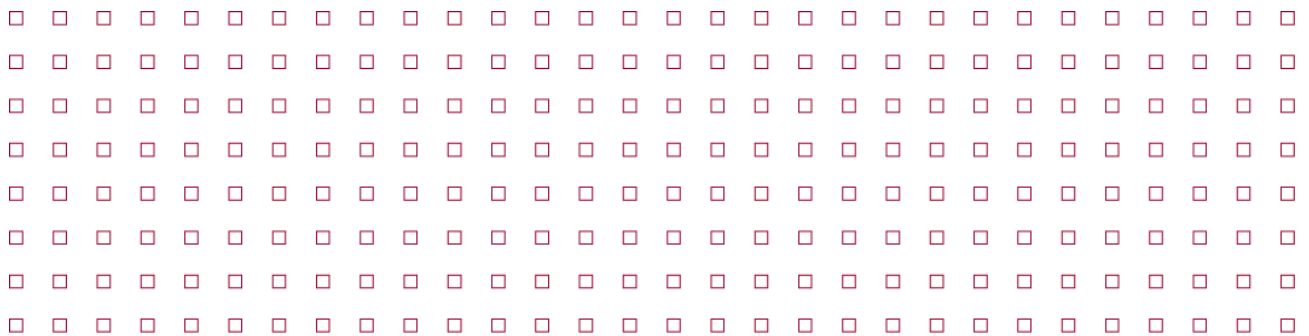


# Report of the Family Mediation Task Force

June 2014



# **Report of the Family Mediation Task Force**

**This information is also available on the mediation Dialogue page**

Alternative format versions of this report are available on request from [FamilyMediationQueries@justice.gsi.gov.uk](mailto:FamilyMediationQueries@justice.gsi.gov.uk).

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## Summary of Recommendations made by the Family Mediation Task Force

We recommend that MoJ should undertake a sustained low level campaign to increase awareness.

We welcome the consideration currently being given by MoJ to the creation of a single authoritative, lively and interactive web presence and help line.

We urge the Government to consult with the Family Procedure Rule Committee to revise the unhelpful and archaic use of language in court forms and guidance (with particular reference to the divorce petition).

We join all those who have urged the government now to abolish fault based divorce.

MoJ should consider the paying for all MIAMs for a period of twelve months.

We recommend that the fee paid to mediators for MIAMs should be increased for a fixed period of three years.

We recommend that the LAA should fund the non-legally aided person for the first single session mediation for a period of three years.

We recommend that the £200 settlement fee for obtaining a consent order once an agreement has been reached in mediation should be increased to £300 for financial and all issues cases only.

We recommend that the LAA consider waiving the second eligibility test so that the initial eligibility test would continue to be valid for six weeks following initial checks by the mediator.

We recommend that mediation should be an exempt service for the purposes of the Residence Test.

We recommend that consideration should be given to a capital disregard for mediation cases analogous to the over 65s disregard.

We recommend that MoJ should review the process to give clarity about the future role of assessment, SPIPs and MIAMs to build on what works and to promote inter-agency partnership working with the client as the central focus.

We recommend that MoJ should review with the FMC by the end of this year whether and how far the McEldowney recommendations have been implemented and what further action is required.

We recommend that the MoJ should clarify the elements of the LAA contracts with mediators that would enable it to achieve its strategic objectives.

We believe it would be right for the Law Society and the SRA to consider whether the regulations should enable solicitors to see both parties together where they want that, for example when they have mediated.

We recommend that options to include children should be urgently reviewed and a small, interdisciplinary group is established to improve training and supervision and registration in this area and update guidelines; and ensure that the FJYPC Charter is updated to include mediation and provide a coherent blueprint for hearing children's voices in DR processes in future.

## The Issues

1. This is a report of the Mediation Task Force, whose membership is listed in Annex A. We have met four times with our first meeting on 20 March and our last on 16 June. We have been supported by MoJ officials who prepared most papers for our meetings and are grateful for their thoughtful help and guidance. We have also had sub committees on finance and on the involvement of children in mediation. Given the limited time for the work there are inevitable gaps and our aim has been to provide pointers to what needs to be done now.
2. There has been agreement for many years that separating parents should be encouraged wherever possible and safe to arrange their affairs without recourse to the courts. This was a theme of the Family Justice Review and is an objective of this and previous governments. The intention has been to encourage out of court dispute resolution, with a particular focus on mediation. This has remained in scope for legal aid (as has legal advice in support of mediation) and the Children and Families Act 2014 places a legal obligation on an applicant to attend a Mediation Information and Assessment Meeting (MIAM) to consider mediation before being able to issue court proceedings in certain private family law matters.
3. The immediate reason for the creation of the Task Force is that publicly funded mediations have in practice fallen by over a third as an unintended consequence of the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) and the loss of a major referral mechanism from legal aid lawyers to mediators. (Attendance at a MIAM had been for most people a pre-requisite to being able to obtain legal aid to engage a solicitor). One result has been an increase in the number of litigants in person in the family courts, many not representing themselves through choice. In addition too many people, including even some solicitors, do not understand that legal aid is still available for mediation. So the government's objective is not being achieved – the reverse in fact.
4. The fall in publicly funded mediations has increased the financial pressure on many mediation providers and some have already gone out of business. This has led to concern that there may be a lack of capacity if and when the number of mediations begins to increase, which may result from the requirement introduced in April 2014 that most applicants to court should first have attended a MIAM to consider mediation.
5. Earlier in the year, the Ministry of Justice took action to gather ideas for how to improve the mediation picture from those working in the sector, academics, the wider family justice sector and the interested public. This has included a web-chat hosted by Family Justice Minister Simon Hughes, which was inundated with ideas, an online crowd-sourcing tool to gather ideas called 'Dialogue' (which gathered almost 50 ideas) and a number of roundtable meetings hosted by the Minister with key parties. The suggestions raised in these forums have been considered by the Task Force and form the basis of many of our recommendations.



