



National Audit Office

## **LEGAL SERVICES COMMISSION**

# Legal aid and mediation for people involved in family breakdown

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Legal aid and mediation for people  
involved in family breakdown

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# SUMMARY

**1** Family disputes that are resolved through mediation are cheaper, quicker and, according to academic research, less acrimonious than those that are settled through the courts. Despite these advantages, only some 20 per cent of people who are funded by legal aid for family breakdown cases (excluding those involving domestic violence) currently opt for mediation. This report examines the reasons for the low take-up and makes recommendations to the Legal Services Commission (the Commission), which administers legal aid in England and Wales, to help increase the number of mediations.

## Main findings

- In the period October 2004 to March 2006,<sup>1</sup> some 29,000 people who were funded through legal aid attempted to resolve their family dispute through mediation. In the same period 120,000 family disputes involving finances and children were completed through court proceedings or bilateral negotiation between solicitors. There were a further 30,000 completed cases settled through the courts that involved domestic violence.



- It is the duty of the solicitor or legal adviser to advise their legally-aided client of the option of mediation in family law cases, although currently there is a financial disincentive to do so as it will result in the loss of potential fees. In response to our survey of recipients of legal aid, 33 per cent said that they had not been made aware by their adviser that mediation was an option. Of those who were not told about mediation, and so did not try it, 42 per cent said they would have been willing to. This represents, potentially, some 14 per cent more cases overall; and even higher rates of take-up might be possible if the option of mediation were better understood by clients.
- The average cost of legal aid in non-mediated cases is estimated at £1,682, compared with £752 for mediated cases, representing an additional annual cost to the taxpayer of some £74 million. Not all cases are suitable for mediation, however, for example, where there has been a history of domestic abuse. Nevertheless, if 14 per cent of the cases that proceeded to court had been resolved through mediation, there would have been resulting savings equivalent to some £10 million a year.<sup>2</sup>
- Mediated cases are quicker to resolve, taking on average 110 days, compared with 435 days for non-mediated cases.
- Most people who live in or near major urban areas have a mediator relatively near by but there are some parts of the country, particularly in rural areas, where individuals might have to travel considerable distances. Some 78 per cent of the population live within five miles of a professional mediator and less than one per cent would have to travel more than 15 miles. Travelling distance may nevertheless be a disincentive to participate in mediation for people on low incomes or those reliant on public transport.
- Our survey of mediators found that there is capacity among many mediators to take on more cases; and 94 per cent of mediators reported that the average waiting time for the first appointment was two weeks or less. There is, however, substantial variation in the success rate achieved by different firms of mediators, measured in terms of the proportion of cases which reach agreement.
- The Commission's current fee structure results in different amounts being paid for mediation to not-for-profit organisations compared with that paid to solicitors (an average of £611 and £463 respectively), which is likely to weaken further the incentives solicitors have to promote mediation.

## Overall conclusions

There is scope to improve the value for money achieved from the legal aid budget through increasing the take-up of mediation. In addition to financial savings, this would bring potential benefits for those involved in family breakdown in terms of outcomes that are less acrimonious, quicker, and longer lasting than might otherwise have been achieved. In order to achieve this, the Commission should publicise the benefits of this option to the general public so that they are aware of and have confidence in it as a means of resolution, and remove the disincentives to solicitors of recommending this option to their clients.

- 2 We recommend that the Legal Services Commission:
  - a actively promote mediation and reflect this in the guidance and information the Commission provides online and in leaflets and information packs for solicitors and their clients, whether legally-aided or not. Information about mediation should be made available in places such as libraries, council offices and doctors' surgeries, where people can read about it before they enter the legal process;
  - b reflect in contracts between solicitors and the Commission a presumption that mediation should normally be attempted before other remedies are tried;
  - c assess the arrangements that solicitors have in place for providing mediation services and review the number of cases that are resolved by this means. Solicitors who have significantly lower numbers of mediated cases should be investigated to ascertain the reasons for the low take-up and, where these prove unsatisfactory, should have their contracts curtailed;
  - d review the list of exemptions from using mediation and the way exemptions are being applied;
  - e assign a unique identifier to track individuals across its three separate databases from start to finish of their cases. This would enable them to produce management information on the number and cost of mediated and non-mediated clients in receipt of legal aid;
  - f extend the provision of mediation to areas of the country that are not well covered, either by supporting extension of the existing provision of outreach services or by providing reasonable travel expenses to those living in areas with less access to a mediator;

- g** incorporate into the quality assurance regime it applies to mediators undertaking legal aid work measures such as the proportion of cases where agreement is reached, and the proportion of cases which do not return to court, and apply sanctions to poor performers;
- h** revise the funding structure for mediators so that fees for not-for-profit and independent mediators will be brought into line; and
- i** the Commission already funds assessment meetings for both parties where only one party is currently entitled to legal aid. As part of this review of the funding structure, the Commission should assess the cost-effectiveness of funding mediation for both parties, where only one party is currently entitled to legal aid, because currently the average cost of a mediated case is less than half that of a case in which mediation had not been tried.



# PART ONE

## For suitable cases, mediation can provide faster, cheaper and less adversarial resolution of family disputes than involving the courts

"If I had a choice again I would try mediation first."

*A recipient of legal aid*

**1.1** People undergoing divorce or separation will often need legal help, for example to establish rights to jointly held assets, or arrangements for care of children. Legal aid is there to meet the cost of professional legal advice and, if necessary, representation at court, for people who would otherwise be unable to afford it. Legal aid is available to people in receipt of income support, income based jobseekers' allowance or guaranteed state pension credit, and to people whose gross income is no more than £2,350 per month. Depending on an individual's income and disposable capital, they may have to make a contribution themselves to the cost of providing legal help, either out of income or as a legal charge on assets (for example, a person may have to repay some or all of the legal aid they received, plus interest, as a share of the proceeds when they sell their house).<sup>3</sup>

**1.2** The Legal Services Commission (the Commission), a non-departmental public body sponsored by the Department for Constitutional Affairs (the Department), is responsible for administering legal aid in England and Wales. The Commission funds the Community Legal Service, a network of solicitors and advice agencies, which can provide help in legally-aided cases. In total, legal aid claims for private family law cases totalled £320 million in 2004-05 and £328 million in 2005-06.

**1.3** The Community Legal Service provides legal aid for a variety of 'Acts of Assistance' in private family law cases, many of which do not directly involve the courts. Any of these different services could be appropriate in family disputes:<sup>4</sup>

- **legal help** provides initial advice and assistance with the problem;
- **help at court** allows for a solicitor or professional adviser to speak on an individual's behalf, without formally representing them in all the proceedings;
- **family mediation** pays for an independent professional mediator (who may also be a solicitor, or be employed within a firm of solicitors) to help the parties reach an agreed settlement.<sup>5</sup> Mediation can conclude with a memorandum of understanding between the parties, which can be made into a legally binding document by court order. **Help with mediation** pays for legal advice and assistance to people attending family mediation;
- **general family help** provides a variety of legal services in family disputes including help resolving disputes by negotiation between solicitors, issuing proceedings, or obtaining a consent order to give legal force to any agreement which has been reached. It is possible that a dispute might be wholly or largely settled using this sort of legal help, through an exchange of letters between solicitors. The limit to general family help is that it does not cover representation at a contested final hearing; and
- **legal representation** provides funding to investigate the strength of a claim or full legal representation in court.

**1.4** The way in which the Commission provides legal aid contributes directly to achieving one of the Department's public service agreement targets: "to achieve earlier and more proportionate resolution of legal problems and disputes, by:

- increasing advice and assistance to help people resolve their disputes earlier and more effectively;
- increasing the opportunities for people involved in court cases to settle their disputes out of court; and
- reducing delays in resolving those disputes that need to be decided by the courts."

**1.5** Solicitors contracted with the Commission have delegated authority to confirm entitlement to legal help, help at court and help with mediation, up to a limit which can vary between £200 and £1,500 depending on the help being provided. In family disputes the Commission expects people to attempt mediation unless there is a good reason why they should be exempted, and solicitors are responsible for deciding whether the individual should be referred to a professional mediator. Mediators to whom cases are referred conduct their own assessment of whether the parties might resolve their case through mediation before proceeding. If more legal help is needed, beyond the financial limit delegated to solicitors, individuals must submit an application to one of the Commission's regional offices. If the application is successful, the Commission grants a 'certificate' of entitlement to a specified amount of further legal aid. We found that half of all clients who received further, certificated, legal aid in family cases following initial advice from their solicitor had gone straight into court proceedings (**Figure 1**).

