

FAMILY MEDIATION IN A TIME OF CHANGE

FMC Review Final Report

Professor John McEldowney

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FOREWORD

In November 2011, the Family Mediation Council (FMC) invited me to undertake a Review under terms of reference agreed by the FMC. The Review is in two parts. Part 1 is designed to satisfy a) the Board of the FMC; b) the relevant Boards and Committees of its Member Organisations, and c) relevant government departments that the Member Organisations meet the criteria for membership of the FMC, set out in Article 5 of its Constitution and that good practice operates in the FMC's participating Member Organisations so that the public interest is protected in the carrying out of mediation and in the provision of mediation services. Part 2 consider the role of the FMC, whether it needs to be changed or strengthened to meet present and future demands, and how this might be accomplished. It is important that both parts of the report are read together. At the centre of my considerations is the priority that must be given to the creation of an effective and efficient system of mediation through systems that monitor how mediation is delivered, supervised and effectively managed. This is essential and must take the highest priority for the future.

Mediators should be regarded as belonging to an important profession with all that entails including the protection of the public interest and appropriate accreditation and supervision of educational and training standards. Family mediation includes privately funded and public funded mediation. Historically, standard setting was first with the Member Organisations for their members. The need for standard setting raised dramatically for publicly funded mediations with the implementation of the relevant parts of the Family Law Act 1996 and the involvement of the Legal Services Commission (LSC). Privately funded mediation should adopt similar standards to those prescribed for publicly funded mediation. It is also important that common

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standards, competences, registration and certification systems should be, as far as practicable, equally applicable to both privately funded and publicly funded mediators. The recently published *Final Report of the Family Justice Review* (hereinafter the Norgrove Report) published in November 2011 makes clear that mediation is of fundamental importance to create a coherent process for dispute resolution:

Para 4.69 Our aim is a supportive, clear process for private law cases that promotes joint parental responsibility at all stages, provides information, manages expectations and that helps people to understand the costs they face. ***The emphasis throughout should be on enabling people to resolve their disputes safely outside court whenever possible***². (italics added).

It follows that mediation, as part of the dispute resolution service, should be coherent in the standards and quality of its delivery; and in the effectiveness of the education, training and regulation of the mediators. Mediation and its full integration into the proposed reforms of dispute resolution services is likely to be an ongoing process in a period of rapid and unprecedented changes in the system of Family Justice. The Government's response to Norgrove was published on 6th February 2012. It supports the major changes in the mechanisms and systems for Family Justice recommended in the Norgrove Report with its significant implications for mediation services. I have been able to take account of the Government's response in my Review.

There are also changes within the Ministry of Justice itself and in the funding available through legal aid. The Legal Services Commission (LSC) is being formed into an Agency over the next six months. The new agency may take some time to become effective.

The financial crisis and economic down turn are also relevant. Figures recently released from the Office of National Statistics (ONS) point to a rise in the divorce rate- the first since 2003. In 2010 in England and Wales the number of divorces rose by 4.9% to approximately 120,000 couples. The economic downturn is likely to place increasing pressures on family life that may lead to marital breakdowns. Cohabiting couples are also likely to face similar pressures. The consequences of such pressures are not inevitable- tough times may forge stronger ties and create the need to work together- but the demand for mediation provision is more than likely to increase significantly.

The overarching consideration is whether the FMC can take proactive measures to address rapid changes in the mediation field as well as keeping up to date with other relevant current events such as changes in legal aid. There are important lessons for government as well as the Member Organisations of the FMC and these are also highlighted in this Review. The current system of regulation may be seen as too "light touch" to be effective and in need of strengthening. Various proposals set out in

²Norgrove Report, Para 4.69.

this Review are directed towards strengthening and supporting mediation, its education, training and supervision.

I published my interim Report at the end of March 2012. Since then I have received submissions and responses from the FMC Member Organisations, the MoJ and the LSC. I have carefully considered all the responses and taken them into account in writing my Final Report. It has allowed me to give additional consideration to many of the key recommendations and where necessary make some changes. In taking forward the various recommendations in the Final Report there should continue to be close co-operation between the FMC, the MoJ and the LSC.

Acknowledgements

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LIST OF RECOMMENDATIONS

PART 1

1. The FMC should receive an annual report from each Member Organisation specifying the following;
 - Compliance with the FMC Code of Practice;
 - The monitoring of its members' compliance with professional practice consultancy requirements;
 - The monitoring of its members' compliance with CPD requirements;
 - The monitoring of its members' compliance with the agreed minimum requirements for qualification for mediators conducting Mediation Information and Assessment meetings (MIAMS);
 - The monitoring of its complaints procedures including an indication of complaints received;
 - CPD education and training being carried out by the Member Organisation. (Para.54).

PART 2

2. None of the Member Organisations are suited to becoming a single regulator and none should be given sole responsibility for regulating family mediation. (Para.51)
3. The FMC should continue as the umbrella organisation representing the professional bodies of family mediation. Its present role should be developed and strengthened in order to enable it to develop, with governmental assistance, a regulatory framework that will develop and maintain family mediation practised to a high standard. (Para.75)
4. The vacancies for two independent Board members should be filled as soon as possible. While it may not be possible to have representation from the MoJ and/or LSC due to their civil service status, the vacancies should be filled by appropriate persons who are identified as having the necessary skills. (Para.85)
5. The FMC Constitution should be amended to include provision for the appointment of an executive officer with administrative support. Costs and organisational details will have to be worked out by the Member Organisations. (Paras.67,85)
6. The FMC should undertake an "away day" for its Board members, whose primary responsibilities need to be considered and clarified. (Para.68)

7. The Constitution should be amended to include provision for limitation of the term that any one Board member may serve. It would be worthwhile for the FMC to undertake regular skills audits to identify gaps. This might encourage member organisations to engage positively with the FMC and ensure that when representatives of member organisations stand down they are replaced by new representatives with the requisite skills set. (Para.69)
8. The FMC should work closely with the MoJ and LSC to establish, develop and monitor standards of practice of family mediation. A joint working party consisting of members from the FMC, MoJ and LSC should be formed to explore how this and other recommendations of this review might be implemented. (Para.75)
9. At present it is not possible for the FMC to be represented on the Family Justice Board, given its size and statutory obligations. This may change in the future. An alternative to representation on the Family Justice Board, and that offers an effective way for the FMC to be heard, is through the working party consisting of the FMC, MoJ and LSC. This will ensure that FMC representations are made to the Family Justice Board and also the Government.(Para.83)
10. There should be a single accreditation standard and procedure for all family mediators qualifying those attaining it for certification to practise. This standard should at least equal the standard of competence required from mediators carrying out publicly funded mediation and should be reviewed regularly. (Paras. 91,92)
11. A system for compulsory re-accreditation after a prescribed number of years should be considered by the FMC (Para.91).
12. A collaborative system for the striking off or suspension or striking off of mediators found to be inadequate in their standards of professional competence or conduct should be introduced. (Para. 94)
13. Experienced mediators should be encouraged to train as PPCs. (Para. 100,101).
14. A Code of Practice for PPCs should be put in place. (Paras.56, 101).
15. The existing arrangements for self-approval by Member Organisations of training courses should end. A new system of independent approval and monitoring of all mediation training courses should be introduced as soon as possible. Courses should be fully assessed with qualifications approved

through external accreditation. The FMC should appoint an independent panel to carry out this work. (Paras.95-99)

16. A system of inspection or audit of Member Organisations should be introduced. (Para. 94)
17. The FMC should establish and maintain a national database which should have on it up-to-date registers of all practising family mediators and of PPCs.(Para. 90)
18. Subject to the availability of resources, the FMC should introduce and keep under review a strategy for measuring and monitoring the effectiveness of family mediation and its mediators.(Para. 92)
19. The FMC website should be kept regularly updated. Practice issues and policy matters agreed by the FMC should be published, where appropriate with clear reasons. (Para. 93)

INTRODUCTION: THE MEDIATION CULTURE

1. It is timely that the FMC agreed to commission this Review prior to the publication of the Final Report of the Family Justice Review (the Norgrove Report). The Norgrove Report makes clear the need for the regulation of mediation that is consistent with effective standards and that failure to live up to this recommendation places considerable risks on the reputation and standing of mediation as a whole.

A clear plan must be developed to maintain and reinforce standards of competence and to ensure the effective regulation of mediation as numbers of mediators increase, without that there are clear risks to children and their parents, and of discredit to the whole approach³.

2. Importantly, Norgrove recognises the work being done by the Ministry of Justice, the Legal Services Commission (LSC) and the FMC in their role of producing a plan which covers accreditation, supervision of training, the training itself and assessment. This point will be examined in more detail in this review. The Norgrove recommendations on mediation are consistent with best practice and are also consistent with other reports. Early in the year in June 2011, the House of Commons Justice Committee report into the Operation of the Family Courts, called for effective standard setting and regulation across the public and private sectors on mediation⁴. The House of Commons Report is helpful as it sets out the important task that mediation and mediators are expected to perform in terms of responsibilities related to the courts. The report also addresses issues of training, accreditation and regulation.
3. Government policy is currently in favour of mediation. This is evidenced in the form of the new Pre-Action Protocol of 6th April 2011 and also the Government's proposals for the Reform of Legal Aid in England, now the subject of a Legal Aid Bill before Parliament. The impact of the legal aid proposals are difficult to predict. It is generally accepted that mediation will increase and there is no cap on mediations. The costs of mediation are also a matter of estimate rather than accurate prediction. In evidence to the House of Commons Justice Select Committee, it was thought that there might be an additional 10,000 mediations with an additional cost of £10 million.
4. There is also an on-going debate about whether in some circumstances mediation ought to be subject to some degree of compulsion. The Government is proposing to make a statutory change so that attendance at the information/intake meeting, (the MIAM), is a pre-requisite for being able to

³ The Norgrove Report, para.4.102

⁴ See: The HC 518-I *Justice Select Committee Sixth Report The Operation of the Family Courts* June, 2011

initiate court proceedings, subject to certain exemptions. This heightens concern that if mediation services are not well regulated, mediation might run a substantial risk of exposing the public to poor quality mediators with serious consequences for the individuals as well as the courts⁵. More people may seek mediation due to the withdrawal of legal aid for litigation and the promotion of mediation as a better alternative to court in many cases. An increase in demand for mediation services leads to increasing risks around poor regulation exposing people to poor quality services.

5. The Norgrove Report considers that mediators should do more than they currently perhaps do.

The main additional function would be to track the progress of the parties to the point where they decide or not to apply to the court so that in particular the risk is reduced if one party is dragging things out in order to disadvantage the other for example over contact with their child. A recalcitrant lack of contact or unwillingness to engage with the process would trigger the mediator to assess as unsuitable for mediation and issue a certificate enabling an application to court to be made⁶. The MoJ is currently considering these matters with the FMC and as yet no final view has been concluded. This is a good example where the FMC should continue to inform debate and discussion pending any decisions made by Government.

6. It is not entirely clear how much this is asking mediators to manage cases but it does raise issues about the future role of mediators in the light of higher expectations.. It is a good illustration of how expectations are raised with the strong implication that they will be addressed somehow. Indeed the Norgrove discussion above is an illustration of the underlying need to ensure that mediation and the court system are well integrated and where appropriate this may need some adjustment of procedures to ensure that mediation does not become a back stop for tactical delay.