6. This report considers the immediate issues facing the mediation sector, taking into account the ideas gathered and makes recommendations for the short term. However we have been clear that the task of encouraging out of court dispute resolution goes beyond them, and that the obstacles are more fundamental than the changes to legal aid. We have taken the opportunity to look at the question more broadly, drawing on international experience, and to think about the future of dispute resolution as a whole.
7. This report focuses on dispute resolution. This is only part of what needs to become a much more joined up strategy to support separating couples, across those who need little help to those whose disputes are intractable, with particular damage to any children.

## The Market for Mediation

8. A recent report estimates that there are around 2.5 million separated families with dependent children (including 16–20 year olds in education) in Britain.<sup>1</sup> Other sources suggest that around a quarter of the 12 million children in the UK have experienced parental separation during their childhood.<sup>2</sup> It is estimated that between 200,000 and 250,000 parents separate each year.<sup>3</sup>
9. Figures on the paths followed by separating couples are sparse, not gathered consistently and have methodological limitations. However, estimates from previous studies suggest that around 1 in 10 children with non-resident parents had their disputed contact arrangements ordered through the court.<sup>4</sup> Data from surveys of separated parents has found that the majority of parents make their contact arrangements informally, and only a small proportion of separating parents have their contact arrangements formally agreed. Data from the Omnibus survey in 2007/08<sup>5 6</sup> found that:
- 1 in 15 children had their contact arrangements arranged through mediators or lawyers (7% of resident parent sample and 8% of non-resident parent sample)
  - 8% of children from the resident parent sample and 17% of the non-resident parent sample had their disputed contact arrangements ordered by court.
  - Figures for applications to court in financial matters<sup>7</sup> found that of cases coming to court only 7% were adjudicated while a third sought orders often for certainty rather fighting to the finish.
10. Anecdotally, the number of privately funded mediations may be increasing, spurred perhaps by publicity around the legal aid changes and the introduction in April 2014 of the MIAM statutory requirement. But any increase is likely to fall well short of offsetting the decline in publicly funded mediations shown below.

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<sup>1</sup> Punton Li, Finch, D. and Burke, D. (2012) Separated families and child maintenance arrangements, Great Britain 2011. London: Department for Work and Pensions.

<sup>2</sup> Cited in Peacey, V. and Hunt, J. (2008) Problematic contact after separation and divorce? A national survey of parents. London: Gingerbread.

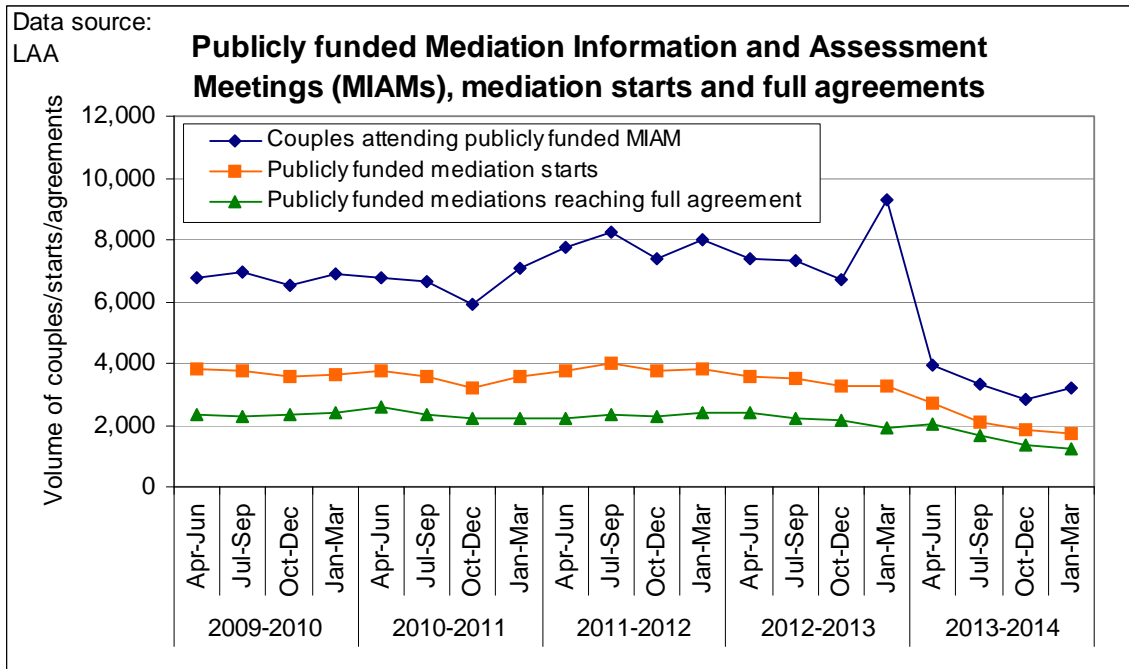
<sup>3</sup> DCA/DfES/DTI (2004) Parental separation: Children's Needs and Parent's Responsibilities. London: DCA/DfES/DTI.