## Compared to court proceedings, mediation can be a faster, cheaper and less adversarial process

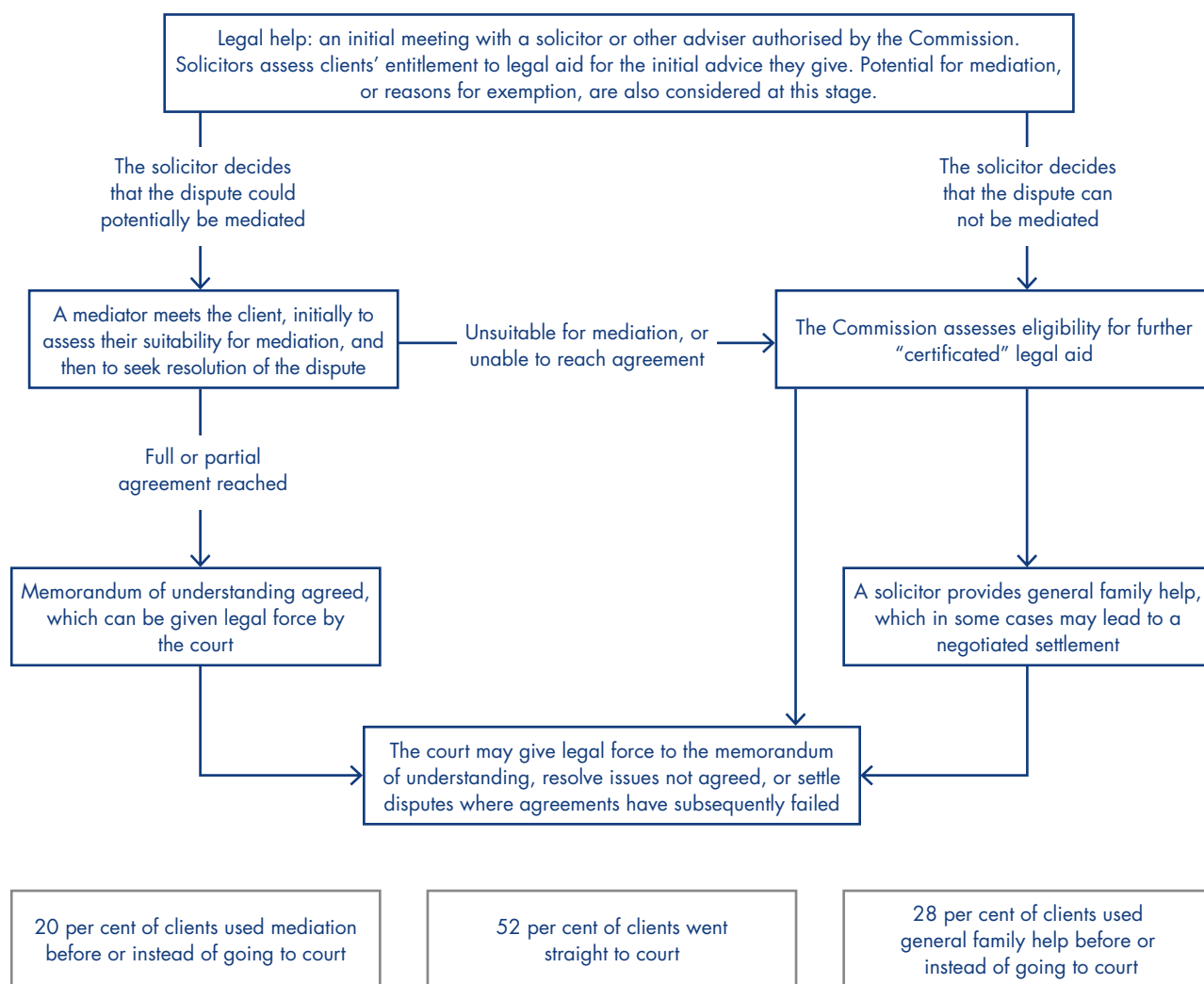
**1.6** Academic research has found that if separating couples are willing to participate, mediation can help them settle disputes more cheaply, more quickly and less acrimoniously than is possible either through the courts or through legal representation.<sup>6</sup> Our analysis of all legal aid claims funded by the Commission between October 2004 and March 2006 found also that, on average, the cost of legal aid in mediated cases was less than half that for cases where mediation was not used (**Figure 2 on page 10**). In addition to potential savings in the cost of legal aid, increased use of mediation could be expected also to save court time.<sup>7</sup> This is despite allowing for the fact that some of the cases in which mediation was used did not result in agreement and were finally settled in the courts or through negotiation between solicitors.

**1.7** Mediation can also lead to faster resolution of disputes. Our analysis of the Commission's data found that, on average, mediations took 110 days (from the start of mediation to the end of the month in which the mediator sought reimbursement from the Commission). This figure will include some cases which were not resolved, or which reached only partial agreement. Despite that, over 95 per cent of mediations were complete within nine months and all mediations were complete within 12 months. In comparison, the average elapsed time between applying for other legal help for family-related matters (predominantly cases relating to children, domestic violence or financial provision) and the date of the final bill was 435 days, or over 14 months. Only 70 per cent of these cases were complete within 18 months.

**1.8** The mediators we surveyed perceived advantages of mediated outcomes to be that they had the potential to be less acrimonious, quicker, less expensive, more equitable and more likely to lead to longer lasting agreements than non-mediated outcomes. Resolution, the organisation representing solicitors working with family law cases, pointed to the advantages of clients maintaining control over the process. Since clients could take into consideration the individual needs of their family when exploring options this could help lead to more workable long term arrangements, particularly with regard to children, and the decisions made are the clients', not imposed by the court.

**1.9** Research undertaken on behalf of the Commission in 2000 suggested that the apparent benefits of mediation might be a consequence, at least in part, of self-selection by people more inclined to reach an amicable settlement choosing to try mediation. Older people, people with higher incomes and women were found more likely, for example, to try mediation than younger people, those who were less well off and men. Mediation was also more likely in cases involving children. People who currently try mediation may be more ready to reach a compromise, meaning that their cases would have been easier, and relatively cheap, to settle whether they had used mediation or not.<sup>8</sup>

## 1 A simplified view of the legally-aided pathways leading to resolution of family disputes



Source: National Audit Office

### NOTE

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

## 2 On average, the cost of legal aid is less in cases where mediation has been used than in cases where it has not been used

|   | Average funding per person for cases in which mediation has been tried<br>£ | Average funding per person for cases in which mediation has not been tried<br>£ | Average 'saving' of mediated case on non-mediated case<br>£ |
|---|---|---|---|
| Cases involving children (e.g. residence of children, contact with them)        | 726   | 1,746   | 1,020   |
| Cases involving finances (e.g. dividing a property between a separating couple) | 711   | 1,510   | 799   |
| Cases involving children and finances   | 785   | 1,743   | 958   |
| All cases   | 752   | 1,682   | 930   |

Source: National Audit Office analysis of Legal Services Commission data

**1.10** In some countries, however, such as Australia, New Zealand and Norway, and in some parts of the United States and Canada, the benefits of mediation are regarded as sufficient to justify making mediation compulsory for separating couples who have disputes over custody of children. In most European countries mediation is voluntary. Nonetheless, several have implemented comprehensive mediation systems and, in Sweden for example, it has been reported that 90 per cent of parents settle disputes over custody and access either on their own or through mediation or counselling.<sup>9</sup>

### Only a relatively small proportion of legal aid applicants attempt mediation

**1.11** Our analysis of legal aid claims between October 2004 and March 2006 found that only some 20 per cent of people applying for legal aid in family breakdown cases had attempted mediation. Divorce and separation is a difficult and emotionally demanding process

and there will always be some cases where, for example, there has been serious domestic violence or where children may be at risk, where mediation will not be appropriate. The example of other countries and the results of our own survey of recipients of legal aid suggest, however, that there is scope for greater take-up of mediation in England and Wales, and that, in cases for which mediation is suited, the benefits could be substantial. The Legal Services Commission is also keen to increase the proportion of family law cases settled through mediation.

**1.12** The rest of this report considers the potential for savings to be made if the proportion of private family law cases settled through mediation were increased, and what more the Commission will need to do to achieve this. Our methodology, detailed at Appendix 2, included separate surveys of mediators undertaking legal aid work, members of the public who had received legal aid in family breakdown cases, and relevant stakeholders.

## PART TWO

# The Commission could promote mediation more strongly and remove barriers hampering greater take-up

**2.1** In order to encourage the use of mediation as a way of resolving family disputes, the Commission will not award a certificate for funding of further legal help unless consideration has been given to a client's suitability for mediation.<sup>10</sup> A key decision is made by the solicitor or legal adviser approached by the client for initial advice, who must either refer their client to a fuller assessment meeting with a professionally qualified mediator, or record the reason why they believe the client to be exempt from attempting mediation. The Commission funds assessment meetings for both parties where only one party is in receipt of legal aid. In some cases, following referral, the mediator will conclude that the case is not suitable for mediation, although the most common reason for cases to fail at this stage, before mediation has been attempted, is because of unwillingness by a non legally-aided party to participate. Some solicitors are also mediators, and some firms provide access to mediation services. The organisations doing most mediation work are specialised family mediation services, some of the largest of which are not-for-profit organisations. The reasons cited for not considering mediation at the outset for cases in 2005 are shown in **Figure 3 overleaf**.