The findings of the Norgrove Report and the FMC

7. As stated, the commencement of this Review with the almost simultaneous publication of the Norgrove Report is exceptionally helpful as the Norgrove Report sets the scene. Relevant to this Review is the following finding of the Norgrove Report:

⁵ Generally see: N. Robinson, "Blue Sky- Now or Never?" the Henry Brown Lecture to the Resolution ADR Conference, Murray Edwards College, Cambridge 23rd September 2011 [2011] *Family Law*. Also: N. Robinson, "Shapeshifters or Polymaths? A Reflection on the Discipline of the Family Mediator in Stephen Cretney's World of Private Ordering", forthcoming, R. Probert, ed., *Family Law Essays*, 2012.

⁶The Norgrove Report recommendation 117.

We are not in a position to comment on the detail. But we are aware that the FMC, which brings together delegates from representative bodies, has found it difficult to work effectively. The risk is agreement only on a lowest common denominator. Representative bodies are also inevitably reluctant to provide adequate funding to another body that may appear to sit above them. We recommend that government should closely watch and review the progress of FMC to assess its effectiveness in maintaining and reinforcing high standards. Government should if necessary create an independent regulator to replace the FMC⁷.

8. Evidence submitted to this Review appears to largely support the Norgrove findings. Submissions I have received were often highly critical of the FMC, even though from Member Organisations within the FMC itself. The problems with the FMC are characterised by many as the absence of cooperation amongst constituent organisations; the tensions within the organisation; the failures of the FMC to react to change rapidly and effectively; the protracted and often tortuous nature of discussions and various weaknesses in the framework of the FMC resulting in failure to find common ground. Personalities and differences of opinion amongst the members have been highlighted.
9. The absence of finance and resources are also highlighted as shortcomings. Capacity and governance issues give rise to strong opinions as to the action to be taken. There are also strong voices amongst some of the Member Organisations for the abolition of the FMC and its replacement with an independent regulator. In that context there appears to be a general consensus that the current arrangements cannot remain as they are and that some changes are inevitable as well as desirable. However, beyond the general expression of dissatisfaction with the FMC, there is little consensus as to the form any new regulatory body might take⁸. The Government's response to Norgrove concludes that:

Government should closely watch and review the progress of the Family Mediation Council to assess its effectiveness in maintaining and reinforcing high standards. The Family Mediation Council should if necessary be replaced by an independent regulator.⁹

10. It is hoped that this Review will be able to shed some light on regulatory best practice with the emphasis on protecting the public interest. Paramount in the

⁷ *Ibid.*,

⁸ Sir Henry Brooke, Mediation in the UK today Civil Mediation Council 20th January 2010. Sir Henry Brooke, Chair of the Civil Mediation Council in January 2010 made a useful summary of the state of mediation in the UK, including family mediation: There have been quite serious tensions within the family mediation community over the years, but it is hoped that these are now firmly in the past.

⁹ Ministry of Justice and Department for Education, *The Government Response to the Family Justice Review: A System with children and families at its heart*. Cm 8273 February 2012.p.76, Recommendation No. 121.

various recommendations made in this Review, is the need to develop a sensible mediation culture in which mediation, whether publicly or privately funded, is appropriately regulated and effectively delivered. Regulation, today, is one of the most hotly debated and contentious of topics. Furthermore, any recommendations for the better regulation of family mediation have to be broadly consistent with government policy on regulation as a whole. As outlined in some detail below the cost of regulation should not be a burden on either private or the public sectors.

11. Systems of cost sharing are increasingly being deployed to share costs across private and public sectors. One of the general lessons from the history of regulation in the UK is that one size does not fit all. Regulation best practice seems to evolve from experience rather than as a result of an ideal model or plan. Often various attempts at self-regulation fail leading to the necessity for re-thinking. In the light of the Norgrove Report it is appropriate as part of this Review of the FMC to consider and recommend how the FMC should be strengthened and/or family mediation regulated.

Family Mediation and mediators

12. Today, family mediation is seen as an integral part of the family justice system. This is a relatively recent acceptance of the role and function of mediators. Historically, family mediation has had “to fight for a voice” and lobby hard for acceptance. The FMC has seen this as one of its successes. It justifiably can be said that without the FMC family mediation would not have achieved its acceptance and certainly not as readily. The member organisations have also played a significant part in developing mediation and addressing high standards¹⁰. There are other influences at work outside the role of the FMC. Various studies have shown that mediation may be an effective way to address family law disputes. Even when mediation has not been successful, the parties may be more able to address the issues in the dispute when the case comes to a court hearing. There is also a strong case for mediation in the perception that it cuts costs significantly. This has obvious relevance not only in respect of publicly funded mediations and the current need to reduce the total Legal Aid bill, but also in respect of privately funded mediations and the overall costs borne by the parties. Furthermore, the success of private mediations represents an additional saving to the public purse in terms of court time and resources.

¹⁰ The list of member organisations is considered in Part 1 of the review. The member organisations are the ADR Group, College of Mediators, the Family Mediators Association (FMA), the Law Society, National Family Mediation (NFM) and Resolution.

13. Despite the acceptance of and the need for mediation, mediators¹¹ are sometimes the victim of their own success. Expectations are raised and in many instances are far too high, that mediation offers a “general fix” for all family law problems. There is a sense that mediation might be the “dumping ground” for difficult cases or a place where more might be expected for the same resources. The Norgrove Report’s Recommendation 117 states that the mediator tasked with the initial assessment meeting will need to be the “key practitioner until an application to the court is made”. Para. 4.99 states that the “main additional function would be to track the progress of the parties to the point where they decide or not to apply to the court”. This leaves mediators in an ambiguous position. The role of mediators in the future way cases are to be handled will need to receive greater clarity, although this issue is currently being addressed by the MoJ in consultation with the FMC.

14. Family mediators encounter difficult and troubled families including the victims of domestic violence and abuse. The expertise of family mediators is often taken for granted or misunderstood. The mediators’ skill set is drawn from many disciplinary skills ranging from the financial and legal to the social and psychological. There is a general wish, if not claim, amongst many mediators that they ought to be accorded the full respect due to their professional status. Consequently the professional role of mediators is not always easy to discern. Some family mediators are legally qualified practitioners and their dual expertise may overshadow their relationship with non-legally qualified mediators. There is some degree of distrust between legally and non-legally qualified mediators, which may lead to disagreement or professional tensions. Family mediation may be the loser in any professional rivalry. There is no commonly agreed single system for training mediators. Most are trained by and members of a mediation professional organisation which is a member of the FMC and which also sets professional standards and investigates complaints. At present no complaints procedure exists that investigates complaints against a mediator other than through his or her own Member Organisation. If a complaint is made to another Member Organisation, it can only advise the complainant to complain to the mediator’s own professional body. There is no centralised system for either channelling or dealing with complaints. There is no national register or system of accreditation of all mediators in England and Wales. Publicly funded family mediators are subject to the Legal Services Commission’s Quality Mark Standards for Mediation as a precondition of a

¹¹ Generally see: Marian Roberts, *Access to Agreement: A Consumer Study of mediation in Family Disputes*, with Gwyn Davis (1988) Milton Keynes: Open University Press, also Marian Roberts, *Developing the Craft of Mediation: Reflections on Theory and Practice* (2007) London and Philadelphia: Jessica Kingsley Publishers. Marian Roberts, *Mediation in Family Disputes: Principles of Practice* (2008) 3rd edition Aldershot: Ashgate. Marian Roberts, “Family Mediation: The Development of the regulatory Framework in the UK” (2005) Conflict Resolution Quarterly vol. 22 no. 4, Summer 2005.

contract. Private family mediation is also a thriving business but there is no national register and there are miscellaneous providers.

15. Family mediation draws on a wide range of skills and techniques that range across a broad spectrum of disciplines and it needs to be distinguished from mediation in general. It uniquely addresses complex financial and related issues as well as children and their welfare. The system of family mediation is used in a number of situations including, but not exhaustively;
 - Children and their arrangements;
 - The financial arrangements of the parties;
 - The division of property;
 - Practical matters relating to separation or divorce.

16. The skill sets required are demanding and require regular updating. Family mediation is not about giving direct legal or financial advice but mediators have to be aware of the areas where advice, be it legal or financial or therapeutic, is required and in most cases this may mean a referral to an appropriate specialist. Mediators need to have at least basic knowledge or awareness of the following:
 - The needs of children and young persons and welfare protection;
 - The various safeguards for the vulnerable including problems associated with domestic violence or abuse;
 - The law relating to ancillary relief in divorce cases;
 - The law relating to cohabitation disputes;
 - The law relating to civil partnerships;
 - Social security and related benefits;
 - Personal, company and family taxation.

17. They also need to know how to assist parties to reach proposals that produce workable agreements, sufficiently robust and well balanced to last and, as appropriate, to meet the approval of a judge if, for example, a financial consent order may be required linked to divorce, or other orders required in other types of legal proceedings.

18. Family mediation is not suitable for all cases. The question of how to define or test what is suitable or not has divided opinion. Settling the boundaries of what is or is not a suitable case is likely to become an important issue. Guidance and codes of practice for the future are likely to be required to meet the challenges when mediation is more widely used than at present.

19. Family mediators work under considerable pressure. Mediating complex and broken family relationships is stressful, time consuming and requires patience, tact and understanding. Good listening skills as well as interpersonal skills are

important. Unfortunately, mediators have a mixed reputation. The National Audit Office found in their report in 2007, concerning public funded mediators that “25% of the clients were unhappy and complained of mediators”. The main complaints consisted of mediators who “had not been good at his or her job, had been rude, unsympathetic or inexperienced, had not been impartial, made the client feel pressurised and was unfair”.

20. There is a need for on-going research into the effectiveness of mediation, mediators and their role, education and training standards. As already mentioned, currently mediation research is not being systematically commissioned let alone monitored and managed to which a consistent lack of resources has doubtless been a contributing factor.
21. The changing nature of mediation is also a pressing challenge. The voice of the child is important and likely to demand greater recognition in the future which, in terms of numbers alone, will, when compared to the past impose additional burdens and training needs on mediation services.
22. At present there is no legislative requirement that practising family mediators must belong to a Member Organisation of the FMC. There is an enforceable requirement included in the LSC Quality Mark, which sets out the standards to which mediation services contracted to the LSC for the provision of publicly funded mediation must adhere. It specifies that mediators carrying out publicly funded mediation must belong to a Member Organisation of the FMC. But there is no similar provision for privately funded mediators, although those carrying out MIAMS should also be recognised by the FMC. In fact most privately funded mediators do belong to a Member Organisation, and receive PPC support and supervision, but it is currently possible for privately funded mediations to be conducted outside the scope of any supervision and/or regulation. Apart from the obvious need to protect the public from poor quality mediation and its consequent cost, both financial and emotional, when privately funded mediation goes wrong, it is ultimately a transfer cost onto the public sector in additional expenses, court time, delays and so on. Cost saving is one aspect of the mediation service that makes it attractive in times of economic recession. The risks and dangers of poor mediation adding costs and increasing burdens to both members of the public and the family justice system underline the need for an effective regulatory system. Privately funded mediators should not be permitted to evade the regulatory system that sets higher standards for publicly funded mediators. There should be common standards.
23. In general, the FMC, MoJ and LSC need to work together to ensure that there is co-operation in addressing the future regulatory requirements for family mediation. Neil Robinson has noted how the mediator

... perhaps best presents as a polymath, a fuser of eclectic skills and knowledge base, not as a master of no trades, but as a combination of insights from different disciplines drawn to the service of particular process and outcome. And the challenge is to make the transition to something "more than" lawyer or psychotherapist, that is, to distil a new profession rather than dilute an old one¹².

