price Tendering**

57. The Green Paper states that the Government intends to introduce price competition to civil and family contracts, but is silent as to whether this includes family mediators and LSC-contracted family mediation services. FMC hopes that no such intention applies to mediators and mediation services, the growth of which has for the past 13 years been carefully nurtured by the ever watchful eye of the Legal Services Commission with the support of the Ministry of Justice and its predecessors.

## **G. Impact Assessment and Modelling Reality**

### **G1 Impact Assessment and Reality**

58. An MoJ impact assessment satelliting the Green Paper estimates that the result of the Green Paper reforms may be as few as 3,300 more publicly funded mediations per annum: yet no calculations are offered to underpin this estimate. FMC would be interested to see these calculations, since 3,300 new mediations represents no more than a 20% uplift in existing volume for mediators and LSC-contracted mediation services taken as a whole.
59. The LSC's 2009/2010 statistics indicate 43,000 matters for children-only work and 10,000 for financial-only applications (none of the above being in conjunction with domestic violence applications).
60. FMC accordingly notes that the MoJ now appears to envisage that the other tens of thousands of parties who presently resolve their family disputes through publicly funded inter-solicitor negotiation or with public funding at court will, presumably, either instruct solicitors on a privately paying basis if they can access personal or family resources to do this, or else become Litigants in Person.

### **G2 Timing of the Green Paper reforms and The Family Justice Review**

61. The interim report of the Family Justice Review is expected during late March 2011. Some initial thinking from the Family Justice Review has already been made available and suggests that the Review may in due course be proposing some very significant changes to the operation of the Family Justice system.
62. Family Justice has always been a system in flux, responding as it does to societal and political drivers, thus it could be said that there is *never* a "right time" for reform.
63. With the Family Justice Review transforming itself into a "once in a generation" reconsideration of what is appropriate for the Family Justice system, FMC is concerned that adjusting the details of public funding outwith the context of the interim, let alone the final report of the Family Justice Review may be unwise to say the least.

64. Further, the impact of the, as yet, not fully operational new drivers towards mediation an ADR as set out and discussed in Section A of this response<sup>36</sup> remain as yet unknown.
65. FMC considers that it is wholly unwise for MoJ to be contemplating the Green Paper or indeed any reforms to public funding in the absence of the fuller picture emerging to a known timeframe from the Family Justice Review, and in the absence of proper evaluation of the full consequences following (say) a full year's operation of the Family Proceedings Rules 2010 and the proposed Pre-Action Protocol on mediation.
66. Most particularly, since implementation of the Green Paper proposals is not planned until mid to late 2012 at the earliest, a more contemplative and better informed consultation would be yet more welcome than that which emerged, surprisingly, with this Green Paper in November 2010.
67. The Family Mediation Council would very much counsel that the Ministry holds off implementing any changes to public funding at the present time and reviews its position after April 2012, following a year's operation of the April 2011 procedural changes and the availability of the final report from the Family Justice Review.

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<sup>36</sup> Paras 9 and 10 above

## **H. Summary of Major Concerns**

68. Whether or not the Ministry considers itself able to operate a dispositively selected policy of planful, constructive delay, FMC would still in closing highlight the following concerns from earlier in this response for particular consideration.

Our major concerns with the paper are:-

### **i) Voluntariness**

Parties must not be railroaded into mediation. The Green Paper's removal of any publicly funded paid-for alternative/s represents absence of choice and absence of voluntariness for the divorcing and separating public. This also represents an abandonment by the State of its obligation to provide publicly funded representation for the adjudication of disputes where adjudication is the most appropriate option;

### **ii) Domestic Abuse**

The paper's offering towards family disputants facing domestic abuse is naïve and uncoordinated;

### **iii) Need for Adequate funded Legal Advice**

The removal of Level 2/Family Help (Lower) public funding for solicitors supporting parties through mediation and implementing mediated settlements (typical unit payment rates a firm of solicitors can receive by way of Level 2/Family Help (Lower) by the side of mediation of £221-370 outside London/£256-429 in London) and its replacement with an unexplained undocumented fee of £150 for the same work is irrational, and inadequate; further, it fails to acknowledge and continue the effective symbiotic partnerships currently operating between mediators and solicitors producing lasting, effective, *implemented*, mediated settlements;

### **iv) Need for appropriate access route into mediation**

To date, the main access route for publicly funded family disputants into mediation has been provided by solicitors' referrals. If this is to be effectively removed there will be no adequate substitute. There is no evidence to suggest that the proposed telephone gateway into public funding will operate adequately or at all as a sole access

point and route into mediation; existing telephone access points into family mediation have had only very limited impact to date

v) **Financial Eligibility**

The Green Paper is irrational around some of its proposed changes in financial eligibility, such as abolition of capital passporting for the current passporting benefits, which is likely to financially exclude those having no access to other funding or services. It also creates elaborate uncosted administrative requirements, including a lack of proportionality in seeking to apply a statutory charge equivalent in both contested property and non-contested mediations, when the fees involved are small compared to the likely costs of collection. It also removes a current driver for parties to choose mediation.<sup>37</sup>

vi) **Increase in Number of Litigants in Person**

The reforms appear to have a minimal effect on mediation, creating 3,300 only new publicly funded mediations: no data is supplied to underpin this assessment. If this is correct, there will surely be highly significant consequences for the rest of the Family Justice system, particularly in terms of a substantial increase in litigants in person.

vii) **Timing issues**

No reasons are given for the need to press forwards with legal aid changes now when an interim report on the wholesale reform of the Family Justice system is imminent from the Family Justice Review, and the new provisions of the 2010 Family Procedure Rules and Pre-Application Protocol have yet to take effect as at 06 April 2011.

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<sup>37</sup> The Law Society and Resolution do not endorse the view set out in this Response as regards the statutory charge applying to mediation costs, and will be addressing the statutory charge in their own Green Paper response.

## **I. Conclusion**

69. Mediators, mediation services and providers have benefited hugely from the support of the Legal Services Commission, the Ministry of Justice and its predecessors, the Department of Constitutional Affairs and the Lord Chancellor's Department since public funding was first made available for mediation in the late 1990s. FMC is delighted that the MoJ continues to allow mediators to "bend its ear" on mediation matters.
70. Nevertheless, one key mediator skill is that of reality testing. Plans or ideas placed before mediators by the parties are tested for:-
- Reality;
  - Workability;
  - Making Sense.
71. In crafting this response FMC has sought to apply this mediation perspective, of reality testing to the Green Paper proposals, and to tell you, the Ministry, why we, the Mediators, do not think that some of your plans will work, or produce the right outcomes.
72. We know that decision making rests with you, the Ministry and with the Coalition Government, but to paraphrase Wilfred Owen,
- "All a mediator can do today is warn. That is why the true Mediators must be truthful."<sup>38</sup>
73. To do any less would be to fail to be true to ourselves. Thus FMC commends this Response and its list of major concerns to the Ministry of Justice.

**Robin ap Cynan, for FMC, 10 February 2011**

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<sup>38</sup> "All a poet can do today is warn. That is the why the true Poets must be truthful." Preface, May 1918. Manuscript.: First World War Poetry Digital Archive <http://www.oucs.ox.ac.uk/ww1lit/collections/item/4547?CISOBX=1&REC=1>