**2.2** Decisions in all these cases necessarily rely heavily on professional judgement. Domestic abuse, for example, is included as a reason for exemption because successful mediation is more difficult where there is a large imbalance of power between the parties, or if there are grounds for concern about the personal safety of the client. A number of respondents to our survey of recipients of legal aid said they were too frightened by the threat of violence from their partner to attempt mediation. We found consensus among the stakeholders we surveyed that mediation should remain voluntary, and that it will not be appropriate for all couples. Opinion is divided, however, about whether the categories can be applied too readily to

cases which could be successfully mediated. We surveyed mediators undertaking legal aid work to ask them whether mediators could successfully mediate cases in these circumstances. Mediators we surveyed believed that the grounds for exemption applied by the Commission would not necessarily be barriers to successful mediation.

**2.3** In 14 per cent of cases clients were automatically excluded from legally-aided mediation because they were respondents in cases for which a court hearing had already been scheduled to take place within the next eight weeks. Mediators we surveyed believed that this was not necessary and could be reduced perhaps to as little as two weeks. There was no reason in principle why mediators would not be able to carry out a fast track assessment of a case in these circumstances. If the case were suitable for mediation and the parties willing, they would expect most courts to be prepared to adjourn a hearing in order to give mediation an opportunity to resolve the dispute. In cases where this was necessary, it would be possible for mediation to take place once an emergency order, such as an interim residence order, had been made by the court.

**2.4** In response to our survey of other stakeholders, Resolution, the body representing solicitors working with family law cases, said that consideration of mediation should be compulsory for both publicly and privately funded clients in family law cases. Their belief was that all separating or divorcing clients should receive at an early stage detailed information about all the options available to them so that they can consider with professional assistance which option or options would best suit their particular circumstances. Because most people with family problems consult solicitors, Resolution recognised that solicitors often act as the gateway, and should make clients aware of the benefits of mediation and other alternative dispute options such as collaborative family law.<sup>11</sup>

### 3 In 2005 almost 57,000 cases were not considered suitable for mediation

| Reasons cited for not referring clients to mediation   | Cases that would have been assessed by a mediator | Cases that would have been assessed by a solicitor | Percentage |
|--|---|--|------------|
| Emergency representation (for example when seeking an injunction)  |   | 15,889   | 28         |
| Fear of domestic abuse   |   | 8,935  | 16         |
| Existing proceedings   |   | 7,677  | 13         |
| Other party unwilling to attend  | 7,451   |  | 13         |
| One of the parties would have longer than a 45 minute journey, each way, to see the mediator, by the fastest means of transport reasonably available to them |   | 3,266  | 6          |
| Mediation not suitable   | 2,294   |  | 4          |
| Mediation broke down   | 1,668   |  | 3          |
| Unable to attend because of inability, disability or restriction on travel   |   | 1,602  | 3          |
| Whereabouts of other party unknown   |   | 693  | 1          |
| Suitable for mediation, but no mediation has taken place or mediation has only partly resolved the issue   | 465   |  | 1          |
| All other reasons  |   | 7,008  | 12         |
| <b>Total</b>   | <b>11,878</b>                                     | <b>45,070</b>                                      | <b>100</b> |

Source: National Audit Office analysis of Legal Services Commission data

## Recipients of legal aid we surveyed who had not participated in mediation expressed negative perceptions of it

**2.5** The biggest obstacle to increasing use of mediation is that one or both of the parties are unwilling for the case to be settled this way. Between October 2004 and March 2006 over 62,000 individuals (representing 36,000 couples<sup>12</sup>) were referred to mediators for assessment of willingness and suitability for mediation, compared to 19,000 mediations (involving 29,000 legally-aided individuals) completed in the same period. Our own findings from surveying mediators, together with the Commission's research, point strongly to the willingness of the parties to participate as the single largest factor determining take-up:

- Forty-four per cent of the recipients of legal aid we surveyed who had discussed mediation with their solicitor or legal adviser, said they did not try mediation because their ex-partner was uncooperative. A further 12 per cent said that they did not try mediation simply because they did not want to.

- Research carried out for the Commission in 2004, similarly, found that the two most common reasons why individuals did not attend mediation were because their "spouse would not go" (34 per cent of individuals surveyed at that time) or because they felt it was "not appropriate" (30 per cent).

**2.6** Comments by recipients of legal aid we surveyed reflected reluctance to see or to come into contact with an ex-partner, sometimes because of fear of violence, alcohol abuse or mental problems, but in other cases simply because the relationship had broken down. One respondent commented that "by the time you get to a solicitor mediation is long past its use", and another said that "sometimes you need a judge to tell someone what they should do 'cos they don't listen to good advice." Among those who had discussed mediation with their solicitor or adviser, five per cent said they had not tried mediation because it was "too late", and a further 12 per cent because they "chose not to". Some of the comments suggest that one of the biggest obstacles to be overcome is an expectation among many people that divorce and separation can be settled only through traditional legal routes. It is clear that some clients do not have confidence that mediation will result in a fair and lasting agreement.



"When there are two people who can't stand each other no amount of talking will resolve matters."

"It was safer for me to let the court decide – I felt my ex could not go back on the court judgement."

*Two recipients of legal aid*

## There is limited public awareness and understanding of mediation

**2.7** Our survey of recipients of legal aid for family law cases found that 33 per cent of respondents had not discussed mediation as a way of resolving their dispute with a solicitor or adviser. People who did discuss mediation with their advisers were much more likely to try it as a way of resolving their dispute. Over a third, 38 per cent, of clients who said they remembered discussing mediation with their adviser also made use of it. In contrast, just two per cent of those who said they were not told about mediation went on to use it. Of those who were not informed about mediation, and so did not try to resolve their disputes using it, 42 per cent said they would in fact have been willing to try it.<sup>13</sup>

"My solicitor never mentioned mediation, but I did receive a letter stating that I had declined mediation. When I questioned this my solicitor told me it was a standard letter and to ignore it. I feel if we had gone to mediation it would have helped both our cases and made the whole affair less stressful."

"I think perhaps that mediation could have solved the problems that were being discussed. Had mediation been offered I would definitely have accepted."

*Two recipients of legal aid*

**2.8** Commission staff we interviewed told us they believed the lack of understanding of mediation among clients and their advisers is a key obstacle to increasing its use. This view was shared by the mediators we surveyed, 23 per cent of whom said that one of the main reasons for clients not trying mediation was that they were poorly informed about the advantages it offered. In response to our survey of stakeholders, Resolution, representing solicitors, supported the use of mediation in appropriate cases, and commented that they would like to see information about all forms of non-court options being given out more consistently to all couples seeking help in resolving their separation issues, together with a more consistent approach and more support for mediation from the Government.<sup>14</sup>

"I got a letter through the post. I thought [mediation] was going to be the same as a solicitor – no one explained the process properly. I really wish I had gone to mediation but did not fully understand what it was at the time. I feel let down by my solicitor and know of many people who feel the same. As a single mum the prospect of going to court and maybe coming away worse off is a frightening prospect. You feel there is no one that can give you advice on divorce, money, children etc. I felt very let down."

*A recipient of legal aid*

## The Commission needs to provide clear guidance to solicitors setting out best practice for working effectively with mediators

**2.9** The Commission publishes guidance explaining how to apply for legal aid which describes the different sorts of legal help which are available, including mediation, all of which is available on the internet. To make it easier to find legal help and information the Commission also supports Community Legal Service Direct, a telephone helpline service.

**2.10** The primary source of information about mediation for many people, however, will be the solicitor or adviser they first approach for advice. More than a quarter (27 per cent) of the mediators who responded to our survey thought that encouragement and advice and increased referrals by solicitors were the key to increasing mediation. Commission staff we interviewed in regional offices at Cardiff and Manchester also believed a key problem was lack of understanding among advisers of what mediation was, and pointed to a need for more effective publicity and provision of information for solicitors.

"The other person's solicitor in the case wrote to my solicitor and suggested mediation. However, my solicitor turned the offer down as she said it would be no good."

"I feel that the legal profession are very guarding of their own position, they will not give guidance in form of a booklet for guidance for people to sort their own matters out. A booklet with basic guidelines of points to consider and how the law usually works out would be very useful."

*Two recipients of legal aid*



## There is a minority of people who would find it difficult to travel to see a mediator

**2.11** Most people who live in or near major urban areas have a mediator relatively near by, but there are some parts of the country, particularly in rural areas, where individuals might have to travel considerable distances. This could be particularly difficult for people on low incomes and may be reliant on public transport, or who are travelling with children or have to arrange childcare. In recognition of this, the Commission funds mediators to provide outreach services in more remote locations, often using community buildings. Nonetheless, one respondent to our survey of recipients of legal aid, for example, living in Lincolnshire, commented that they would have had to travel into Lincoln to see a mediator, and that this was inconvenient for someone reliant on public transport. **Figure 4** shows that in parts of northern England, Wales, East Anglia and the south west, the distance to the nearest mediator's office is at least 15 miles. In practice, some 78 per cent of the population live within five miles of a professional mediator and less than one per cent would have to travel more than 15 miles.