Both the development of family mediation in the short to medium term and any longer term development of a "new profession" will need a less fragmented and confusing regulatory system than presently exists. There should be a simplified system of common standards, reliably and transparently monitored and enforced, which is easily accessible to both mediators and members of the public.

¹² N. Robinson, "Shape shifters or Polymaths? A Reflection on the Discipline of the Family Mediator in Stephen Cretney's *World of Private Ordering*", forthcoming, R. Probert, ed., *Family Law Essays*, 2012.

PART 1

TERMS OF REFERENCE

24. Part 1 to satisfy that a) the Board of the FMC; b) the relevant Boards and Committees of its Member Organisations, and c) relevant government departments that good practice operates in the FMC's participating Member Organisations; and also that the public interest is protected in the carrying out of mediation and in the provision of mediation services.

Introduction

25. Part 1 of the Review is concerned with the question of whether the Member Organisations meet the required criteria of FMC membership under Articles 4 and 5 of the FMC's Constitution and that the public interest is protected in carrying out of mediation and in the provision of mediation services. Good practice is not defined in the terms of reference. Broadly, the relevant criteria are drawn from Article 5 of the FMC Constitution. Good practice should be distinguished from fitness to practice which is outside the terms of the review and falls under the responsibilities of the individual Member Organisations. In its present style of self-regulation the FMC has to take in good faith the representations made to it by its Member Organisations. Two systemic weaknesses are apparent from the current arrangements.
26. The first is the absence of an inspection system that independently investigates the performance or monitors the Member Organisations. This Review does not have the resources or time available to consider in detail and investigate in depth the various working practices and problems within the Member Organisations and it is important that this limitation should be highlighted as part of the Review. As this is the first Review undertaken on behalf of the FMC, this limitation needs to be given attention for any subsequent Reviews to be effective. In some instances, there will also be a need to rely in large measure on the regulatory systems that have been put in place by the Member Organisations.
27. The second weakness is that the co-operation of the Member Organisations is based on voluntary agreement. The voluntary nature of the FMC is consistent with the FMC's current Constitution and was appropriate for the FMC's purposes when it was established in 2007. Given the many changes in the area of family mediation and the Government's growing acceptance of the importance of its role, voluntary agreement alone is no longer adequate to meet the expectations of government and public and is unlikely to provide sufficient robustness in ensuring the creation and maintenance of the

necessary level of standards. But difficulty in reaching agreements within the Member Organisations in the FMC is a consistent complaint about the organisation which points to the need for change.

28. It is recommended that adequate powers are provided for the effective investigation of good practice amongst Member Organisations. Precisely how this may be undertaken is discussed below.

Do the FMC's participating Member Organisations meet the criteria for membership?

29. The focus is primarily on the Member Organisation's compliance with the criteria as set out in Article 5 of the FMC Constitution.
30. In answering this question, my approach has been to rely on the written submissions and information received as part of the Review. This has been followed up with meetings with each of the six Member Organisations. Where it was considered necessary they were then asked to supply further information. The various findings of the review are based on the information received to date and an analysis of current practice and understanding at the end of December 2011. The Member Organisations' compliance with the criteria is set out below.

Some common themes and issues emerged in the course of the Review and these are also set out below under the heading of **Generic Good Practice**.

31. In summary, in order to meet the criteria for membership under Article 5, the FMC Member Organisations must:
- a. Maintain a national register of members who are practising mediators, who must have successfully completed an approved foundation training course and who, on re-registration, must be able to confirm that they have completed the annual CPD and PPC requirements (Article 5.2);
 - b. Regulate their members in accordance with a code of practice compliant with the FMC Code of Practice (Article 5.3);
 - c. Ensure that
 - Their members receive professional practice consultancy on a regular basis, the amount of which is specified in accordance with whether or not they have achieved the level of competence recognised by the LSC for publicly funded mediators or an equivalent procedure;
 - PPCs who are members fulfil PPC CPD requirements;
 - They maintain a register of approved PPCs (Article 5.4);

- d. Ensure that their members fulfil specified CPD requirements (Article 5.5);
- e. Have in place a complaints procedure which must include provision to ensure that information about the procedure is clear and accessible and includes a timetable for the handling of a complaint, a written record and an appeals procedure (Article 5.7);
- f. Have adequate funds to meet their share of FMC expenses (Article 5.8);
- g. Have in place an appropriate equality and diversity policy (Article 5.9).

Under Article 5.6 Member Organisations may approve foundation training courses and providers.

32. For this review, Member Organisations were also asked to provide details of their systems for monitoring their mediator members' compliance with the FMC agreed minimum requirements for mediators carrying out MIAMs, and for ensuring that their mediators are covered by adequate professional indemnity insurance in accordance with Section 3.7 of the FMC Code of Practice.

National Family Mediation (NFM)

33. NFM was founded in 1982 as an umbrella organisation with a network of affiliated member services in England and Wales, all of which are not for profit organisations and charities in their own right. All services have contracts with the LSC for the provision of publicly funded mediation for those financially eligible, and all mediators, who come from a range of professional backgrounds, have either achieved recognition as professionally competent under the LSC Competence Assessment Procedure or are working towards recognition.
- a. It maintains a register of all mediators employed by its services, currently numbering 311.
 - b. NFM uses the FMC Code of Practice.
 - c. All mediators employed by NFM affiliated services submit an annual review detailing their professional practice consultancy, which is then confirmed by their PPC. NFM maintains a register of PPCs.
 - d. The annual renewal submitted also details the mediator's CPD points and this is also confirmed by the PPC. This information is cross-referenced with CPD registers completed by NFM trainers, or the PPC if the training is external.
 - e. A complaints procedure is in place. A complaint is primarily dealt with according to the complaints procedure of the service involved. A dissatisfied complainant may complain further to NFM itself, where it

will be allocated to the complaints officer for investigation of the management of the complaint and the process followed by the service.

The matter originally complained of is not reinvestigated.

- f. NFM has always contributed its share of FMC expenses.
- g. It operates an equality and diversity policy.

34. NFM provides its own foundation training and other training courses. It does not approve outside bodies to carry out foundation training or other courses but accepts for foundation and other CPD purposes all courses provided or approved by other Member Organisations.

35. Only its mediators who have already achieved FMC LSC Competence recognition or those working towards it, who have reached the Readiness to Practise stage are eligible to conduct MIAMs. Mediators sign a register when undergoing compulsory MIAMs training, if it is an NFM course. This is then double checked with the mediator's PPC and checked again when the mediator submits his or her annual renewal form. If the MIAMs course is not an NFM course then confirmation of attendance is checked through the PPC. NFM provides professional indemnity and trustee liability insurance for its services as part of affiliation.

The Family Mediators Association (FMA)

36. The FMA was established in 1988 and has a membership of individual mediators also from a wide range of professional backgrounds. Its members carry out both private work and, if they work for a mediation service that is contracted to the LSC, publicly funded work. The latter have to have achieved recognition as professionally competent under the LSC Competence Assessment Procedure. FMA also has its own accreditation procedure available to mediators with a minimum of 40 hours mediation experience. This accreditation is not regarded as a basic competence but as a career progression and PPCs should have obtained it within one year of completing their foundation training as PPCs if not before.

- a. The FMA maintains a register of mediator members currently numbering 495.
- b. It uses the FMC Code of Practice.
- c. The annual membership renewal form requires confirmation that professional practice requirements have been met, and this is either

countersigned or independently confirmed by the PPC. FMA maintains a register of PPCs.

- d. The annual renewal form also requires details of CPD points acquired during the year which is either covered by the PPC's countersignature or confirmed independently by the PPC. PPCs must confirm further CPD points related to their practice as PPCs.
 - e. There is a complaints procedure in place. Once a mediation service's complaints procedure has been exhausted, a further complaint may be made to the FMC Board. The procedure is monitored regularly by the FMC Chair as part of management review.
 - f. FMA has always met its share of FMC expenses.
 - g. FMA has an equality and diversity policy in place.
37. FMA runs its own foundation training course and also provides a number of other training courses. It does not approve outside training bodies to carry out foundation training, but accepts all courses provided or approved for foundation training or CPD purposes by other Member Organisations.
38. The FMA has a system in place for monitoring mediators carrying out MIAMs fulfil the required qualifications. The mediators must complete and return a pro-forma assessment sheet setting out their qualifications and practice experience in sections, each one of which must be countersigned by their PPCs. Members provide their own professional indemnity insurance and confirmation of cover and the name of the insurer is included in the annual membership renewal form.

Resolution

39. Resolution, formerly the Solicitors' Family Law Association, has a large membership of which most are family lawyers. There are also affiliate members who work within the area of family justice including students, academics and retired members. Resolution has its own system of accreditation whereby, having received a specified amount of mediating experience, PPC consultancy and training, a mediator must submit a portfolio which is then reviewed by two members of the Resolution accreditation panel who will make recommendations. If the panel members do not agree on the recommendations, a third panel members will also review the portfolio.

- a. Resolution maintains a register of its mediator members, currently numbering 606.
 - b. Currently, Resolution follows the Law Society Code of Practice for family mediators. As discussed at para.38b below, the Law Society Code is not wholly compliant with the FMC Code and compatibility needs to be achieved. Resolution intends to ensure that the code, under which its mediators work, is FMC Code compliant. It will consider any amended version of the Law Society Code. If that is FMC compliant it will ensure its mediators adhere to it. If it is judged not to be FMC compliant, it will either adopt the FMC Code or will draft its own code ensuring that it is FMC compliant.
 - c. All mediator members must fulfil the FMC requirements for professional practice consultancy. This has to be confirmed on members' annual return forms which are checked and queries raised if necessary. A system of spot checks is carried out whereby a random sample of mediator members will be contacted and asked to provide documentary evidence of meeting with PPCs. Resolution maintains a register of PPCs.
 - d. Confirmation of fulfilment of CPD requirements is also included on the annual return form and evidence required in any spot checks carried out.
 - e. Resolution has a comprehensive complaints procedure in place.
 - f. Resolution has always met its share of FMC expenses.
 - g. An equality & diversity policy is in operation.
40. Resolution delivers its own foundation training course. Its members must have either completed this course or completed another FMC approved foundation training course, followed by a Resolution familiarisation course. It also runs other training courses.
41. Resolution has a procedure in place for checking its mediators' eligibility to conduct MIAMs. For those mediators not passported by their LSC recognition of professional competence, confirmation of eligibility from PPCs must be received before mediators can be placed on the list sent to the national MIAMs register. The Resolution annual renewal form requires confirmation of professional indemnity insurance.