<sup>4</sup> See Blackwell, A. and Dawe, F. (2003) Non-resident parent contact. London: Office for National Statistics and Lader (2008) Omnibus survey report no. 38. Non-residential parental contact, 2007/8. Cardiff: Office for National Statistics.

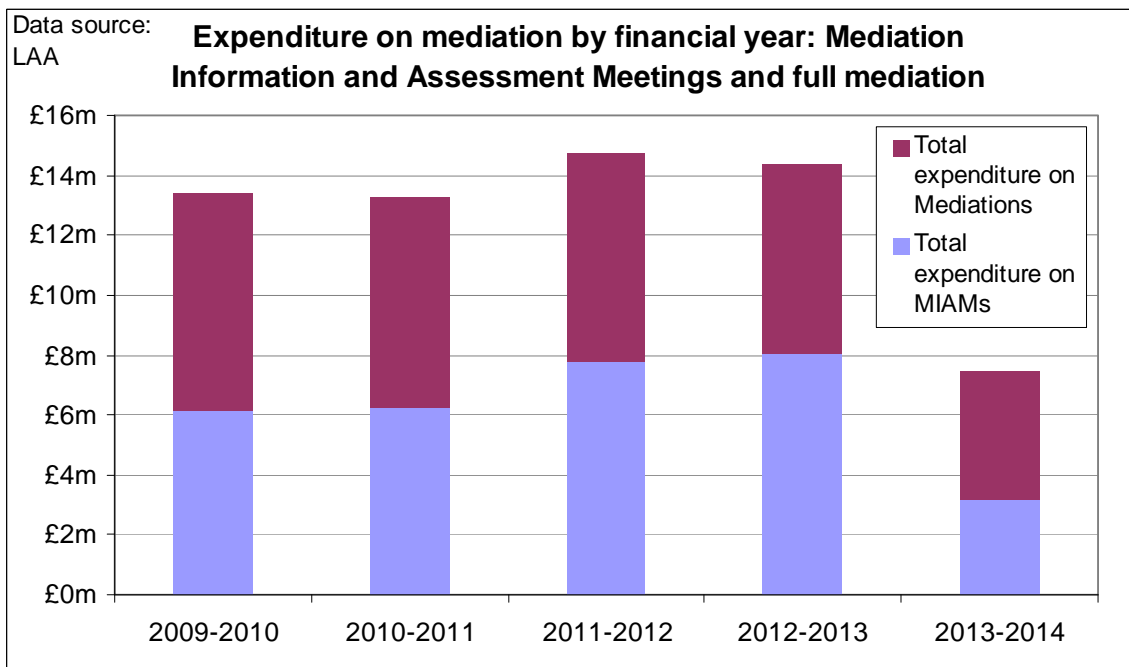
<sup>5</sup> Lader (2008).

<sup>6</sup> Note: the analysis of data is at the child level; parents were asked about one child only. The inconsistency between the responses of the RP and NRP sample is common and likely to be due to NRPs that respond to these surveys are those who are more engaged with their parenting. We may assume the responses from RP are likely to be more representative than NRP responses.

<sup>7</sup> Assembling the jigsaw: understanding financial settlement on divorce Emma Hitchings, Jo Miles and Hilary Woodward – Family Law March 2014 vol 44.



11. There has been a steep decline in public spending on mediation, down by over half, or by around £8 million per year to under £6 million per year, coming from fewer mediations and the removal of payments to mediators to contact respondents.



12. The LAA plan had allowed for an increase in spending of £10 million or more a year (to £25 million pa) rather than a fall of £8 million a year.

13. One result of the decrease in mediations has been financial pressure on mediation services to stay in business. There have been redundancies and some closures. In addition however we are told that many organisations are struggling through,

holding on by cutting expenses and salaries in the hope that the new MIAM requirement will lead to an increase in mediations and income.

14. But financial pressures are not new. Despite the relatively steady numbers of MIAMs and mediations before 2013, we know that many mediation providers were struggling before the legal aid changes. The reasons are likely to include:
  - a roughly 40% increase over the past 5 years in the number of mediation organisations approved as suppliers to the LAA: currently, 257 mediation providers are operating out of 1759 locations. One mediation service can have numerous locations so while this does not suggest an increase in the number of suppliers, it may indicate that some services have over-reached themselves in a market that is already saturated with providers;
  - unsustainable business models for some mediation services that rely too heavily on LAA contracts and do not have enough other income streams;
  - although unlike other categories of law, where there have been reductions in remuneration rates in recent years, the payment rates for mediation from the LAA have not been reduced but neither have they increased;
  - without an adequately integrated approach to standards, qualifications and accreditation, and a common charging mechanism, the fragmented structure of mediation, with six different membership structures (Resolution, National Family Mediation, the Family Mediation Association, the Law Society, ADR Group and the College of Mediators), lacks a coherent approach to promotion of mediation, with inadequate and confusing signposting and difficulty for people in making the choice about which service is right for them.
15. Clearly any sustainable model will need to address these structural weaknesses.