**2.12** The Commission is developing proposals to extend its existing Community Legal Service Direct telephone advice service. The proposals include expanding the service to provide specialist advice on family law issues, and to incorporate advice on family breakdown issues within a new 'triage' service used to identify the most appropriate sort of help for the individual. The telephone advice service will not provide advice on mediation but it will provide links to the family mediation Helpline and will be able to direct clients to publicly funded family mediation services.

## Parties who are not legally aided have little incentive to participate in mediation if they do not wish to

**2.13** Our survey of recipients of legal aid also showed that a major reason for the failure of mediation to reach an agreement is that a partner refuses to cooperate. Based on statistical analysis of our survey, we estimated that this was the reason mediation was unsuccessful for between 15 and 28 per cent of all legal aid clients in family disputes. Measures to encourage partners to take part

in, and persist with, mediation (for example, by funding their participation rather than requiring them to pay for mediation) could play a key role in increasing successful outcomes, as in certain cases those who have to pay for their own legal fees are deterred by the perceived "additional" costs of mediation, even though the cost of a mediated case is likely to be substantially less than the cost of a contested court case.<sup>15</sup> The importance of the willingness or unwillingness of the parties to a dispute to engage in the process of mediation was emphasised by stakeholders, and highlighted by 26 per cent of respondents to our survey of mediation providers as the reason for the success or failure of mediation to reach an agreement.

"I think there would be a greater uptake of mediation if there was a greater onus on the 'second party' to consider mediation. The party applying for public funding generally has to at least consider mediation. All too often, however, the other party just ignores the correspondence. The first party then applies for public funding and issues court proceedings. The other party can then apply for public funding without considering mediation because of the imminent court date."

*Comment by a mediator responding to our survey, who was also a solicitor*

**2.14** The scope to increase use of mediation could be substantial. In 93 per cent of the 53,000 initial assessment meetings to establish suitability for mediation carried out between October 2004 and March 2006, one party was publicly funded. In comparison, the proportion of cases which went on to mediation in which one party was publicly funded was 48 per cent. Whether one or both parties were publicly funded did not make a substantial difference, however, to whether mediation was successful. In cases where one party was funded no agreement was reached in 43 per cent of cases, compared to 40 per cent of cases where both parties were publicly funded.

"I want mediation but ex-husband would not pay to go because he had to pay his own way."

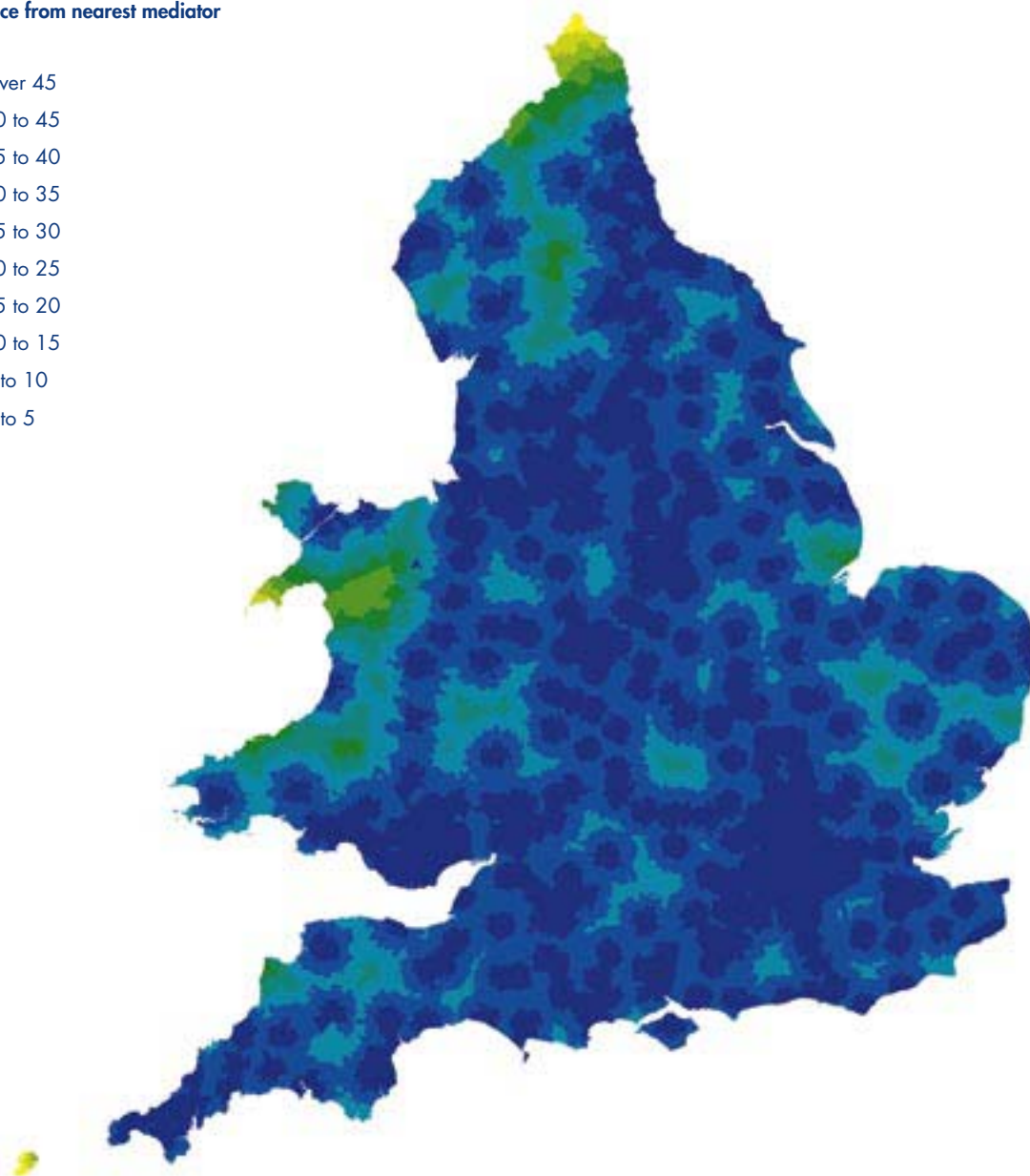
"Mediation is an excellent tool, if you can get both parties to agree to it. In my particular case my solicitor recommended it but my husband's legal team recommended he proceed to court. Suggestion: put solicitors under an obligation to recommend mediation as a way forward before litigation."

*Two recipients of legal aid*

**4** People in most parts of the country can access mediation services, although in more rural areas the travelling distance to a mediator's office can be substantial

**Distance from nearest mediator  
(miles)**

- Over 45
- 40 to 45
- 35 to 40
- 30 to 35
- 25 to 30
- 20 to 25
- 15 to 20
- 10 to 15
- 5 to 10
- 0 to 5



Source: National Audit Office

# PART THREE

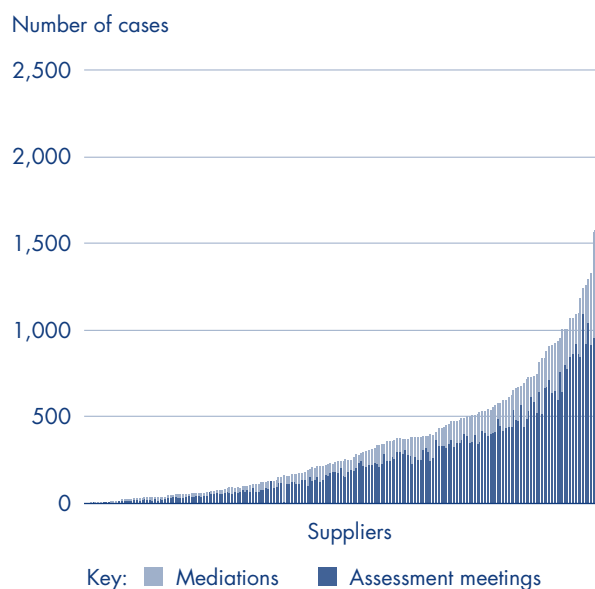
## There is capacity for mediators to take on more work

**3.1** The Commission contracts with specialist mediators, in both the independent and not-for-profit sectors, and with some firms of solicitors which also offer mediation services. Across England and Wales, 137 firms of solicitors or independent mediators and 63 not-for-profit organisations provided mediation help to at least one legally-aided client between October 2004 and March 2006. **Figure 5** shows that in practice there is very wide variation in the volume of mediation work undertaken by different organisations (solicitors and specialist firms of mediators). Ten per cent of all mediation work over the period was undertaken by four mediation organisations (two independent firms and two not-for-profit organisations), whereas some mediators had handled very few cases.