The Law Society

42. The Law Society has a panel of solicitor family mediators. There are two levels of membership: general membership valid for two years, and such a member is

expected to have achieved practitioner membership within two years, and practitioner membership. There are three routes to practitioner membership: a) the passported route - the member has successfully completed the FMC/LSC competence assessment procedure and gained recognition to mediate all issues cases; b) the development route - the general member has completed 90 hours mediation practice within the two years – mediation practice is at least 25 hours actual mediation plus PPC consultancy and acquisition of CPD points, and submitted a portfolio of work; c) the direct route - the applicant is not already a general member but has completed a foundation training course plus 90 hours mediation practice and submitted a portfolio of work. Successful practitioner membership accreditation enables the holder to carry out publicly funded mediation.

Regulation of its mediators who hold practising certificates is SRA based. Those mediators who do not hold practising certificates must belong to another FMC Member Organisation.

- a. The Law Society maintains a register of its family mediators who are practitioner members, currently numbering approximately 155. An additional 10-15 are general members.
- b. The Law Society uses its own Code of Practice for family mediators. Currently, this Code falls short of compliance with the FMC Code in a number of areas, which have been specified to the Law Society. In response, the Law Society intends to revise its Code in order for it to achieve compliance with the FMC Code, implementation of which is presently under review and consultation. It is recommended that the Law Society ensures that its Code is compatible with the FMC Code as soon as is practicable and in any event within three months from the date of this report.
- c. Members of the mediation panel must have PPCs. The Law Society does not train or have its own register of PPCs, although it might do so in future. It is currently dependent on its members using FMC recognised PPCs from the other FMC Member Organisations. At present it has no system in place for monitoring members' professional practice consultancy. It is recommended that the Law Society puts a system in place for monitoring members' compliance with professional practice consultancy requirements as soon as is practicable and in any event within three months from the date of this report.
- d. For panel members who have solicitors' practising certificates CPD points must be confirmed annually, and this is subject to spot checks by the SRA, but at present there is no specific check on mediation CPD points. There is no check on general practitioners either. It is recommended that a system for checking mediation CPD points should be put in place as soon as is practicable and in any event within three months from the date of this report.

- e. Currently, there is no in-house complaints procedure. It is not clear if complaints about members of the mediation panel with practising certificates may be made to the Legal Ombudsman or prosecuted by the SRA in front of the independent Solicitors Disciplinary Tribunal. It is recommended that the Law Society establishes its own in-house complaints procedure as soon as is practicable, and in any event within six months from the date of this report.
 - f. The Law Society has always met its share of FMC expenses.
 - g. It operates an equality and diversity policy.
43. The Law Society does not deliver a mediation foundation training course but does deliver a MIAMs preparation training day.
44. The Law Society submits the names and details of practitioner members only for the MoJ list of mediators eligible to conduct MIAMs, all of who are also LSC recognised to carry out publicly funded mediation. It requires professional indemnity insurance for solicitors who are members of its mediation accreditation scheme.

The College of Mediators

45. The College of Mediators was established in 1996, and was originally known as the UK College of Family Mediators. Its aims are to set standards for mediation, maintain a register of mediator members and demonstrate how its standards are set and maintained. Members come from a range of professional backgrounds. Membership is open to all mediators who meet its standards and currently includes community, civil and commercial, workplace and peer mediation as well as family mediators. Mediators can either join the College as “Trained Mediators” if they have successfully completed and FMC approved foundation training course. They can also apply for the senior level of membership as “Approved Mediators” once they have successfully completed the LSC Competence Assessment enabling them to do publicly funded work. It approves, but does not deliver, foundation and post qualifying training for mediators. There are some inconsistencies between the FMC Code of Practice and the Code operated by the College as set out below.
- a. It maintains a register of 104 family mediators.
 - b. It uses its own Code of Practice. Some specific inconsistencies with the FMC Code of Practice have been pointed out to the College, which has responded that these are covered either in their Code itself or in issue related College policy documents.

- c. Members are expected to fulfil professional practice requirements and must confirm on their annual renewal forms that they have done so. The form is counter-signed by the applicant's PPC. The College monitors compliance with this and may exercise its discretion to ask members for evidence. The College has its own register of 34 PPCs. In addition a further 52 PPCs belonging to other Member Organisations offer supervision to its members. The College concedes its monitoring of PPC activity has been limited due to limited resources. It intends to review its approach to the assurance of PPC practice in 2012 with a view to adopting a more robust approach.
 - d. The annual renewal form also asks for full details of CPD undertaken during the year and type of points it represents.
 - e. The College has a complaints procedure in place.
 - f. The College has always met its share of FMC expenses.
 - g. The College has an equality and diversity policy.
46. The College approves, but does not itself deliver, foundation training courses and other post-qualifying training courses. Courses are vetted and assessed by two assessors, who are members of the College's professional standards committee and the Board of Governors. Approval is for three years only, after which time applications must be re-submitted for approval.
47. The College has amended its annual renewal forms to include a required signature from PPCs confirming applicants' eligibility to conduct MIAMs. It is the PPC's responsibility to check that eligibility. The renewal forms have also been amended to include confirmation of professional indemnity insurance.

Alternative Dispute Resolution Group (ADR)

48. ADR Group is a commercial organisation, which has been involved in mediation and dispute resolution techniques with over 25 years' experience. It is the trading name of IDR Europe Ltd and ADR Net Limited with a registered company office in Bristol and has been involved in family mediation since 2000.
- a. It maintains a register of family mediator members. Its family mediator membership was re-established in July 2011 after its contract with FMA for administration of the latter's membership ended. At present there are 72 family mediators on its register.
 - b. ADR has adopted the FMC Code of Practice. It also
 - c. The family membership application form requires a declaration of an applicant's professional practice consultancy during the previous year.

This must be countersigned by the applicant's PPC. Details are recorded on ADR's database and spot checks are undertaken periodically against declared supervision by checking with PPCs' records. ADR maintains its own register of PPCs.

- d. The application form also requires details of the CPD points acquired. Again details are recorded on ADR's database and cross-checked against records of ADR's training courses. Spot checks are undertaken periodically against declared CPD by checking with PPCs and requests for written evidence of attendance on another provider's training course..
- e. A complaints procedure is in place. Complaints received are referred by the Complaints Administrator to the Chief Executive of ADR Group, whose decision is final.
- f. ADR has always met its share of FMC expenses.
- g. It has an equality and diversity in place.

ADR delivers its own foundation training course and other training courses for family mediators. It does not approve external foundation courses or providers but will accept for CPD purposes those delivered or approved by other Member Organisations. It provides its members with information in respect of minimum insurance requirements and offers a discounted scheme providing comprehensive cover through Oxygen Insurance. The family membership application form requires confirmation of professional indemnity insurance cover.

- 49. ADR will only record a member's status as MIAMs qualified and notify the MoJ that the member should be included in the register of MIAMs qualified mediators on the Directgov website after receipt of a letter from the mediator's PPC confirming the member's fulfilment of the requirements for qualification.

Generic Good Practice

- 50. There are a number of generic recommendations that emerge from consideration of individual Member Organisations. Each Member Organisation is autonomous. It operates within generally defined parameters of self-regulation. This is unlikely to be seen as sufficiently robust when considered against the higher benchmarks that emerge from the public interest and ultimately are likely to need revising up to conform with robust standards expected from publicly funded mediators as well as private mediators.

51. None of the Member Organisations are ideally suited to becoming a single regulator and none should be given sole responsibility for regulating family mediation. This is an important finding of this Review. Identifying a single regulator from any of the Member Organisations is unlikely to be acceptable to any of the other member organisations. The way forward is to build on what has been achieved by the FMC. The role of the FMC is discussed more fully below (paras.63-74) including how the FMC might improve its own governance and effectiveness.
52. It is important that Member Organisations recognise that, in line with the public's expectation and the Government's, there is a need for greater clarity and consistency of the standards of service expected from mediators. As the Norgrove Review states, that "a clear plan must be developed to maintain and enforce standards of competence and to ensure that effective regulation of mediation as numbers of mediators increase"¹³ The Government's response to Norgrove is "... to create a coherent and effective system which draws on the expertise which all parties bring to it and which delivers effectively for users"¹⁴. This expectation is likely to be met by the development of the FMC along the lines outlined in Part 2 of this Review where the future of family mediation regulation is considered in the sharing of responsibilities between all the Member Organisations, through the FMC and the MoJ/LSC.
53. Moving towards a more robust system of regulation may not always follow a pre-determined path. For example the Law Society had for many years operated its own systems for complaints against solicitors and adjudication. The present position is that service complaints are mainly handled by the independent Legal Ombudsman, and regulatory matters are prosecuted by the SRA (as the regulatory body) before the independent Solicitors' Disciplinary Tribunal.
54. As an immediate and first step, it is recommended that the FMC should receive an annual report from each Member Organisation setting out in full the following:
- Compliance with the FMC Code of Practice;
 - The monitoring of complaints procedures including an indication of complaints received;
 - Monitoring of mediators' compliance with professional practice consultancy requirements (where appropriate);
 - Monitoring and compliance with the requirements for qualification for conducting MIAMS;

¹³ *Family Justice Review, Final Report* , November, 2011, para 4.102

¹⁴ Ministry of Justice and Department for Education, *The Government Response to the Family Justice Review: A System with children and families at its heart*. Cm 8273, February 2012, p.25.

- CPD education and training being carried out by the Member Organisation.

Supervision and standard setting

55. The various Member Organisations were invited to provide their Code of Practice to enable a comparison with the FMC Code of Practice. In some instances detailed above, there are inconsistencies and omissions from the FMC Code of Practice with the Codes of Practice being used in some of the Member Organisations. This needs to be addressed in the following way:
- Regular checking by the FMC that the various Codes of Practice are up to date and fit for purpose;
 - A regular reporting responsibility on the various changes in Codes of Practice made by Member Organisations to the FMC;
 - Compliance with the FMC Code should be demonstrated by the text of the Code operated by a Member Organisation, rather than in policy documents which may be less easy for mediators and members of the public to access;
 - A monitored time-table for implementation of changes to the Codes of Practice to conform with the FMC Code. In this instance it is recommended that all Member Organisations should be fully compliant with the FMC Code of Practice within the three months following the completion of this Review.
56. The PPCs have an important role but their supervision responsibilities in terms of numbers they supervise and the quality of the supervision is largely unknown. There is need for the PPCs to be subject to a separate PPC Code of Conduct. This will not only encourage the achievement and maintenance of high standards of both supervisors and supervisees, it will also strengthen the on-going training of newly qualified mediators and encourage the sharing of expertise from more experienced mediators.
57. It is therefore recommended that there should be a PPC Code of Conduct. However, due to the present shortage of PPCs and concern over the difficulties of recruitment, I no longer consider that a compulsory quota of the number of supervisees would be practicable. There should also be a register of PPCs and an accreditation system consistent with the licensing arrangements for mediators.

PART 2

58. Part 2 considers the role of the FMC itself, whether it needs to be changed and/or strengthened to meet present and future demands, and how this might be accomplished. In this part I take account of the findings in Part 1. The FMC's current role, organisation and status is assessed. This is followed by consideration of the possible ways to address the challenges that face mediation and its regulation in the short, medium and long terms.

The FMC's current role, organisation and status

59. The FMC's Constitution provides a good starting point for considering its present organisation and role. Article 4 of the Constitution sets out the following Aims and Objectives:

- To support the Member Organisations in their co-operative development of mediation and ADR;
- To provide maintenance and development of professional and training standards as a means of ensuring public confidence in and awareness of family mediation;
- To provide the profession as a whole with one unified body with which to make representations to and to negotiate with government and other national interests;
- To prescribe and maintain a set of professional practice and training standards common to the Member Organisations, to which their members must adhere and which the Member Organisations must regulate and monitor;
- To provide a forum for collaborative discussion and policy making; and
- To arrange that appropriate information regarding mediation is collated and available.