## The Potential for Dispute Resolution Services

16. We refer here to out of court dispute resolution services rather than mediation because, as discussed below and supported by international experience, although mediation is likely to remain the primary option, it should be seen as only one element in the whole process of helping couples to settle their differences. Other services could include psychologists, counsellors, child consultants, financial advisers and in particular, legal advisers.
17. We know from research<sup>8</sup> that 47% of people divorcing or separating after 1996 did not seek any legal advice. The majority of couples, even in a system working as we would want it to work, will make their own arrangements regarding their children and finances without external help. This is welcome as long as it is the result of agreement rather than – where children are involved – one parent leaving and breaking off contact, or where money is involved, one person consenting to an agreement with consequences that they do not fully understand.
18. Equally, there will continue to be couples who cannot avoid resolving their differences in court and indeed for whom court is the most appropriate option.
19. It is very difficult to draw an accurate picture of the dispute resolution landscape in England and Wales because robust statistics about the extent to which divorcing and separating couples use dispute resolution is not coordinated effectively. We are not alone either in having poor data or in the difficulty of encouraging couples to use dispute resolution services.
20. Many countries have reported low take-up of mediation over the years and have expressed disappointment about the difficulties they have encountered in encouraging couples to settle disputes consensually and away from courts. But there are some indications of what we might hope to achieve. When the Norwegian Government introduced mandatory mediation for couples with dependent children in the 1990s, it found that that around a third could actually benefit from mediation; while the remainder either sorted things out for themselves or were in such high conflict or had other issues that they needed to resort to court. Australia, New Zealand and Canada have all had success in promoting mediation and their experience reinforces the hypothesis that the potential for out of court dispute resolution is around 30% of divorcing and separating couples. In achieving that level Canada has seen a reduction in couples resorting to using the court from 10% to 5%, Australia has seen a 32% reduction in the number of final hearings in children's cases; and New Zealand has seen an increasing reduction in family matters needing court disposal. Norway estimates that fewer than 10% of cases now go to court.
21. We believe that a pointer to what we might look to achieve in England and Wales is 30% of divorcing/separating couples going to out of court dispute resolution and 5% to court, compared to figures of perhaps 8% and 10% now. These are crude and uncertain numbers but they give a sense of scale and direction.

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<sup>8</sup> Barlow et al 2013.

22. If successful changes of this kind would see a fall in the number of people in dispute at court. But the increase in the proportion going to out of court dispute resolution would mean more people getting help than currently is the case. A significant proportion would in effect move from sorting things out (or not) by themselves to receiving help. If they are managing now why help them? Evidence from Australia and Canada is that this group includes families with multiple and complex issues and high levels of family dysfunction, and anecdotally we are starting to see the same picture here. The net consequences and benefits would need to be monitored and researched, but we strongly believe this would be likely to lead to gains in terms of more secure and sustained arrangements between couples including in particular gains for children.
23. Changes of this scale would clearly only happen over a period of years. The onus on the FMC and its organisations to deliver reform would increase, and the level and character of the work of the courts would no doubt change substantially.
24. In looking towards this pattern of choices and provision we do not want to downplay the continuing role of the judiciary and the courts, and not only for the small minority who take their dispute to judicial resolution. The agreements that people reach outside court are now and will continue to be strongly influenced by the law and its interpretation by the courts. And there will still be many couples who issue court applications for consent orders to give greater certainty about the arrangements for children and money.
25. The role of the judiciary in promoting mediation and other forms of out of court dispute resolution at every stage of the litigation process is also crucial not only so that appropriate cases move out of litigation into mediation but also so that the general public and legal profession is constantly reminded by the judiciary itself that the court may not be the best option.

## Barriers to Progress

26. We have touched already on some of the barriers to greater use of mediation, in particular:
- the loss of the referral route from solicitors to mediators that legal aid used to provide;
  - the misperception that legal aid is no longer available for mediation;
  - lack of public understanding that mediation exists as an out of court dispute resolution option (a recent MoJ survey showed 53% awareness of mediation);
  - the absence of a single strong, recognisable body behind mediation which the public knows it can go to find an accredited mediator or find out about mediation, which has hampered awareness and therefore access;
  - tighter criteria for legal aid eligibility – e.g. capital limits.
27. One of the other but frequently unacknowledged reasons why mediation has not been taken up by the public in the numbers that, given its many benefits, one would expect is that couples going through relationship breakdown are highly stressed and not in a position to make rational choices. And even if one partner wants it – and maybe **because** she (and it is perhaps more often she) wants it – the other may not. Emotions may include shock, guilt and hatred – not a good starting point. For many, the expected partisan support from a solicitor and the hoped for vindication of their position from the judiciary are, at such times, often much more attractive than the prospect of working consensually with their former partner. This being so, for there to be the kind of cultural shift that we propose, encouragement and support as well as incentives will be required at every stage of the separating couple's journey.
28. But above all there is the public lack of understanding of what mediation is. This is closely tied up with the widespread belief that, beyond asking friends and family for advice once the decision to separate is made, the first port of call is to go to see a solicitor. Now that publicly funded legal advice is no longer available, people contacting a solicitor are very likely to only get as far as the receptionist who explains there is no legal aid for legal advice. Even if a client is advised that they can be assessed for suitability for mediation and for whether or not the mediation would be funded, this message may get lost in the confusion of phoning round a number of mediation agencies. Add to this the likelihood that the client may not appreciate what mediation is or why they are looking for a service, people are commonly in a distressed state and not able to process all this information.
29. We turn now to what is being done and what more might be done to tackle these barriers. Some are short term, designed to address shorter term needs. Some look to the longer term.