**3.2** Only two of the mediators we surveyed said that there had been instances where they had turned away legally-aided clients due to lack of capacity. Of the 103 mediators who answered the question, 94 per cent said that there was adequate supply of mediators in their area to meet demand. Only one per cent said that the average waiting time between clients being referred to them and their first appointment was longer than three weeks, and 94 per cent of mediators reported that the average waiting time for the first appointment was two weeks or less.

**3.3** Our survey of mediators found that there is capacity among many mediators to take on more work. Of 107 respondents, 60 gave an estimate of the number of additional clients they had capacity to mediate. These mediators believed they had capacity to undertake, on average, a further 118 cases each, representing an increase of approximately a third over their current volumes of work. However, the UK College of Family Mediators raised some concern that, because of a reduction in the number of mediators now being trained, it may prove difficult to increase capacity sufficiently quickly to meet future increases in demand for mediation.

### 5 There is very wide variation in the workload of different mediators<sup>1</sup>



Source: National Audit Office analysis of Legal Services Commission data

#### NOTE

<sup>1</sup> This data relates to the period October 2004 to March 2006.

**3.4** The Commission is proposing to introduce a new national framework of 'Preferred Suppliers' which will replace existing contracts with solicitors from April 2007 onwards. The key elements of the new proposals are that:

- in time, only firms qualifying as preferred suppliers will have a legal aid contract;
- preferred suppliers will have greater devolved powers to determine eligibility for legal aid;

- in order to qualify as preferred suppliers firms will have to demonstrate a high standard of legal advice (tested using peer review and file assessment by the Commission), show a track record of compliance with existing legal aid requirements, represent value for money, and show that they are a soundly financed and viable business. The Commission has proposed that, having met this higher entry threshold, firms will be subject to a much reduced audit and inspection regime; and
- the processes firms follow to claim fees for legal aid work will be simplified and will be done wholly electronically.

One effect of the changes will be to concentrate legal aid work for solicitors among a smaller number of firms capable of meeting the higher quality threshold. The Commission currently has no plans to implement a 'preferred supplier' regime for mediation suppliers.

## The current fee structure for mediators differs according to whether or not the organisation is "not for profit"

**3.5** The Commission's current fee structure results in significantly different amounts being paid to mediators for similar work, depending on whether or not they are not-for-profit organisations. Firms of solicitors and independent mediators are paid fees calculated on standard scales for different sorts of mediation work and for single or multi-session mediation meetings. The Commission supports not-for-profit organisations by paying them an annual fee, set at three different rates depending on the amount of work they do, plus a fee for each mediation. **Figure 6** shows that for mediation work undertaken between October 2004 and March 2006 the average cost of each case was £611 for work done by not-for-profit organisations and £463 in the case of solicitors and for-profit organisations.

### 6 Mediators in the not-for-profit sector are paid a combination of fixed and variable fees

|   | Not-for-profit mediators | For-profit mediators |
|---|--------------------------|----------------------|
| Variable fees paid to mediators depending on the number of cases mediated | £2.70 million            | £5.34 million        |
| Fixed element of funding  | £2.03 million            | –                    |
| Total value of payments   | £4.73 million            | £5.34 million        |
| Number of mediations carried out  | 7,744                    | 11,536               |
| Average cost of each mediation  | £611                     | £463                 |

Source: National Audit Office analysis of Legal Services Commission data

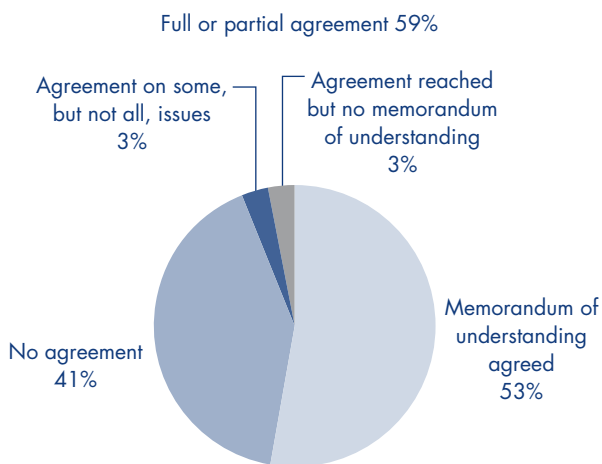
#### NOTE

Figures relate to the period October 2004 to March 2006.

## The Commission will need better management information on the complexity and outcomes of mediated cases to monitor the impact of any increased take-up of mediation

**3.6** The Commission records, on the basis of information provided by mediators, whether mediation results in full agreement and a memorandum of understanding signed by both parties, agreement on all the issues in dispute but no formal memorandum of understanding, partial agreement on some but not all issues, or failure to reach agreement. **Figure 7 overleaf** shows that, for the 19,000 cases concluded between October 2004 and March 2006, full agreement (supported, in most cases, with a formal memorandum of understanding) was reached in 56 per cent of cases, and partial agreement on some of the issues in dispute was reached in a further three per cent of cases. Mediators we surveyed pointed out that, even in cases where no formal agreement was reached, mediation may still have helped couples make progress towards settling their dispute by opening a dialogue between them.

**7** Full or partial agreement was reached in 59 per cent of mediated cases in October 2004 to March 2006



Source: National Audit Office analysis of Legal Services Commission data on 19,000 cases

**3.7** Agreement was slightly more likely in disputes about contact and residence of children only. In these cases there was agreement in 61 per cent of cases. People dealing with property and finance issues, on the other hand, which may require more technical legal advice to settle, and on which individuals may be less likely to compromise, reached full or partial agreement in 56 per cent of cases. One of the mediators we surveyed pointed to an assessment system they had independently developed and which they were using to sort cases into those most likely to be resolved through mediation.

**3.8** Clients who have reached agreement through mediation may go to court to secure, at relatively low cost, a legally binding court order. Cases in which mediation does not result in a durable agreement may incur additional legal aid costs to fund further negotiation between solicitors or contested court action. A measure of the extent to which mediation achieves successful outcomes is the extent to which clients receive legal aid for subsequent legal action.

**3.9** Respondents to our survey of mediators had no knowledge of whether their own clients had subsequently pursued further action relating to the same case and the Commission does not collect this information. The Commission maintains separate databases to record claims from suppliers for mediation work and for legal assistance. The separate databases are not linked and there is no unique identifier which allows individual

recipients of legal aid to be traced through the whole system. Without this information, the Commission will be unable to measure accurately the impact of changes in the number of individuals attempting mediation or changes in the proportion of disputes relating to property, children or all issues that are mediated.

**3.10** In order to ascertain the number of mediated clients who subsequently went on to a contested court hearing, we downloaded information from the Commission's databases and matched clients by postcode and by name. This does not give a completely accurate view because people are likely to change address in the course of a dispute over family matters. However, on the basis of our analysis of over 19,000 cases (representing 29,000 individuals), as **Figure 8** shows, we estimated that 13 per cent of clients who signed a memorandum of understanding after mediation subsequently went to a contested court hearing.

**3.11** Some of those people who failed to reach agreement but nonetheless did not proceed to a contested court hearing may have reached a settlement negotiated between the two parties' solicitors. We found from our survey, however, that in some cases couples resolve their disputes on their own. For example, one respondent, who did use mediation, commented that "after initial consultation with a mediator, we decided not to proceed with divorce as she scared us both to death by saying that it would probably cost us every penny we have".

## The Commission does not routinely monitor and manage the performance of mediators

**3.12** The Commission advised us that it requires all contracted mediation services to comply with the Mediation Quality Mark (MQM). All mediators undertaking publicly funded work must have been assessed as competent by the UK College of Family Mediators or by having practitioner membership of the Law Society Family Mediation Panel. Each mediator must also have a supervisor who assesses the quality of the mediation work undertaken. The Commission has developed Mediation Contract Management Review Criteria to be used for monitoring the quality of work done and to measure and benchmark mediators' performance. This will include comparison between mediation organisations, regionally and nationally, of outcomes achieved for clients. It is expected that the new Criteria will be implemented in early 2007.



## 8 Regardless of recorded outcomes, a proportion of all mediated clients subsequently went on to a contested court hearing

| Case outcome  | Proportion of clients who subsequently went on to a contested court hearing<br>% | Proportion of clients who did not proceed to a contested court hearing<br>% | Total<br>% |
|---|--|---|------------|
| Signed a memorandum of agreement                                    | 13   | 87  | 100        |
| Reached agreement but did not sign a formal memorandum of agreement | 12   | 88  | 100        |
| Reached partial agreement   | 24   | 76  | 100        |
| Failed to reach agreement   | 31   | 69  | 100        |

Source: National Audit Office analysis of Legal Services Commission data for the period October 2004 to March 2006

**3.13** Our review of the Commission's data found that while, on average, 41 per cent of all mediated cases failed to reach agreement, whether an organisation was an independent mediation organisation or a not-for-profit body made no difference to the overall success rate. However, at the level of individual firms undertaking mediation work there is substantial variation between firms which are otherwise doing similar volumes of work. Among the ten firms of mediators doing most work, each of which had undertaken more than 300 cases between October 2004 and March 2006, the proportion of cases failing to reach agreement ranged from 22 per cent to 52 per cent.