60. The FMC was founded late in 2007. Generally it may be described as a voluntary organisation intended to represent its six Member Organisations. During the four years of existence it has made substantial progress. Work accomplished includes:

- the drawing up and implementation of an agreed FMC Code of Practice from September, 2010;
- the agreement of required standards of qualification for mediators carrying out MIAMs and the accompanying guidelines for PPCs;
- the administration through NFM of the FMC LSC - approved Assessment of Professional Competence scheme for mediators carrying out publicly funded work;
- the revision of that scheme;

- continual liaison with the relevant government departments over matters connected with relevant government departments over matters connected with family mediation.

61. Work in progress or planned includes:

- The establishment of a single accreditation qualification which must be achieved by all family mediators, whether carrying out publicly funded or privately funded work;
- The provision of a disciplinary procedure with regard to the FMC LSC approved Assessment of Professional Competence scheme and a more general complaints procedure;
- Reviewing the agreed minimum qualification requirements for mediators conducting MIAMs and the accompanying guidelines for PPCs;
- Continued liaison with government departments.

62. Article 4.5 of the Constitution of the FMC underpins much of its work. It provides the Member Organisations with a forum for collaborative and cooperative discussion and policy-making. In practical terms this confers a benefit on the members if there is agreement. However, if agreement fails to materialise then the FMC may become gridlocked. The lack of agreement may cause delay and lead to inertia. It may also build up frustrations and professional disharmony amongst its members.

The Governance of the FMC

63. Article 6.1 of the Constitution provides that: “Each Member Organisation shall appoint one representative to sit on the Board, and in addition independent governors to a maximum of three will be appointed by the Board.” Currently there is only one independent member and vacancies for the other two have been of relatively long standing. The FMC is entirely dependent on its Board members and their agreement. The absence of strong outside independent voices, beyond the current single voice of the one external member, does not help to make the Board more than a talking shop where, in the absence of consensus, disagreement may triumph. In theory all the members are equal. In practice some may feel they have [to] a stronger voice than others. The common denominator amongst the members is the commitment to family mediation. Family mediation itself is a widely defined discipline with many inputs across a wide spectrum. As already mentioned skills and training from one profession are often “borrowed” by another and the interdisciplinary nature of the Membership is one of its strengths. But it may also be its weakness. Conversations across the disciplinary divide may be lost in translation or, worse, misunderstood. Personality differences may become dominant and

decision-making made more difficult. Setting priorities is threatened when perceptions are not always shared amongst all the Members.

64. The governance of the FMC is mainly conducted through the Board. All the Members are able to meet and discuss matters of common interest at Board meetings. Outside the Board meetings there is much to be done but at present this is undertaken on a voluntary and unpaid basis. There is no appointed Chair of the Board. In practice the Board meetings are chaired by the independent member. The Board has largely operated as a working party with the intention of fulfilling the aims and objectives set out in the FMC Constitution. Using its powers under Article.6.6-6.8 the Board has appointed a permanent sub-committee – the Professional Training and Standards Committee. This committee has the power to review and develop common professional practice and training standards as referred to it by the main Board and also any related matters.
65. There is a *de facto* Convenor of the FMC. This role emerged from 2009, as a means of convening Board meetings, setting the agendas as well as liaising with outside agencies including relevant government departments[, and also setting the agenda for the FMC Board]. The work is unpaid, conducted on a voluntary basis and is *ad hoc* in nature. There is a likely to be a considerable gap when the current Convenor retires in 2012.
66. Under the current constitution, and in terms of governance and procedure, the FMC does not have an Executive Committee. This is a reflection of the foundations of the FMC, namely its voluntary origins and the need for consensus amongst its Members.
67. The office of Convenor and/or Chair should now be better thought through so that a form of executive or executive officer might be appointed answerable to the Board.
68. The FMC Board has not developed a skill set or data base of competencies amongst the Board members. This is partly because Board members appear to think that their role as such is only the same as representing their organisation with an implicit mandate to speak. Some members do see their role as something more, namely the development of the FMC and, however loosely defined, of mediation and the regulation of mediators. To date, the FMC has not undertaken an “away day” training for Board members to support them in their role and in the carrying out their responsibilities which might prove very useful and is recommended. There is no provision under Article 6 of the FMC Constitution for limiting the term that Board members may serve. The primary responsibility of a Board member needs to be clarified and spelled out. Speaking for an organisation is an aspect of representation that may prove to

result in a conflict of interest when attempting to resolve family mediation policy or make decisions about the standards.

69. Provision for limiting the term that a Board member may serve also needs to be put in place. It would be worthwhile for the FMC to undertake regular skills audits to identify gaps. This might encourage member organisations to engage positively with the FMC and ensure that when representatives of member organisations stand down they are replaced by new representatives with the requisite skills set.
70. The FMC is under increasing pressure to adapt to change and this is likely to increase rather than decrease in the future. Expectations placed on the FMC have always been high. Given many of the limitations of the FMC under its Constitution, organisation and membership, there is a real danger that it will be constantly “blamed” for not achieving what is expected of it. Yet many of the expectations are simply outside its remit and procedural controls. Consider the complex question of how to discipline a member or Member Organisation. The FMC lacks statutory powers or contractual/licensing competences. It may expel a member organisation, but falling short of expulsion it has no powers to discipline a Member or, more importantly, to exercise controls or real supervision over its Member Organisations, although it should again be noted that only mediators belonging to an FMC Member Organisation can carry out publicly funded mediation or MIAMs. The FMC’s aspirations are laudable but difficult to achieve. It needs to address two aspects of its governance: the role and responsibilities of its representative members as referred to above, and that of appointment of additional external independent members.
71. Under the FMC constitution up to three external independent Board members can be being appointed. Currently there is only one external member appointed. External members provide a significant opportunity for the FMC to engage with the outside world. They provide additional skill sets and professional links that should help to enhance the role, standing and status of the FMC.
72. It might be possible to use the external members’ category to engage with key stakeholders and bring to the FMC the experience of retired civil servants or the private sector. This would provide further evidence to the outside world of the importance and standing of the FMC and its attitude to its responsibilities.
73. It is recommended that active steps should be taken to appoint two more independent or external Board members as soon as possible.
74. The Family Law Bar Association (FLBA) and the Bar Council are not currently members of the FMC. There are good reasons for the Bar Council to become a

member. Barristers represent an important group of stakeholders in the family justice system and bring considerable professional reputation and skills to mediation. An increasing number are training as mediators and a mediation-friendly pool of barristers is likely to provide a future pool of mediation-positive judges. There is general enthusiasm to become involved with the FMC and it is understood that the Bar Council intends to apply for membership in the foreseeable future. Provided that it meets the constitutional criteria, this application should be favourably received. It is timely that barristers are represented on the FMC. It is not clear whether the FLBA intends to apply separately for FMC membership.

The Future of the FMC and Regulating Family Mediation

Introduction

75. I turn to consider how family mediation might be appropriately regulated. In Appendix 2 I have set out a short history of regulation and how present day examples of contemporary approaches to regulation may be helpful for future consideration. The Norgrove Report recognises the need for a comprehensive plan which covers accreditation, supervision of mediators, the training and its supervision, and assessment. Implicitly this connects the three important strands engaged in the regulation of mediation. Family mediation requires a modern and up-to-date system of regulation that sets standards, regulates the profession and provides an up to date licensing and accreditation scheme. As the umbrella organisation for family mediation's professional bodies, the FMC is in the best position to work towards the creation of a more coherent regulatory framework for family mediation. But it will need the collaborative support of government. In the light of the Norgrove findings it is recommended that a joint working party should be set up by the FMC and the MoJ/LSC tasked with taking forward the recommendations set out in this Review. At present FMC representation on the Family Justice Board is not possible for reasons discussed below (para. 83). There is the necessity for the FMC to be fully consulted and engaged with the changes in the family justice system from the outset. The working group would have the potential to act as a means of communication with the FMC on matters of common interest. There is already in existence the MoJ Mediation Steering Group but this is a rather wider organisation which includes academics and other mediation stakeholders. It is a useful organisation in its own right providing a valuable forum for informed discussion and policy considerations, but the working group recommended in this report for *inter alia* the implementation of its proposals should perhaps be a tighter organisation composed of just the FMC, the MoJ and LSC.

76. Mediation has come of age. Today it is accepted as an important part of the modern justice system. The Family Law Pre-Application Protocol effectively requires all separating couples when applying to the courts to consider mediation. One of the few areas of legal aid expenditure that will be maintained is that of publicly funded mediation. The public interest requires levels of professional standards that are consistent with a high reliance on mediators for a variety of skills crossing the divide from children to family property and welfare. The time is ripe for major reform of the regulatory aspects of mediation.

The Future of the FMC and Proposals for Change

77. As already mentioned, the FMC has achieved a remarkable amount in a short period. Its achievements and progress against its plans have been set out above.

78. In addition, it has also achieved greatly improved communication with the MoJ and the LSC, as well as creating better relations within the mediation community. The role of its Member Organisations in education and training is also important, although the self-approval of courses has inevitably attracted criticism of the creation of a “closed shop”, and the time must have come for the approval of training courses to be conducted by an independent panel – see further below.

79. The mediators that fall within the ambit of the FMC Member Organisations have been generally reasonably well regulated in terms of protocols and monitoring through the Member Organisations. As pointed out previously, some private mediators carrying out family mediation are not members of organisations affiliated to the FMC and consequently do fall outside the FMC’s remit though the indirect influence of FMC Codes and good practice should not be discounted.

80. The FMC has operated on the basis of consensus, with limited resources and on the basis of *pro bono* work undertaken by the current Convenor and independent Board Member. It seeks to combine a forum for discussion and agreement of standards with that of a lobby group seeking to influence policy. But, its regulatory functions are likely to be increasingly important. As a voluntary group it has reached a stage where without changes to its governance and structure it cannot be expected to do more. There is a risk that it will fail through disagreement and that without resources its scope and

potential will be too limited. Furthermore, the FMC was not originally designed or intended to fulfil some of the responsibilities it may find itself encountering.

81. Mediation and mediators require appropriate regulatory standards that are commensurate with changing circumstances and additional responsibilities placed on the mediation service. Many of the changes are likely to need proactive as well as responsive decision making. A working party with the MoJ and LSC should be tasked to take forward these recommendations. It is recommended that some degree of shared responsibility should be adopted by the MoJ with the FMC.
82. The Government's response to Norgrove makes clear that it will closely watch and review the progress of the FMC to assess its effectiveness in maintaining and reinforcing high standards and to replace the FMC by an independent regulator if necessary.¹⁵ Strengthening the FMC in the ways suggested in this Review set out in outline below is a first step in ensuring that the FMC is able to fulfil its full potential. There are a number of additional ways the FMC might be supported through strengthening its links with the MoJ/LSC. The Government's response to Norgrove has included the setting up of a Family Justice Board, with an Interim Board established in April 2012.

This Board will provide the leadership and direction necessary to implement our ambitious plans for change. ... The Board's main focus will be on driving improvements in performance across the system and ensuring that the different parts of the system work together as effectively as possible to enable this¹⁶.