## Helping People to Make Better Decisions about How to Separate

30. Over the past few months, responding to the immediate pressures, MoJ has worked with mediators and family justice experts, including the advice sector, to make sure that the public are being given the right information about mediation at the right time; supported the mediation sector in publicising mediation; and placed articles about the advantages of mediation in the consumer, national and specialist media. MoJ has also produced a video and user-friendly family mediation leaflets and posters which have been placed in all courts, strengthened the information on gov.uk and worked with the Family Mediation Council – the representative body for family mediators – to help them develop their website. The MoJ has also produced a marketing and communications toolkit for mediators, aimed at supporting them to market themselves effectively.
31. The Task Force has aimed to gather together other ideas that have been generated recently, including at meetings of mediators and family justice experts chaired by Simon Hughes MP, Minister for Family and Civil Justice. These are listed below together with their current status:
- to make sure that solicitors are aware of their responsibility to refer people to mediation, the Law Society has published the new MoJ mediation leaflets and posters on its website and has recorded a podcast with Simon Hughes on the Children and Families Act provisions on its website;
  - to send a letter to all participants (applicants and respondents) to encourage them to consider mediation if they have not already done so. This has merit and MoJ is pursuing the idea, building on what happens already in some areas of the country;
  - the President will be asked if he will approve a version of a letter to respondents for him to commend to all DFJs; MoJ is using 'nudge' techniques on the wording of this letter to increase success;
  - all courts have now been sent information about the new Family Mediation Council web site and will be provided with a continuing supply of hard copies of mediation posters and leaflets to display;
  - similarly, this publicity material has gone to all LFJBs for them to circulate;
  - to help mediators present a compelling and consistent case for mediation MoJ has worked with Professor Liz Stokoe (a social interaction academic) to refocus the language in its leaflet and poster to be more positive and less conditional, and the Family Mediation Council and the member organisations are following suit with their websites to ensure consistency of language;
  - MoJ has also produced for all mediators a Mediation Marketing Toolkit which provides advice and guidance on getting the best of local media opportunities.



## Information and guidance (and fault based divorce)

32. We believe it would now be worth contemplating a paid for communications campaign: to increase awareness of the change in the law to require applicants to attend MIAMs and availability of legal aid for both the mediation itself and legal advice alongside mediation; to raise awareness of mediation; to clarify that legal aid and legal help is available; and possibly to promote the new Family Mediation Council web site (subject to the following paragraphs). Where and how much to promote these things would clearly need to be considered carefully since they will only be of interest to people who are separating or friends and family of those who are separating. **We recommend that MoJ should undertake a sustained low level campaign to increase awareness.** We believe this is likely to be more effective than a big bang event, which we understand has not worked in the past. (The reason is likely to be that such publicity will only be taken in by people who are separating, or their friends and family.)
33. These initiatives point in the right direction, but more fundamental changes are needed particularly around what is available on the web and the need for more coherent and powerful guidance and tools. There is a plethora of government web sites either focused on separating parents or touching on them, and even more generated by mediation organisations and others such as Wikivorce, CABs, and commercial divorce businesses. Both UK and international research have found that this situation is likely to confuse and misdirect people. **We welcome the consideration currently being given by MoJ to the creation of a single authoritative, lively and interactive web presence and help line aimed at cutting through the confusion.**
34. A single portal was recommended by the Family Justice Review but has not yet been delivered. The timetable to develop this is not yet clear. Depending on the outcome of the consideration of this development it may make sense to promote the new website rather than the FMC website. But a campaign to promote the MIAM requirement would still be worthwhile, followed by a promotion of the new web presence.
35. More generally we would urge the Government to ensure that, in all its written material relating to separation and divorce and especially that used by the court, it employs language that is easily understandable and that seeks to promote a collaborative rather than adversarial approach. In particular we would ask the government to consider whether the time is now right to reform the divorce laws to ensure that separating married couples are currently faced with the arcane and adversarial language at what is often the very start of their journey. The existing forms and literature relating to the divorce procedure do little to promote a collaborative approach and in fact run against the messaging which aims to promote a more conciliatory process. The pack sent out to respondents in response to a divorce petition has language that will inflame, including blame for some form of unreasonable behaviour, and the threat of having to pay the petitioner's costs. **We urge the Government to consult with the Family Procedure Rule Committee to revise the unhelpful and archaic use of language in court forms and guidance (with particular reference to the divorce petition).** It would also help if the pack included a covering letter to explain the context.

36. Some of the language stems from the requirements of fault based divorce. Mediators, including those on the Task Force, refer often to the damage done by the requirements of what most people recognise is a charade. Some separating couples can see this and accept that to make the necessary allegations is a price worth paying. But others are not in that rational state and the allegations drive the receiving party into even greater hostility and away from mediation. **We join all those, including most recently the President of the Family Division, who have urged the government now to abolish fault based divorce.**

## Finance and Mediation

37. We have also considered what might be done financially both to encourage people to use out of court dispute resolution and /or to help the cash flow of mediation organisations, recognising the constraints on public spending. We accept that the £10 million estimated for the anticipated increase in publicly funded mediations does not represent a pot of money that is accessible to fund any proposals or activities recommended in this Report. Indeed were all our recommendations accepted, the total cost of mediation we understand would struggle to go beyond actual expenditure on mediation in 2013/14.
38. A full list of the options we have considered is in Annex B, together with reasoning behind the ones we have rejected. It is at this stage that we must give thanks to the hundreds of ideas on how to promote mediation submitted to the Ministry of Justice via the web chat, the online Dialogue, the Ministerial roundtable and correspondence. We are very grateful for the engagement of the mediation sector in this process and commend them for the innovative proposals that were submitted. However, not all of the ideas were suitable for the remit of the Task Force, some we have passed on to MoJ for longer-term consideration and some we know are already being developed. We recommend only the following proposals of the many we have considered and which have been pressed on us.
39. Key criteria for any proposals are that they should:
- support increased take-up of mediation by the public;
  - improve the viability of mediation;
  - support longer term objectives for the development of out of court dispute resolution; and
  - be cost effective.
40. We know that there were only around 13,500 publicly funded mediations in 2012/13. The mandatory requirement that a potential court applicant should now attend a MIAM affords the mediator an opportunity to discuss all the benefits of mediation with one of the two participants but the respondent is not obliged to attend. The reluctance of many respondents to attend a MIAM represents a significant barrier to a greater take up of mediation. Some of this reluctance no doubt stems from a misunderstanding of the nature of mediation, some from a wish to avoid for as long as possible any further dealings with their former partner and some from those who believe, rightly or wrongly, that the dispute is best dealt with by the court. Our recommendations set out below try, among other things, to remedy to some extent this difference between applicants and respondents.
41. Experienced mediators are clear that cost is often a real consideration, in particular the relative cost of mediation for both finance disputes and disputes about children compared with going to court for someone who does not intend to use a solicitor. On the face of things mediation is more expensive than going self-represented to court – maybe not the reality, but the way it appears to the public. A mediation about finances is likely to cost somewhere between £500 and £1000 whereas the applicant's court fee for a financial order application is £255 (and of course nothing for the respondent).