**3.14** We asked recipients of legal aid who had used mediation to comment on their experience. We received responses from 265 people who had received legal aid for mediation, of whom 148 gave us their comments.

- 58 people (22 per cent of respondents) made positive comments about their experience of mediation. These people believed that mediation had been less stressful or expensive than alternative ways of handling their dispute, that it was preferable to court, and that the mediator had been good at their job. Some believed that mediation should be compulsory in family breakdown cases.
- 67 people (25 per cent) made negative comments. These people said that their mediator had not been good at his or her job, had been rude, unsympathetic or inexperienced, had not been impartial, made the client feel pressured and was unfair. Others commented that court was a better option or that court was needed anyway. Six people said that mediation had actually made things worse.

**3.15** The mediators we surveyed, taking all the responses together, considered that the three most important factors contributing to legally-aided mediation resulting in a successful outcome were the willingness of the two parties to commit to the process, engagement of experienced and skilled mediators, and support for the process from the client's solicitor. Similarly, staff we spoke to in the Commission's regional offices agreed that mediators' skills would be key to making mediation a more successful way of resolving disputes.

**3.16** The perspective of the Family Law Bar Association was to be more sceptical about the scope to increase legally aided mediation, noting that clients who are not currently mediated could not be expected to respond to mediation as successfully as do currently mediated clients; also believing that the supply of mediators is inadequate to meet demand and that there is no action the Commission could take which would increase use of mediation in family disputes. The Family Law Bar Association noted that in order to be successful people have to be psychologically ready for it.

**3.17** It would be unrealistic to expect mediation to work for everyone undergoing family breakdown. For some cases, for example, where there is a real threat of violence, it will be inappropriate or impossible. In response to our survey, the Family Law Bar Association noted that the agreements people reach take place within a legal framework about which there is widespread misconception and ignorance. In this context, people will continue to need access to good legal advice, which complements other ways of helping them resolve their disputes. However, other evidence, particularly from recipients of legal aid themselves, suggests that when the parties in the dispute, mediators and solicitors are all committed to the process and work together to make it work, mediation can help people reach agreement more quickly, more cheaply and less acrimoniously.

# APPENDIX ONE

## An overview of how the legal aid system works in family breakdown cases

**1** The Legal Services Commission was set up in April 2000 under the Access to Justice Act 1999. It provides legal help to members of the public through the Community Legal Service (CLS), a network of organisations, including local authorities, central government departments, solicitors and advice agencies such as Citizens Advice Bureaux, which funds, provides and promotes legal services. The Commission is responsible for developing and maintaining the CLS.

**2** The Commission's aim is that the CLS should allow appropriate access to those services that meet citizens' needs. To this end, the Commission is required to act as the procurer of legal aid services within the CLS to ensure the provision of a high quality public service at a fair and efficient price. The Commission contracts with solicitors, independent and not-for-profit mediators, and other advice agencies to provide legal help.

**3** Clients are entitled to funded legal help from the CLS system if they meet two eligibility criteria:

- A means test, against thresholds for earnings and ownership of assets; and
- a merits test, which considers whether the case has a sufficiently realistic prospect of success to justify the likely cost.

### Controlled work

**4** Contracts for controlled work cover the provision of initial legal assistance, which the Commission calls 'Legal Help', and 'Help at Court', which allows a solicitor to speak on a client's behalf, for example to obtain an emergency court order, without formally representing them in all proceedings. The cost of 'Legal Help' has risen from £143 million in 1997-98 (at 2005 prices) to £182 million in 2005-06.

**5** Contracts cover specific categories of law (such as family law), specify the number of cases the supplier is authorised to start and, for not-for-profit agencies, the maximum number of hours direct casework time that the Commission will pay for.

**6** Suppliers have devolved powers to decide whether clients are eligible for legal aid and what work should be done. The Commission makes monthly payments in advance, and suppliers submit monthly bills in arrears to cover the work they have actually done in the month.

**7** Under current arrangements, solicitors are paid for family work under the Commission's Tailored Fixed Fee scheme. The scheme pays fixed amounts for each case calculated on the firm's average costs at previous fee rates applied in 2003-04, plus an uplift of 2.5 per cent, disbursements and Counsel's fees. Because the calculation is based on historic fee rates the amount paid differs from firm to firm, but for each firm the fees are fixed regardless of the number of hours worked. The Commission, through a process of peer review, tests a sample of case files to ensure that suppliers have correctly assessed clients' eligibility for legal aid, that they have only claimed allowable costs, and that the quality of work done is competent.

**8** The Commission funds services provided by not-for-profit organisations by paying the cost of a caseworker's salary (based on local authority pay scales), plus a flat rate allowance for running costs (£9,578 a year, or £10,907 in London).



## Certificates for further work

**9** For work beyond the initial legal help, suppliers must apply to the Commission for funding on a case by case basis. The Commission sets limits on the amount and cost of work that can be done without referring again to the Commission. Different hourly rates are applied to different categories of work, and the rules (set out in the Commission's Funding Code) determining which rates apply to solicitors' and barristers' work on a particular case are complex. The Funding Code requires solicitors to have considered the potential for clients to be referred to mediation before a certificate for further legal aid will be granted.

**10** Oversight of exceptionally expensive cases, where costs are likely to exceed £25,000, is handled by a dedicated Special Cases Unit within the Commission, but it would be unusual for private family disputes to lead to such high costs.

## APPENDIX TWO

## The National Audit Office methodology

**1** This Appendix details the principal methods we used to collect and analyse evidence in support of the study.

### Survey of recipients of legal aid for private family law cases

**2** We sent short written surveys to 4,000 people who had received legal aid for family breakdown cases and whose cases were now completed. We received 1,015 valid replies, of whom 265 had attempted mediation, a response rate of just over 25 per cent, from which we may draw statistically valid conclusions. We asked:

- whether individuals had first sought advice about legal aid from a solicitor or another adviser, such as a Citizens' Advice Bureau;
- whether the solicitor or adviser had discussed mediation as a way of resolving the dispute;
- if mediation had been discussed but not used, what the reason for this was;
- if mediation had not been discussed, whether the individual would have been willing to try it; and
- we invited respondents to make any other comments about their experience which they wanted to raise.

### Survey of mediators undertaking legal aid work

**3** We sent written questionnaires to all 197 organisations with a legal aid contract for mediation work in England and Wales. The survey included firms of solicitors which also undertake mediation work, and specialist mediators both in the independent and not-for-profit sectors. We received 107 replies, a response rate of 54 per cent.

**4** The principal issues covered in the survey were:

- barriers to take-up of mediation, and the evidence for these;
- the capacity of mediators to handle current demand for mediation, and their capacity to take on increased volumes of work;
- the non-financial advantages or disadvantages of mediation;
- the most common reasons why mediations are successful or unsuccessful, and the evidence for these;
- the relative costs of mediation and other approaches to dispute resolution in family breakdown cases; and
- mediators' knowledge of the outcome of mediated cases, and the evidence for this.

### Data analysis, including financial analysis

**5** We extracted data for further analysis from the three separate databases the Commission uses to record case details for family breakdown cases:

- SPAN holds details of assessment meetings;
- SPANMED holds details of mediations; and
- CIS holds details of certificated legal aid work carried out by solicitors.

**6** We focused on data for cases concluded between October 2004 and March 2006. We chose this start point because before this date the Commission recorded only mediation work carried out by solicitors and "for-profit" mediators on the SPANMED database, whereas after this point cases handled by not-for-profit mediators are recorded. We used specialised data extraction and statistical tools IDEA and SPSS to undertake our analyses of the Commission's data.

## Geographical information systems analysis

**7** We used geographical information systems software to correlate the location of mediators with population across England and Wales. This gave us a broad view of how easy it would be for members of the public to get to a mediator.

## Case file examination

**8** We undertook a detailed examination of a statistically representative sample of 200 successful claims for legal aid to test whether people awarded legal aid had been properly entitled to receive it, at four of the Commission's twelve regional offices (Cardiff, London, Manchester, and Newcastle).

## Interviews

**9** We interviewed, using a set of standard questions, key Legal Services Commission officials responsible for assessing claims for legal aid, and overseeing legal aid work done on family breakdown cases by mediators and solicitors, in the Commission's headquarters in London and in the Commission's regional offices in Cardiff, London, Manchester, and Newcastle.

## Consultation with stakeholders

**10** We surveyed a variety of third party stakeholders working with people experiencing family breakdown. We asked for views on: the cost of legal aid; the non-financial benefits of mediation; the arguments for or against compulsory mediation or compulsory consideration of it in legal aid cases; the respective roles of solicitors and mediators in assessing suitability of cases for mediation; the barriers to mediation; the circumstances when mediation would not be appropriate; and the scope to increase use of mediation.