83. In my Interim Report I recommended that the FMC ought to be represented on the Family Justice Board. It was hoped that this would provide an important mechanism for the Government to continue to monitor the progress of the FMC and ensure its effectiveness in maintaining and reinforcing high standards. Since writing the Interim Report is clear that the planned role and structure of the Family Justice Board makes such a proposal impractical. The Family Justice Board is a tightly focused group of executive members accountable to Ministers for the performance and improvement of various statutory delivery organisations. As recommended above, there should be a working party composed of the FMC, MoJ and the LSC. This would allow the FMC to make recommendations to Government and inform the Family Justice Board.
84. In order to be able to meet the increased expectations required of it, the FMC might be further practically supported by government through the provision of some financial support for specific purposes.

¹⁵ Ministry of Justice and Department for Education, *The Government Response to the Family Justice Review: A System with children and families at its heart*, Cm 8273, February 2012, p.76 No. 121.

¹⁶ *Ibid.*, p.26 para 89.

Governance and constitution – recommendations

85. There should be a full complement of independent Board Members. Existing vacancies should be filled as soon as possible. The skills of an independent Member should ideally include an understanding of the role of regulation; experience in working with different professional organisations; levels of tact and diplomacy that are commensurate with their status and the ability to command respect for the FMC within the court services and in working with civil servants and the general public. Ideally there should be a wide consultation to find suitable candidates. A retired senior civil servant or someone with appropriate private sector experience might be suitable. The independent Board Members have a pivotal role in shaping the future of the FMC and ensuring that the FMC may act independently when required from the member organisations. There is a very helpful HM Treasury, *Corporate governance in central government departments code of good practice* (HM Treasury/Cabinet Office, July 2011) that might form the basis for taking matters forward within the governance of the FMC. It is also important that the FMC should have some form of an Executive, perhaps consisting of an Executive Officer with administrative support. Costs and organisational details will have to be worked out by the Member Organisations.
86. The FMC should have the opportunity to make representations to the Family Justice Board. It is not possible to have the FMC represented on the Family Justice Board for reasons set out above. As also mentioned above, the use of the working party that could consist of the FMC, MoJ and LSC might be an effective solution to ensure that FMC representations are heard.

Standards, Accreditation and Training

87. Currently there is no accurate number or identification of all the family mediators practising in England and Wales, and there is acknowledged duplication of membership between the Member Organisations but to date this has not been measured. So far the FMC has not taken steps towards setting up a database of family mediators.
88. As yet, there is no common method of accreditation and therefore no single transparent system in place for sorting out competent from incompetent

mediators, although the establishment of a single accreditation scheme now represents work in progress.

89. There is the LSC Competence Assessment Scheme plus the accreditation schemes of FMA, Resolution and the Law Society but collectively these fall short of what is required. There is no commonly agreed system of practising certificate. It is recommended that the introduction, supervision and monitoring of mediation standards requires a single and generally accepted accreditation system resulting in a common practising certificate. The FMC is capable of initiating this process but its Member Organisations would have to carry out its supervision and monitoring. The process of practice certification will need a database that is regularly maintained and updated.
90. Currently, there is no national database for family mediators and there is a need to this to be managed and undertaken. There is a limited database of mediators contracted to the LSC maintained by the MoJ as part of the Direct Gov. web site. This does not cover all family mediators or mediators that meet minimum standards. The FMC should take on data base responsibilities as part of its remit. There is an urgent need to establish a single web-based registry of family mediators who belong to the FMC organisations which should be kept up-to-date. This is important as the Department of Work and Pensions are currently in the process of developing an on-line hub for separating parents. This is a matter that needs to be kept under review. .
91. The FMC should professionalise family mediation providers, including privately and publicly funded mediators, with a single qualification requirement that would enable them to become fully accredited and eligible for a practising certificate. All practising mediators should be required to have practising certificates and, where appropriate, be required to undergo a re-accreditation process. The common standards and procedures for qualifications should be agreed in the FMC, and administered and monitored by the MOs, who should then include them in their annual reports to the FMC.
92. The standards of expertise and knowledge required need to be kept under regular review. There is a need for an on-going monitoring of the effectiveness of family mediation, mediators and their role, education and training standards. Currently, no such evaluation takes place. Subject to the availability of resources, the FMC should introduce and keep under review a strategy for measuring and monitoring the effectiveness of family mediation and its mediators.
93. Again, in general, the FMC, MoJ and LSC need to work together and this is essential in addressing the future regulatory requirements for family mediation. The FMC website should be kept regularly updated. Practice and policy

decisions agreed by the FMC should be published and where appropriate with reasons.

94. It is recommended that there should be the following:

- A single unifying standard for all family mediators, whether carrying out publicly or privately funded work, that is regularly reviewed and is at least consistent with the requirements of the LSC Quality Mark;
- A single certification of professional practice for all family mediators, demonstrating that that standard has been achieved;
- Consideration of a system of compulsory re-accreditation;
- The introduction of a collaborative system for striking off or suspending mediators found to be inadequate in their standards of professional competence or conduct;
- Regular inspections of all Member Organisations. The inspection system might take the form of an audit similar to that carried out by the LSC for those that have LSC contracts. The inspection system and personnel undertaking this task might be considered in consultation with the MoJ/LSC and under the supervision of the newly established Family Justice Board;
- The system of inspection or audit of Member Organisations should be conducted by an independent person with clear terms of reference and time-scales for compliance.

95. Currently, there are nine FMC recognised providers delivering approved foundation training courses, five of which are approved by the College of Mediators and four of which are Member Organisations of the FMC. Additionally, Member Organisations deliver other CPD training courses as do other approved providers. Although there is compulsory training required for those that have not conducted mediation for five years, there is no regular system of re-training or fitness to practise examination. The FMC is limited in its ability to address the question of monitoring the quality and standards of the education and training of mediators, and the present arrangements inevitably invite criticisms of lack of real transparency and creating a “closed shop”.

96. It is recommended that the education and training of family mediators should be given urgent attention. This should include:

- A system of assessing and analysing the competence of mediators as they complete training courses;
- Regular and supervised re-training schemes to ensure that mediators are up to date as part of a rigorous CPD system.

97. Best practice should be encouraged and training courses that simply grant qualification for attendance should be replaced with a formal system of assessment as part of the accreditation of mediation as a profession. This should lead to a structure for primary training, post qualification training and CPD education. Senior mediators should be actively encouraged to train as PPCs.
98. It is recommended that there should be an independently organised system for the approval of all mediation courses and that such courses should be fully assessed with qualifications approved through external accreditation. The existing arrangements for self-approval within Member Organisations should be ended and new arrangements for external monitoring and assessment introduced as soon as possible.
99. There is a role for the FMC to take forward this last recommendation by appointing an independent panel for the approval of courses and monitoring of their external validation and assessment.
100. There is also a need for the recommendations below to be implemented as soon as is practicable: The PPCs provide an important access to knowledge and expertise. The more experienced and knowledgeable family mediators ought to be given incentives for them to become involved as PPCs. The future of family mediation and its success will largely depend on the ability of senior mediators informed through their own experience and knowledge to influence and contribute to a new generation of family mediators by encouraging best practice. PPCs should carry out this work according to the provisions of an additional Code of Practice specifically for PPCs.
101. The training and education of PPCs should be given priority in the future regulation of mediation. Regular monitoring of PPC training courses is essential. The system of education and training of PPCs should also be integrated into the overall system for mediation assessment.
102. Finally, it is important to recognise the future direction for mediation services within an EU context. The European Parliament have recently commented on the Mediation Directive¹⁷ and drawn attention to Article 4 as follows:
Article 4 of the directive provides that Member States must encourage the development of quality control mechanisms in mediation and the continuing training of mediators. The training offered in the European Union differs widely in type and quality. A great many people have qualified as accredited mediators without possessing the appropriate intellectual and human qualities. It should

¹⁷ See DG for Internal Policies: Policy department C: Citizens' Rights and Constitutional Affairs: Legal Affairs: Lessons learned from Implementation of the Mediation Directive: The Judges' Point of View PE 453.169 The Directive 2008/52/EC.

be mandatory in all Member States for a public authority to be responsible for official recognition of the quality of the training, on the basis of rules laid down at European level. In that additional context it is again recommended that the common standards and procedures for qualifications should be agreed in the FMC, and administered and monitored by the MOs, who should then include them in their annual reports to the FMC.

THE WAY FORWARD

103. Lisa Parkinson has noted that mediation may draw from “parent disciplines, but it is a discipline in its own right”¹⁸. Recognising the nature of mediation as a discipline in its own right is an important way to take forward positive proposals for the future of the FMC. Neil Robinson has argued “...that the quality, standard and depth of knowledge of the family mediator should be no less than that of any other Family Justice practitioner, lawyer or otherwise”¹⁹. Regulating mediation and settling on some form of objective scrutiny is not easy. Robinson points to the challenges facing the American Bar Association in 2008 when it attempted to set objective criteria and how difficult this proved to be. Robinson describes the challenge as understanding the model of mediation “that provides access to a multi-disciplinary community of mediators, who both work in co-mediation pairs and as sole practitioners”²⁰. In that regard, the aims of my Review are to encourage a commonly agreed standard for the professional development of family mediators that are appropriately certificated and are compliant with professional standards that are common in many professions. Family mediation and the FMC has reached a stage in its development that the next steps are critical in that development to ensure that it is fit for purpose, that there is a national register for family mediators and a robust system for inspection, accreditation, certification and supervision that is in the public interest.

104. The FMC is in the best position to create and maintain this enhanced regulatory framework. It is clear that the FMC has already achieved some of the basics of

¹⁸ L. Parkinson, “Training for Family Mediation” Family Mediation Association Journal November, 2011 also see, S. Roberts, “Decision Making for Life Apart” (1995) 58 *Modern Law Review* 714.

¹⁹ N. Robinson, “Shape shifters or Polymaths? A Reflection on the Discipline of the Family Mediator in Stephen Cretney’s World of Private Ordering”, forthcoming, R. Probert, ed., *Family Law Essays* 2012.

²⁰ *Ibid.*

a regulatory system in terms of its existing voluntary and self-regulatory arrangements. These include the FMC Code of Practice, the FMC LSC Assessment of Professional Competence scheme for mediators carrying out publicly funded mediation and the agreed minimum professional requirements for those carrying out MIAMS. In the near future it is also likely to include a single accreditation scheme for all family mediators. In the light of these achievements, there would have to be strong persuasive evidence to justify the view that the FMC should be replaced by an independent regulator. Ultimately it is for the government to make such a decision. But, as specified above, the FMC will need to put its own house in order by appointing a full complement of external Board members and, more importantly, by defining and delineating the inevitably dual functions of the Board members who represent its Member Organisations.