Although the cost for a mediation about children arrangements is likely to be substantially less and indeed comparable with the court application fee of £215, an application to court can seem more attractive because unlike mediation it offers the possibility of a court order even if the arrangements for the children are reached by negotiation within the litigation process.

42. Non means tested mediation is available in a number of countries, including Australia, Canada, Ireland and Norway. Recognising the constraints on public spending we cannot propose anything even approaching that but we make some more modest suggestions to give mediation a time-limited boost.

### Free MIAMs for all for 12 months

43. The first proposal is that consideration should be given to funding all MIAMs, not just those who meet LAA financial eligibility. To pay for all MIAMs for a short period – twelve months perhaps – would we believe make a real impact on the take-up of mediation and would increase understanding and awareness of the process at a time when this is a major barrier. It would show attentive response to feedback from the mediation sector while having a contained cost. We recognise that the costing will require further investigation together with study of the practicalities (whether LAA or MoJ could provide the funding as a discrete exercise; whether or not and how LAA could contract on a temporary basis with services outside the usual field of mediation practitioners; and on what criteria). Timing is also an issue. Late implementation would greatly reduce its value: the boost is needed now. So our recommendation is that **MoJ should consider the paying for all MIAMs for a period of twelve months**, subject to those qualifications. The provision would be reviewed towards the end of the twelve months.

### Increase fee for MIAMs

44. LASPO has substantially increased the work done by mediators. Solicitors in the past would have filtered out cases for mediation. Now mediators are having the first contacts with potential clients, and having to take them through the options and processes. At the same time the payment for following up with the other party has been removed. So the need for administrative and other input has increased while resource has reduced. This has led to insolvencies of some organisations and squeezed others, and we are told led to undesirable pressure to save costs by for example delivering more cursory MIAMs. We expect that the number of mediation starts will begin to pick up as a result of the compulsory MIAM for applicants and our other recommendations. But the pressures on mediation are immediate. **We recommend that the fee paid to mediators for MIAMs should be increased for a fixed period of three years**, to be kept under review during that time.
45. Based on 2013/14 volumes of MIAMs and allowing for an additional 20% uplift for increased volumes, initial illustrative estimates provided by MoJ suggest costs of around £400,000 for every 10% of fee increase. Were the fee increased by 15%, from the current £87 to £100, the additional cost could be £550,000 (figures are rounded to the nearest £50k).
46. A potential disadvantage of this option, which would need further investigation, is whether it could be introduced sufficiently quickly. We understand that fee levels are set by legislation, which is unlikely to be achievable before spring 2015.

**Fund the first single session of mediation for the second person when the first person is legally aided**

- 47. In order to encourage the take-up of mediation, where one person is publicly funded, the cost of the MIAM for the second party is also paid regardless of their circumstances. However, should the parties then choose to proceed with mediation, while the legally aided person is fully funded for the entire process, the non-legally aided person has to pay. Feedback from the mediation sector has suggested strongly that this is a major disincentive for the second person to proceed with mediation, partly just because it is a cost, but also out of resentment that the ex partner is getting the mediation for nothing.
- 48. To increase the involvement of the LAA in this would be a mixed blessing for mediators because the LAA's rates are so much lower than private rates and the higher payment by the privately funded party would be lost. Based on the charge rates provided to us by one member of the Task Force the LAA pays £84 for the first session regardless of what that is for, whereas his organisation charges £100 for a child only session with no proposals, £200 for a child session with proposals, and £450 for all other first sessions.
- 49. For the reasons given earlier we nevertheless **recommend that for a period of three years the LAA should fund the non-legally aided person for the first single session mediation.** We expect that an increase in the volume of mediations would offset the loss from the reduction in rates between private rates and LAA rates. But this is a risk to the finances of mediation and we also recommend that its effects should be kept under close review.
- 50. Based on 2013/14 volumes of mediation starts with an additional 20% uplift, initial illustrative estimates provided by MoJ indicate that the potential cost of this option could range between £250,000 and £500,000, depending on how large the increase in the number of single session mediation where only one party is legally aided would be. The table below provides some indicative scenarios.

Increase in number of single session mediations where one person is legally aided	10%	20%	50%
Potential additional cost	£250,000	£300,000	£500,000

- 51. These initial estimates also include the cost of some of these single session mediations where agreements are reached. In addition, some mediations may require additional sessions, in which case the only the legally aided party would be funded. For every 10% of additional single session mediation proceeding to further sessions, the additional cost could be as high as £15,000 (taking the 50% assumption from the table above).
- 52. These costs are we believe modest if they help to secure greater engagement by possible respondents.