**11** We received responses from the following:

- Child Support Agency
- Elizabeth Lawson QC (on behalf of the Family Law Bar Association)
- Families Need Fathers
- Family Justice Council
- Family Mediators Association
- Magistrates Association
- National Family Mediation
- Oxford Centre for Family Law and Policy
- Relate
- Resolution (formerly the Solicitors Family Law Association)
- UK College of Family Mediators

## APPENDIX THREE

## International comparisons

### Comparative international approaches to mediation in family breakdown cases

At present, mediation is not compulsory for divorcing couples in England and Wales. Recent divorce law reforms, however, have placed increasing emphasis on the use of mediation as a means of resolving disputes.<sup>16</sup> There is, as yet, no formal system in place for the referral of couples to a mediator but the Family Law Act 1996 introduces some compulsion for applicants in divorce proceedings who are seeking legal aid (where exemptions do not apply) to attend a meeting to consider the appropriateness of mediation.

### Mandatory mediation

The United States and Canada are two of the few countries worldwide where some states/provinces have mandated mediation for separating couples with custody disputes. In California, mediation has been compulsory for this group of people since 1981, with other states in the United States following suit since. By 2001, mediation had been mandated in 13 states and many others had statutes bestowing the power on judges to order mediation at their discretion.<sup>17</sup> This type of custody mediation is an 'early intervention for disputing parents'.<sup>18</sup> Parents must attend at least one mediation session, which is provided free of charge. There is only an obligation to attempt to mediate, not to reach a settlement. Subsequent legislation has provided for some opt-outs, separate sessions and special assessments for cases where domestic violence is alleged. Domestic violence has been raised as the greatest barrier to fair and successful mediation and, hence, in most systems where mediation is mandated, there are exemptions where this has been alleged.

Research, mostly in California, has shown that 'satisfaction levels are equal to, or higher than, those of voluntary clients' and 'settlement rates are similar'.<sup>19</sup> The Californian Centre for Families, Children and the Courts initiated in 1991 a series of interlocking studies covering over 18,000 contested child custody cases that used mediation. Because mediation was mandatory, there was no litigation comparison group. The results are shown below.<sup>20</sup>

### Success of custody mediations in Californian Courts

In a two-week period during 1991, 55 per cent of families undertaking mediation sessions reached agreement.

Among the 45 per cent who did not reach agreement, more than a quarter were scheduled for further mediation.

### Satisfaction of participants

The majority of over 6,700 parents in snapshot studies in 1991 and 1993 reported substantial satisfaction on numerous aspects of the mediation process and its outcomes:

- 86 per cent said they would recommend mediation to others.
- 93 per cent indicated that mediation was a good way to come up with custody and visiting plans.
- 87 per cent perceived mediation to be a fair way to decide custody and visiting plans.
- However, follow-up studies two years later indicated a decline in measures of satisfaction as only 67 per cent still felt mediation had proved a good way to determine custody and visiting plans and only 68 per cent thought it had been fair.

Despite this, satisfaction did remain higher among those who reached agreement in mediation, compared to clients who did not reach agreement and used other court processes.

## Outcomes

The range of agreements resulting from mediation was comparable to those in the general divorcing population.

## Compliance with agreements

Mediation parents more often reported that the mediated agreement had sufficient detail to guide them, compared to those using other court methods (64 per cent versus 53 per cent).

A study in Charlottesville found that fathers who participated in mediation remained more involved with their children one year and 12 years later, compared to fathers in the litigation group.<sup>21</sup>

Mediation is also mandatory in Australia, New Zealand and Norway. In Australia and New Zealand 'parents have long been required to attend conciliation counselling (which has affinities with mediation)' and presently, 'new Court Rules require a 'bona fide' attempt at alternative dispute resolution...before an application can be filed'.<sup>22</sup> The Family Law Reform Act 1995, implemented in Australia in 1996, placed an increased emphasis on mediation in order to protect the best interests of children.<sup>23</sup> Rule 12.04 of the Family Law Rules 2004 orders mediation in certain circumstances. This Act also provided for the creation of around 60 Family Relationship Centres to be built nationwide. Here a number of services are offered, including advice and dispute resolution services.

In Norway, according to the Marriage Act 1991, mediation is compulsory for all divorcing couples who have children under 16 years old, except in specific circumstances such as cases of domestic violence. Spouses are required to attend in person unless compelling reasons prevent them from doing so. Once an attempt at mediation is made, a certificate is issued to this effect.<sup>24</sup>

## Non-mandatory mediation

Recommendation R (98) 1 of the Council of Europe provides that 'mediation should not, in principle, be compulsory' and, hence, in most of Europe this understanding of mediation has remained, with many countries favouring voluntary mediation as the primary means of resolving disputes.

Spain is one of the few countries in Southern Europe where a formal system for mediation has been put in place. Mediation has been practised there 'since the mid-1980s by psychosocial teams attached to the family courts.'<sup>25</sup> A draft bill was prepared in 1997 which eventually became an Act in 2001. This established a

public centre for mediation, organised the participation of professional corporations and the principles and procedures of family mediation.<sup>26</sup>

In Sweden, mediation is referred to as 'cooperation talks'. The aims and processes are much the same as elsewhere with parents meeting with an expert to come to an agreement about matters such as custody and access. The aim also involves encouraging parents 'to improve their ability to cooperate as parents'.<sup>27</sup> In Sweden, 90 per cent of parents who separate solve the questions regarding custody, residency and access either entirely on their own or with assistance through family counselling or 'cooperation talks'.<sup>28</sup> Cooperation talks, like mediations, are discussions chaired by experts, the goal of which is compromise solutions. But even if this aim cannot be achieved, the talks may enable the parents to gain greater understanding of one another's viewpoints and may learn to handle their conflicts in a way that does not cause suffering for their children.<sup>29</sup>

In Sweden, publicly funded legal aid is no longer available in family law cases (including divorce), nor does the Legal Expenses Insurance policy cover family law. Instead, the Swedish government offers cooperation talks as a free alternative to people who want to separate.<sup>30</sup>

In a case that concerns divorce and related issues, legal aid may be granted only where there are special grounds. All municipalities in Sweden offer cooperation discussions. The discussions are free of charge.<sup>31</sup>

The Finnish Marriage Act contains an entire chapter relating to family mediation. The basic message is that 'disputes and legal matters arising in a family should primarily be settled in negotiations between the family members and decided by agreement.'<sup>32</sup> The Finnish Marriage Act recommends mediation and, in addition, family mediators' services are available to solve problems arising from the implementation of an approved agreement. It is at this stage of the enforcement of custody or right of access agreements or decisions that mediation has had a greater impact.<sup>33</sup>

Comprehensive systems for mediation also exist in France, Belgium, Germany and Austria.

## Child-inclusive divorce mediation

The need to make children's opinions on divorce issues heard is becoming a more integral part of the mediation process. As a result, some methods for including children in discussions about the future have been developed, notably in the US.<sup>34</sup> The Family Law Reform Act 1995, implemented in 1996, also put a greater emphasis on the child's best interests in the process of dispute resolution in Australia. As a result of the Act, a study was conducted into the current level of child-inclusion and it was found that only four per cent of mediators had ever consulted school age children.<sup>35</sup> Following this, a four month pilot project was launched into child consultation. The results of this study reported that over 80 per cent of parents whose children were consulted as part of the mediation process felt that they benefited 'a great deal' from it.<sup>36</sup>

## Parental education

The idea behind this type of intervention is to provide parents with group-based education which centres on the key challenges posed by relationship breakdown. 'Typical aims are to increase the participants' knowledge of the effects of divorce on children; improve parental communication; reduce children's exposure to conflict and facilitate the child's post-separation adjustment.'<sup>37</sup> These classes are already widely used in the US and Canada and are often a mandatory stage of the divorce process. They are also being considered in New Zealand and The Netherlands.<sup>38</sup> These educational programmes typically report a high level of parental satisfaction (90 per cent and above), even when attendance is mandatory.<sup>39</sup> In the statewide mandatory divorce education class in Utah, 56 per cent of participants admitted to being resentful of having to attend. However, 93 per cent of these people later rated the programme 'worthwhile' and 89 per cent said that it should be mandatory.<sup>40</sup> Participating in an education programme early in the process appears to be more effective than participation at a later stage.<sup>41</sup>

One example of a parental education class is the 'Children in The Middle' Programme that was originally developed by the Centre for Divorce Education in Ohio. This is a two-hour class aimed at divorcing parents that uses interactive rather than didactic teaching methods.<sup>42</sup> This programme is one of the most extensively evaluated and has produced some positive outcomes including a reduction in children's exposure to conflict, parents reporting that they felt better equipped to handle and work through difficult situations and, over a two year period, a reduction in the likelihood of parents re-litigating.<sup>43</sup>

Empirical research into education programmes also suggests that there is an argument for mandating these classes for all divorcing parents where custody and access matters are disputed.<sup>44</sup>

## Contact guidelines

At present, no guidelines of this nature exist in the UK. However, they are in use in around a dozen states in the US and have been recommended by research in Australia.<sup>45</sup> Even within the US, the guidelines vary widely, ranging from a very prescriptive approach in Texas – if parents live within 100 miles of each other there is a rebuttable presumption of 48 hours contact every other weekend, plus Wednesday evening 6-8pm and extended visitation in the holidays – to a much more relaxed approach in Ohio, where a tailor-made arrangement to suit each individual family is preferred.