105. In order for the FMC in particular, and family mediation in general, to be able to work realistically towards meeting expectations of both government and public, it will need help and support from government, so that the responsibility for achieving, maintaining, reviewing and developing such a framework is shared. At present family mediation is not a regulated profession and, as already mentioned, the FMC can only produce, monitor and enforce a regulatory framework for those mediators who elect to work within its remit. The responsibility for bringing all family mediators within that remit rests ultimately with government. The Government's response to Norgrove has shown a willingness to work with the FMC, provided it can show that it can work towards achieving and maintaining high professional standards in family mediation. The FMC should see this as an opportunity to engage with the Government positively.
106. There are some who strongly favour statutory regulation²¹ of mediation. Statutory regulation of mediation is not a simple option or one that is likely to be introduced overnight, even if a case was made in its favour that would be accepted by the Government. Statutory regulation would take considerable time to plan and execute. It would have to be subject to pre-legislative scrutiny in terms of consultation with stakeholders. It would be necessary to identify systemic risks and a core set of minimum protections. It would require a mandatory register of authorised mediators and appropriate financial protection. Statutory regulation also requires some form of risk-based supervision strategy that targets the regulatory action required to protect consumers. The provision of an in house system of complaints would also require accompanying processes to connect with statutory regulation. Any enforcement strategy needs

²¹ See: The discussion on the Regulation of will writers House of Commons Standard Note: SN?HA?05683 (17th May 2012).T

to encourage incentives for compliance that also deters non-compliance with sanctions for wrongdoers including, where appropriate, financial penalties. There would also need to be appropriate systems in place that bring mediation under the statutory regulation to fall within the jurisdiction of the Legal Ombudsman. Strong evidence would need to be produced to show that there are significant problems that cannot be addressed under the present, if improved, arrangements. In the meantime the FMC has a real opportunity to set its own house in order. If its member organisations really co-operate so that the FMC can take forward and implement the recommendations in this review, this will result in a form of regulation by agreement that is likely to prove effective.

107. The FMC is considered by some as incapable of providing the requisite independent, proportionate and robust standards for mediation that are monitored and sufficiently well enforced. The main objection is that the FMC is composed of member organisations and acts as a representative body for the constituent membership organisations and cannot simultaneously be the regulator. In short the FMC is said to have conflicts of interest and conflicts of function. These objections are met by the fact that the FMC is more than the sum of its member organisations alone. Article 4.3 of the FMC Constitution makes clear that one of the FMC's main objectives is to provide the profession of family mediation as a whole with one unified body. Article 4.4 sets out how the FMC is to act in terms of establishing "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". The increase of the external membership of the Board to its full complement of three, should strengthen the FMC, enabling it to address more independently the consumer and public interest, provided that the collective will of the member organisations allows it to do so. If necessary the requirements of independence and the protection of the consumer and public interest could be made explicit in the terms of reference provided to external members on their appointment. The FMC's constitution could also be amended to allay any concerns about independence when exercising its regulatory functions. However, it is important not to belittle the value of the very real experience that exists within the member organisations. Using a combination of that experience and a more obvious independent element provided by the external members, the FMC will be in the best position to shape the development of family mediation including its regulation.

108. The FMC currently lacks sufficient resources to address all regulatory and related issues effectively. This is a matter of importance and might be addressed through collaboration with the MoJ/LSC. The issue of resources may also be considered by external members with suggestions and proposals

discussed by the FMC. It is likely that the administrative and executive support required by the FMC is likely to grow, in the future and this will need to be addressed.

109. Charting the FMC's regulatory pathway requires engagement with best regulatory practice and developing techniques of monitoring and assessment of the FMC Code. This is a matter for dialogue and evolutionary change based on experience. The revised LSC Competence Assessment Scheme is a case in point which shows how the FMC can influence and develop in collaboration with the LSC. The whole point of this exercise is to bring all accreditation schemes including that of the Law Society's within the FMC regulatory umbrella so that the public are aware of what to expect when they employ an FMC recognised mediator. The working group established between the FMC and the MoJ/LSC would provide an effective way to identify and respond to any regulatory shortcomings. There is no ideal model of regulation that can be adopted and applied to mediation and mediators. Experience has shown that the most effective regulation comes about through the process of considering specific problems in a timely and proportionate manner. The consumer and public interest of today is often in flux. The Coalition Government is committed to reducing regulatory burdens as far as possible and is unlikely to introduce statutory regulation without strong evidence of significant problems. There is also a need to balance better consumer protection with the additional costs of regulation.

With the political will of its member organisations and the support and encouragement of the relevant government departments, the FMC can offer a viable way forward. It is an opportunity that should not be missed.

Appendix 1

Terms of Reference of the Review

FAMILY MEDIATION COUNCIL (FMC)

Independent review of the FMC and its Member Organisations 2011:

Terms of reference and procedures.

Purpose of the review

The purpose of the review is two-fold:

Part I: To satisfy a) the Board of the FMC; b) the relevant Boards and Committees of its Member Organisations, and c) relevant government departments that good practice operates in the FMC's participating Member Organisations; and also that the public interest is protected in the carrying out of mediation and in the provision of mediation services;

And,

Part II: To consider what should be the role of the FMC, whether it needs to be changed or strengthened to meet present and future demands, and how this might be accomplished.

Part I

A. Terms of reference

The review will be conducted by an independent reviewer, who will review and report upon the extent to which Member Organisations meet and continue to meet the required criteria of FMC membership set out in the FMC's Constitution, in particular

- section 4.4: Aims and objectives; and
- section 5: Criteria for membership.

The review will consider in particular a) relevant policy and procedural documents which set out the ways in which each Member Organisation meets the requirements of FMC membership; and b) evidence submitted to

demonstrate the extent to which it fulfils these policy and procedure intentions in practice.

These documents and this evidence will include details of its

- Register of practising family mediators;
- Code of Practice and that code's compliance with the FMC Code of Practice;
- Complaints procedures and the workings of those procedures in practice;
- System for monitoring its mediators' compliance with CPD requirements;
- System for monitoring its mediators' compliance with professional practice consultancy requirements;
- System for monitoring its mediators' compliance with the FMC agreed minimum requirements for those mediators' who carry out MIAMS;
- Register of PPCs;
- System for co-ordinating and monitoring the work of its PPCs;
- System for approving foundation training courses and providers;
- System for ensuring that its mediators are covered by adequate professional indemnity insurance in accordance with section 3.7 of the FMC Code of Practice;
- Equality and diversity policy.

B. The review

1. The review shall consist of consideration of the following documents and information:
A report from each Member Organisation setting out its arrangements for dealing with the matters set out in para.1 and 2 above, including comment on any disciplinary matters, and accompanied by relevant organisational documents.
2. After consideration of the above the reviewer will hold meetings with representatives of the Member Organisations, and will then issue an interim report.
3. A workshop with the reviewer, the FMC Board and other representatives appointed by the Member Organisations, and representatives of the relevant government departments will be held before the issue of the reviewer's final report and recommendations.

C. Timetable

The Council will formally approve the finalised terms of reference and finalised timetable for the review on 21st October. The timetable will allow Member Organisations one calendar month in which to prepare their written submissions. The independent reviewer will be asked to submit his preliminary report within two months of the deadline for submission by Member Organisations, during which time he or she may also make further enquiries of and hold further meetings with each organisation. Any workshop will take place within six weeks from the publication of the reviewer's preliminary findings and the final report will be published within two months from the date of the workshop.

Part 2

A. Terms of reference

The review will consider and report on the present role of the FMC with reference to its Constitution and its Code of Practice, taking into account the experience of the FMC since its inception and the effectiveness of its current working practices.

The review will also consider and report on the future role of the FMC, taking into account likely demands on it, and whether it needs to be changed and/or strengthened in the light of current or future demands. It will also make recommendations as to how this might be accomplished, These may include changes to the FMC Constitution.

B. The review

The reviewer will consider a report from the Convenor of the FMC, endorsed by the Board, on work, completed, in progress and scheduled for the immediate future. This report will include details of the FMC LSC Competence Assessment Procedure for mediators undertaking publicly funded mediation.

The reviewer will also consider comments and recommendations from participating Member Organisations and other stakeholders concerned with family mediation, including the relevant government departments. The reviewer will first receive written comments and recommendations from the above and will then have individual meetings with them – see timetable below.

C. Timetable

The written report from the Convenor will be submitted to the reviewer within one calendar month from 21st October 2011.

The written comments and recommendation from the Member Organisations and other stakeholders, including the relevant government departments will also be submitted to the reviewer within one calendar month from 21st October 2011.

The reviewer will then hold individual meetings with representatives of the Member Organisations and other stakeholders, including the relevant government departments. Those with the representatives of the Member Organisations will coincide with the first meetings referred to in Part I above.

The reviewer will be asked to submit a preliminary report within two months of holding the last meeting with a Member Organisation or other stakeholder. A workshop with the reviewer, the FMC Board and other representatives of the relevant government departments will be held before the issue of the reviewer's final report and recommendations. If practicable, this will coincide with the workshop referred to in Part I above. The final report will be published within two months from the date of the workshop.

Appendix 2

Regulation in its Historical Context

Regulation in its historical context

There is a long history of regulating professional organisations in this country. There are numerous examples to choose from that contain many common themes that are relevant to the future regulation of mediation. From voluntary groups to more formal lobby groups; from self-regulated trade to a more elevated professional status; from recognition either through joint stock company or eventually to Royal Charter or statutory regulation. The early days of the Incorporated Law Society are a case in point. In 1823 solicitors were invited to subscribe to a new professional body, a Law Institution. The main promoters were also prominent in the venerable Society of Gentlemen Practitioners (SGP) or more commonly known as the Law Society formed earlier in 1739 to raise and defend the standards of the profession. The Law Institution promised much more than the SGP. It offered a building and library in the heart of London, an agency for employment, a club room and offices, a registry for the sale of property and money to be lent. Above all through subscriptions it achieved financial autonomy. These were matters that the older SGP had shown little interest but the new Law Institution attracted widespread subscriptions, even outside London, and over time it offered negotiations with the SGP so that the old society quietly faded away soon after 1823. In 1832 the imposing neo-classical façade of Chancery Lane²² became the public face of the growing ranks of the profession. The 100 volumes of the early library collection had reached 32,500 by 1891. Solicitors became elevated from being a “trade” to a recognised profession, an aspiration that rivalled the Inns of Court and the status of barrister. In 1831 it received a Royal Charter and the title Law Institution altered to become the Incorporated Law Society coinciding with the formal demise of the SGP.

Regulation in its modern context

Today political considerations are strongly in evidence in making regulatory choices. The “better regulation agenda” as it was optimistically called had begun under the Conservative government in 1985 based on the idea of reducing administrative burdens and decreasing the cost of regulation²³. Deregulation policy was shaped by

²² Designed by Vullimay

²³ See: the DTI White Paper, *Lifting the Burden* Cmnd 9571 (1985).

a series of White Papers in 1985, 1986 and 1988²⁴. A Cabinet Committee on regulation was established and this led to an ante- red tape virus that spread across Whitehall culminating in the Deregulation and Contracting Out Act 1994 after another series of White Papers²⁵. The 1994 Act has been further extended in 2001 by the Regulatory Reform Act 2001 and then again by the Legislative and Regulatory Reform Act 2006. The movement in favour of deregulation was not confined to the UK as a similar approach was evident in the European Community, now European Union²⁶. The invigoration of the light touch agenda was reinforced by the Hampton Report²⁷ and the setting up of a Better Regulation Programme under the Better Regulation Executive, separated from the Cabinet Office since 2007. Hampton recommended the streamlining of many regulatory bodies and at the same time the co-ordination of regulatory policy with a regulatory impact assessment as part of each policy initiative. Adopting single strategies, reducing administrative burdens and driving regulation from the centre appears to offer an attractive style of regulation. Central government using traditional command and control techniques seeks to master the role of regulators while regulators look to decreasing controls and increasing autonomy among those regulated. The tensions are well explained by Black:

Indeed, rather than negating the decentred analysis, the observation that the state is seeking to increase its centralised control is its natural corollary. Either through the establishment of “meta-regulators” to regulate non-state regulators as in the case of the accounting, medical and legal professions, or through the internal regulation of other governmental regulators, central government is seeking to enhance its steering capacity²⁸.