### **Increase the Legal Help with Mediation consent order fee**

53. This proposal relates to the involvement of solicitors in support of mediation agreements. Help with Family Mediation (HwFM) was introduced under LASPO. This allows payments to solicitors for them to provide legal advice and assistance in support of family mediation – once the process has begun and specifically to issue proceedings to obtain a consent order in relation to an agreement reached through mediation.
54. The provision was made in recognition of research that showed that people may not choose to mediate because of the lack of legal support and advice. Little use has been made of it. The potential 16,000 HwFM clients last year made fewer than 30 claims in the same period, amounting to £6,000 of legal aid expenditure.
55. We strongly support the original rationale for the provision. People often want and need some legal support, and the lack is a deterrent to mediation. Four other factors influence us:
- research has shown that mediation is more attractive if it is seen as in some way part of a legal process;
  - experience elsewhere has shown the benefits of some degree of legal involvement. The original Family Relationship Centres in Australia were prohibited from setting up within so many metres of a lawyer's office. This distancing has been found to be damaging and subsequent partnership working between mediators and lawyers has proved to be extremely beneficial to everyone concerned;
  - involvement and benefits to solicitors will encourage them to support mediation;
  - the longer term model for out of court dispute resolution discussed below will require greater involvement by other professions, including lawyers.
56. Reports from mediators suggest that take-up is low because solicitors are unwilling to take on the work, either because they do not want to use up matter starts or because the rates paid are too low. Data from the LAA has highlighted that a limitation on matter starts does not in fact bite on solicitors in this area. However not all solicitors may understand this so the LAA is aiming (again) to explain this to them.
57. The main barrier appears to be the level of payment for this work: £150 for advice and an additional £200 in finance cases only to assist the client to obtain a consent order once agreement has been reached in mediation. The solicitor has to review any agreement that has been reached in mediation and then turn it into an order. This can involve substantial work and the solicitor would be exposed in the event of later problems. We were told that current rates do not compensate for the work and the risk. The fact that almost no one has taken up this business despite the other pressures on solicitors' income suggests that this is right.
58. It is hard to say what level of increased payment would be successful but it has to be reasonably substantial. **We recommend that the £200 settlement fee for obtaining a consent order once an agreement has been reached in mediation should be increased to £300 for financial and all issues cases only.** The other solicitor would still receive the basic HwFM £150. The effects should be regularly reviewed.

59. Assuming that in 20% of successful mediations a solicitor will assist the clients to obtain a consent order MoJ has provided initial illustrative estimates suggesting that an increase of £100 on the order fee for finance and all issues mediation could lead to additional cost of between £300,000 and £700,000 per year. This is based on 2013/14 mediation and agreement levels with 20% more mediations. Costs will depend also on the number of cases where legal advice is provided, which may change with a higher fee for orders.

**Assumptions on behavioural response of mediation clients and solicitors providing advice**

		Proportion of mediations reaching agreement where solicitor draws up an order and claims Legal Help order fee payment (£300 fee)		
		10%	20%	50%
Proportion of legally aided clients seeking legal advice funded by LAA (Legal Help – £150 fee)	10%	£200,000	£300,000	£600,000
	20%	£300,000	£400,000	£700,000
	50%	£600,000	£700,000	£1,000,000

60. These possible costs arise of course only because almost no one is using the provision made only last year.
61. A more administrative point is that a mediator will have checked the eligibility of a client for legal aid. If the client is then referred to a solicitor for advice and a consent order the check for legal aid has to be done again, adding to costs. **We recommend that the LAA consider waiving the second eligibility test so that the initial eligibility test would continue to be valid for six weeks following initial checks by the mediator.**

**The Residence Test**

62. A provision currently before Parliament will make it a requirement that individuals seeking legal aid should provide evidence that they have been resident in the UK for the prior 12 months. If such evidence is not available on audit, the legal aid provider is at risk of not being paid by the LAA. This will be a major burden on mediation. Separating couples are often in chaos, having moved house, lost papers, and lacking evidence of where they have lived. Many are likely to be turned away from mediation if this requirement is introduced. **We recommend that mediation should be an exempt service for the purposes of the Residence Test.**

**The Capital Disregard**

63. The changes made by LASPO in April 2013 related to the subject matter of the dispute disregard and the abolition of capital passporting. The mortgage and equity disregards remained unchanged.
64. This means that people who are disputing substantial capital assets (for example the family home) fall outside eligibility for civil legal aid. The actual market value of the home does not determine eligibility for legal aid. The means test instead takes account of the equity value of the home – that is, the difference between its current market value and the amount required to redeem any mortgage secured on it. Since 1996, a limit of £100,000 has been imposed on the amount of equity value in a house that is

ignored in the legal aid means assessment. These regulations also limit the maximum amount of mortgage that can be offset against the equity value to £100,000. They were introduced in response to the perceived problem of apparently wealthy people getting legal aid, despite owning large and expensive houses.