## Higher conflict families

These cases are the most difficult to resolve and they use a disproportionate amount of state time and resources. Due to this, several specialised services have already been developed in England and Wales. These include supervised contact and handover, individual and family counselling and therapy, and substance abuse and domestic violence programmes. More innovative interventions have been developed internationally. However, these are all in the early stages of development and evaluations are limited as yet.<sup>46</sup> Some are discussed below:

- 'Impasse Mediation: The Alameda Model': This encompasses two types of mediation, the 'individual model' and the 'group model'.
- The 'individual model' involves a first phase assessment and individual counselling with each parent and child. Information from the child's counselling is used to 'sensitise' parents. This is followed by the dispute resolution stage and any agreement reached is reviewed by lawyers. 'An evaluation of this model found that 83 per cent of court-referred parents who had failed in mediation were able to reach agreement and two years on, 60 per cent had adhered...'<sup>47</sup>



- The 'group model' involves parents meeting separately in gender mixed groups for four weeks with parallel group sessions run for children. The parent groups combine and receive feedback from the children's group leaders as to how each child is coping. Final sessions are used by parents to mediate a parenting plan. Evaluations of this model found it was just as effective as the 'individual model', with around 'two-thirds of parents able to keep or renegotiate agreements and stay out of court for a two to three year period'.<sup>48</sup>
- 'Parenting without Conflict: An educational intervention for high conflict families': This model is based in Los Angeles, California, and is attended, in the main, by court-ordered parents who are in breach of their orders or are involved in intense conflict or chronic litigation.<sup>49</sup> The aims of the model are to increase a 'sense of accountability to the law, create awareness of the effects of conflict on children and to develop conflict resolution and communication skills.'<sup>50</sup> The model involves both parents separately attending six two hour lectures. These involve group discussion using 'vignettes, videos, role play and skill practice sessions.'<sup>51</sup> Written material is also provided on matters such as how to help children through divorce. Findings on this model are mixed. However, one 'substantial study reported positive client evaluations, and found that nine months on parents were significantly more cooperative and communicative...'<sup>52</sup> Results were not found to be quite as good as the Alameda model.

## Time and Cost

In a study of the Colorado court, 92 mediation cases were compared to 100 cases that had not participated in mediation.<sup>53</sup> The results showed that mediation can increase the efficiencies in dispute processing, leading to a more efficient and timely flow of cases, with fewer unexpected delays:

- The mediation group had significantly fewer days between filing and final orders (group mean of 334 days) than did the comparison group (group mean of 395 days).
- The mediated group were significantly more likely to present stipulations on parental decision making, child residence and child support than the comparison group, which saved judicial and court time.
- The amount of hearing time scheduled was significantly less for the mediation group than the comparison group (two hours versus 3.6 hours).
- Only five per cent of mediation cases had hearings scheduled for a full day, compared with nearly 25 per cent of the comparison group.



## ENDNOTES

- 1 These figures are the latest available as they are the product of a special exercise by the National Audit Office amalgamating data from the Commission's three databases on legal aid.
- 2 In the 18 month period October 2004 to March 2006 some 118,620 cases were completed through court proceedings or bilateral negotiation between solicitors, equivalent to some 79,080 cases a year. The average cost of legal aid in non-mediated cases is estimated at £1,682 compared with £752 for mediated cases, equivalent to a saving of £930 per case. In response to our survey of recipients of legal aid, 33 per cent said they had not been told about mediation, and of those 42 per cent (or 14 per cent of the total) said they would have been willing to try it. The estimated potential annual saving is calculated as 14 per cent of 79,080 cases at £930 each, totalling £10.2 million.
- 3 Appendix 1 provides a more detailed description of how the legal aid system works.
- 4 The funding described here reflects current arrangements. Changes to these arrangements were proposed in the consultation document *Legal Aid: a sustainable future*, issued jointly by the Commission and the Department for Constitutional Affairs in July 2006, and subject to further consultation in February 2007.
- 5 All mediators contracted to the Legal Services Commission to provide family mediation services are required to have trained with a training body approved by the UK College of Family Mediators, and to comply with a Code of Practice which forms part of the mediator's contract with the Commission.
- 6 Gwynn Davis, *Monitoring Publicly Funded Family Mediation*, 2000.
- 7 A study of the Colorado Court published in 2004, for example, found that as well as speeding up settlements the amount of court time scheduled for hearings was significantly less for mediated cases than for non-mediated cases (Joan B Kelly, *Family Mediation Research: is there empirical support for the field?*, published in *Conflict Resolution Quarterly*, volume 22, no. 1-2, Fall-Winter 2004). This would help to speed up the passage of cases through the courts, improving outcomes particularly for children. Court fees for family cases are fixed by Statutory Instrument and, in cases covered by a legal aid certificate, are paid out of legal aid.
- 8 The view of the UK College of Family Mediators was that more recently there had been a greater uptake of mediation by younger people, those who are less well off and men, and that people were also more ready to use mediation to settle financial issues.
- 9 *Divorce Mediation in Europe: An Introductory Outline*, Miquel Martin Casals, EJCL volume 9.2, July 2005. Public funding is available in Sweden only for mediation in family law cases.
- 10 In comparison, in Canada the Divorce Act imposes a duty on lawyers to inform and discuss with their clients the availability of mediation. In Finland where, as in England, mediation is not mandatory, the District Court is obliged to inform couples of mediation as an option.

11 Collaborative family law is a new process in which separating couples each choose a collaboratively trained family lawyer to advise them. Clients participate in four-way face to face meetings with their lawyers, seeking to reach agreement in a non-confrontational way without threatening to go to court. At the outset all parties sign an agreement disqualifying the collaborative lawyers, or their firms, from representing those clients in court if the collaborative process breaks down.

12 These totals include 9,666 people who attended assessment meetings alone because the other party was unwilling to attend. The Commission recognises that these cases are unlikely to proceed to mediation but pays for assessment meetings in these circumstances so that, should relations improve, at least one party is aware of the potential benefits of mediation. There were 53,000 assessment meetings in total, in which individuals participated together, separately or alone.

13 338 respondents said their solicitors/advisers did not discuss mediation with them. Eight of these found out about mediation by another means and used it. Of the 330 that did not, 137 (41.5 per cent) said that they would have been willing to try mediation if they had been told about it; seven (2.1 per cent) said they might have been willing; 169 (51.2 per cent) said they would not have been willing. There were also 17 respondents that were unable to answer whether they had been informed about mediation or not.

14 In Australia, information and advice has been available since July 2006 at new Family Relationship Centres, as well as through a Family Relationship Advice Line and website. In some other countries structured education programmes are provided to separating couples. A study of one programme in America found that although 56 per cent of participants had been resentful of having to attend the programme, 93 per cent had later rated it worthwhile and 87 per cent indicated that as a result of the programme they were now more likely to use mediation to settle their disputes.

15 As a comparator, in Sweden, for example, publicly funded legal aid is no longer available in family law cases, but mediation is provided as a free alternative to separating couples.

16 *The longer-term impact of family mediation*, Relate Centre for Family Studies. Social Policy Research 103 – September 1996.

17 *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, Joan B. Kelly. Virginia Journal of Social and Policy Law, Winter 2002.

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19 *Intervening in Litigated Contact: Ideas from other Jurisdictions*, Joan Hunt & Ceridwen Roberts, September 2005.

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21 Ibid.

22 Ibid.

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

24 *Divorce Mediation in Europe: An Introductory Outline*, Miquel Martin Casals. EJCL, volume 9.2, July 2005.

25 Ibid.

26 Ibid.

27 Ibid.

28 Ibid.

- 29 [http://ec.europa.eu/civiljustice/adr/adr\\_swe\\_en.htm](http://ec.europa.eu/civiljustice/adr/adr_swe_en.htm).
- 30 <http://www.uvt.nl/faculiteiten/frw/onderzoek/schoordijk/cva/publicaties/rapporten/legal.aid.systems.pdf>.
- 31 European Judicial Network website - [http://ec.europa.eu/civiljustice/adr/adr\\_swe\\_en.htm#20401](http://ec.europa.eu/civiljustice/adr/adr_swe_en.htm#20401).
- 32 Ibid.
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- 45 Ibid.
- 46 Ibid.
- 47 Ibid.
- 48 Ibid.
- 49 Ibid.
- 50 Ibid.
- 51 Ibid.
- 52 Ibid.
- 53 *Family Mediation Research: Is There Empirical Support for the Field?*, Joan B. Kelly. Conflict Resolution Quarterly, volume 22, no.1-2, Fall-Winter 2004.

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