The Macrory Review²⁹ that followed the Hampton Report, was asked to look at the role of sanctions and the functioning of criminal sanctions. This is a critical part of the regulatory system. Regulators require a range of incentives and sanctions in order to be effective. The Macrory Review accepted that the existing use of criminal sanctions for regulatory offences was required. He also recommended that a new punitive regulation system was necessary rather than reliance on simple moral persuasion or good behaviour. He recommended an extension of the range and

²⁴ DTI White Paper, *Building Businesses Not Barriers* Cmnd 9794 (1986) and *Releasing Enterprise* CM 512 (1988)

²⁵ DTI, *Deregulation: Cutting Red Tape*, (1994), *Thinking About Regulation: A Guide to Good Regulation* (1994); *Getting a Good Deal in Europe* (1994).

²⁶ R. Baldwin, *Is better regulation smarter regulation?* (2005) Public Law 485

²⁷ Philip Hampton, *Reducing Administrative Burdens: Effective Inspection and Enforcement Final Report* London: HM Treasury, 2005.

²⁸ J. Black, *Tensions in the regulatory state* (2007), *Public Law* 58 at p. 66.

²⁹ R. Macrory, *Regulatory Justice: Sanctioning in a post-Hampton World: A Consultation Document* London: Cabinet Office, May, 2006 and *Regulatory Justice: Making Sanctions Effective* London: Cabinet Office, November, 2006.

variety of penalties available to regulators. He adopted the principle that a regulator's own sanctioning powers should be used rather than recourse to the formalised use of the criminal courts.

Macrory's recommendations were largely accepted by the government. New compliance codes and greater managerial controls were also favoured, in his Review, as a way of making the compliance arrangements more effective. The implementation of many of the Macrory Review's recommendations can be found in the Regulatory Enforcement and Sanctions Act 2008. This underlines the shift beyond the criminal courts for the application of sanctions to regulator based systems of sanctions and enforcement. The Act underlines the five principles of regulation set out in Hampton namely enforcement action should be transparent, accountable, proportionate, consistent and targeted.

The impact of the Hampton and Macrory Reports is important in setting the future direction for regulation in the United Kingdom. The Hampton Report reinforces and encourages a targeted approach to regulation that requires all regulators to perform risk assessments and to adopt an effective, efficient and proportionate response while not placing unnecessary burdens on business. The Coalition Government has made a strong policy statement that set sustainable growth, economic stability and a credible deficit reduction plan as essential.

Examples of Recent Approaches to Regulation

There are two recent examples that help in understanding the different strands of regulation and the approach to regulation today when compared to the past. There is no single or ideal model that can be adapted for mediation. Both examples may serve to inform the way in which different styles and circumstances of regulation have lessons that might be helpful when considering how mediation services might ultimately be regulated. The first example is focused on a single regulator, the Forensic Science Regulator, when faced with the challenges of regulating forensic science providers. Recently the Government decided to abolish the Forensic Science Service (FSS). Forensic science providers have increasingly been private sector businesses. The second example is focused on the adoption of a regulatory board within Defra to regulate animal health and welfare through the principle of co-regulation engaging with private and public sectors.

The recent closure of the state run and mainly public financed Forensic Science Service (FSS) that used to be run by the Home Office. Private sector providers in recent years have helped fill the niche left by the closure of the Forensic Science Service. The result is that there is a mix of privately funded and publicly funded providers. This is a good example of cost-sharing between the sectors. Private providers as well as the police are free to develop their own services. This will create new challenges during a period of intensive change. Regulating forensic scientists will require addressing both public and private entities. The importance of uniform

and fully accredited forensic services includes the need for proper resources, training and appropriate processes and integrity in setting benchmarks and accreditation schemes. There is an International Standard ISO 17025 which sets the competence levels for testing and accreditation of laboratories. The current arrangements for regulation are in the hands of the first and single regulator appointed since February 2008³⁰. The appointment is run through the Home Office and is a public appointee whose main function is to ensure that the provision of forensic sciences services to the criminal justice system and that there is an appropriate regime of scientific quality standards. The regulator has currently no statutory powers. There is a separate and independent Forensic Science Society that is the professional body for forensic practitioners. It is largely supportive of the work of the regulator and operates a full range of related services. There is a Society's Membership and Ethics Committee which applies a strict criteria for membership, engages in supervising CPD activities and ensures that there is supervision of the Chartered Forensic Practitioner status. It holds workshops and conferences and seeks to enhance the education of forensic scientists.

In the future there is also considerable EU regulation over forensic science with an EU Framework Decision requiring DNA and fingerprint laboratories to conform to ISO/IEC 17025. Recent changes with the abolition of the FSS will require the regulator to be vigilant especially as many of the newly created police laboratories will be non-accredited. Addressing these matters has resulted in various drafts and guidance issued by the Regulator including the draft Codes of practice and Conduct for forensic science providers and practitioners in the criminal Justice system (2010) and various attempts to build into the regulatory structure the main components of ISO 17025 (2011).

A major complaint against the FSR is that the regulator lacks statutory powers. Having established a regulatory framework, the FSR is planning to issue enforceable standards for the UK. This, however, was postponed first in April 2011 and is now planned for December 2013. The regulator has admitted that enforcing such standards is difficult when there is no statutory leverage for enforcement or compliance with the standard.

The crucial question of whether or not to adopt statutory powers has proved difficult to resolve. It is instructive to consider this point in some detail. In oral evidence to the House of Commons, Science and Technology Committee on The Forensic Service the regulator stated:

During the research phase leading up to the development of my role, Home Office Officials spoke to many regulators and said, "What sort of regulatory model should we have?" The overwhelming recommendation from them was: Avoid some sort of statutory model, if you can, because it tends to restrain

³⁰ Mr Andrew Rennison,

you” The recommendation at the time was to go for light-touch regulation but with the regulator having the freedom to move into areas that he or she saw fit. I enjoy that freedom at the moment....

However, I am now reaching the conclusion that we have to seriously consider some sort of statutory underpinning of my role and some powers to mandate standards. Now that we have developed and consulted widely on the standards, it is entirely appropriate to consider whether we should be mandating those – bolstering the European regulations and translating that into domestic law with some sort of domestic powers to mandate standards.³¹

The government is currently considering whether or not to grant the regulator statutory powers. The arguments for doing so are familiar ones. The regulator is also faced with many organisations including the courts and the police with statutory powers. The House of Commons Select Committee have accepted that the regulator should have statutory powers to regulate the provision of forensic services. Statutory powers in this context are very much seen as an evolutionary phase in the development of effective regulation.

The second example is focused on the creation of a regulatory board within Defra, the main sponsoring department for animal diseases. Analysis of animal diseases in terms of prevention and cure is interlinked with the question of how best to regulate animal health. Defra has been actively engaged in a number of consultations and deliberations. Beginning with the inquiry into the foot and mouth outbreak in 2001 under Sir Iain Anderson³², there have been a number of working parties and public consultations, some of which are ongoing³³. The Consultation on a new independent body for Animal Health has taken place over many years and with a change of Government. Designing the most appropriate regulatory regime for animal health and welfare required careful consideration to ensure the “right fit” between the design of the best regulation and the requirements for animal health and welfare³⁴. It was clear from the Government’s consultation process that there are a number of goals in the regulation and governance of animal health. These are to reduce the overall levels and total costs of animal diseases; ensure that investment in disease prevention and management is effective, efficient and economical; share costs between main beneficiaries and risk managers; Improve confidence of the livestock industry and that of other stakeholders in the way disease risks are managed. It is clear that sharing costs and introducing any form of independent regulator will substantially alter the largely self-regulatory nature of the current arrangements. Cost sharing is likely to mean that livestock owners gain financial responsibilities that were

³¹ House of Commons, The Forensic Science Service, Science and Technology Committee (2011), para. 127

³² Foot and Mouth Disease, 2001: *Lessons to be Learned Inquiry Report*, 22nd July 2002 HC 888.

³³ Public consultations are in 2006 and 2007 and there is a UNITED KINGDOM Responsibility and Cost Sharing Consultative Forum.

³⁴ See: Peter J. May, “Regulatory regimes and accountability” (2007) *Regulation and Governance* 8-26. C. Scott, “Accountability in the Regulatory State”, (2000) 27 *Journal of Law and Society* 38-60.

hitherto largely held by government through subsidy and support. This will empower livestock awareness but also require a much more open debate and informed decision-making; a substantial departure from the lobbying stance taken by stakeholders in the past. The Government has an expectation that any new regulatory structure will have the following benefits to ensure more independent and better informed decision making:

- increase the involvement of livestock awareness amongst farmers and other key stakeholders;
- provide incentives to reduce the cost of managing disease;
- provide incentives for better risk management and;
- ensure greater financial transparency and accountability in the livestock industry.

Defra's transferred its existing animal health policy responsibilities to a new regulatory body within Defra. The new body is the Animal Health and Welfare Board for England with the Government Chief Veterinary Officer as an adviser and employed by the regulatory body. The first meetings were held in November and December 2011. Decision making is intended to be based on the best evidence and a proportionate response to risk, balanced by costs and benefits. There is, however, an expectation, on the part of the Government, that there should be accompanying funding for the regulatory body to support 50% of the costs of tackling exotic disease outbreaks. The Government's agenda by creating a regulatory agency is to take forward cost sharing policies for animal health and welfare, within a scientific context of advice.

The two types of regulation mentioned are illustrative of the common use of cost sharing across publicly funded and privately funded sectors. The debate about the advantages and disadvantages of statutory powers is also helpful in the context of family law mediation.

Government Policy: Regulation: One-in, One-out

The Coalition Government has introduced the One-in, One-out rule to achieve the main objectives which is to reduce unnecessary regulation and by cutting red tape it is hoped to deliver economic growth. Poorly designed, disproportionate or uncoordinated regulation is seen as an impediment to innovation and productivity³⁵. The policy to increase deregulatory measures and refrain from additional legislative burdens is tightly policed and is monitored by a Regulatory Policy Committee. Any proposed regulatory responsibilities including statutory powers have to be assessed and subject to Impact Assessment. The One-in, One-Out policy requires that the cost of new regulations must be compensated for by a corresponding cut. It is clear

³⁵ HM Government, *One-in, One-out: Second Statement of New Regulation* Department for Business, Innovation and Skills, 2011.

that any proposal for regulatory changes to cover mediation will have to be consistent with government policy. This has to be factored into any recommendations. The Government's response to Norgrove included the following:

We have also begun plans to establish a Family Justice Board. At the earliest opportunity we will pursue the range of changes to legislation which we set out here (in the Government's response) so that the right frameworks are in place to drive improvements³⁶.

³⁶ Ministry of Justice and Department for Education, *The Government Response to the Family Justice Review: A System with children and families at its heart*. Cm 8273 February 2012 p.4.