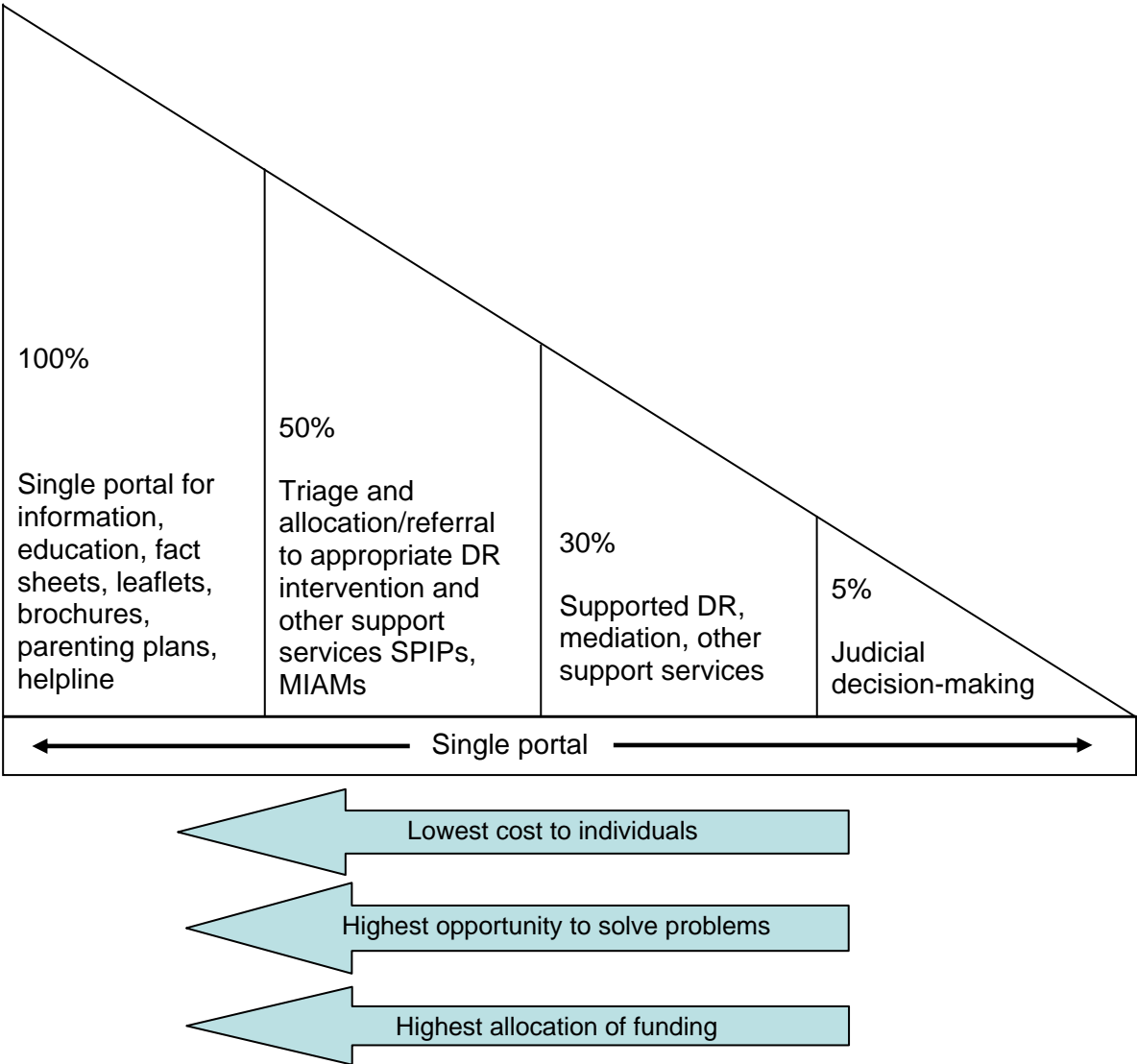
65. We appreciate that the financial eligibility criteria for civil legal aid are designed to focus limited resources on those of moderate means and with moderate amounts of capital. Changing property values and mortgage levels, particularly in London and the South, affect all applicants for legal aid, not only those in family disputes, so changes to the rules would have wider costs. However separating couples have particular difficulties in that the value of the property could well be split between them, and in any event they may be unable to access its value. We were told that the effects are felt disproportionately by women. **We recommend that consideration should be given to a disregard for mediation cases analogous to the over 65s disregard.**



## The Future of Dispute Resolution

66. This report has begun to describe a more professional and effective approach to guiding separating couples and helping them to resolve their differences without going to court. We have relied in this substantially on evidence from the experience of other countries, and Annex C summarises briefly the positions in Australia, Canada and Norway. A possible broad structure is this:

### Number of Cases



67. The lines below the chart indicate the scale of change that will be needed over time to deliver fundamental change in the choices that separating couples make. It is not new – the Family Justice Review laid out the same structure and needs. But to deliver it requires sustained effort, some investment, and above all a change of expectations about what should happen when people separate.

68. The entry point – the single portal – is under discussion, and is a vital part of the process. It is in fact much more than an entry point, aiming to guide and support people along the whole of their journey, including as they start to think about their options, through dispute resolution (with the emerging possibility of on-line mediation), and court where necessary, with form filling and case management capability. We envisage that the portal should be accessible to everyone separating or considering separating; that it should be easily available and provide clear and useful information. As envisaged in the Family Justice Review, a portal of this kind could itself help many couples sort out their issues without further recourse to professional help.
69. The next stage, assessment, allocation and referral, is currently under-developed in this country. MIAMs are in many ways in their infancy, the use and availability of SPIPS is patchy, and other countries have developed more sophisticated approaches to assessment using questionnaires and intelligent scoring systems. A number of pilots and trials are in progress in England and Wales and we need to look at these and the information provided by Local Family Justice Boards to understand the extent to which mediators, lawyers and the courts already work together and how. We have not been able in the time to get to grips with what may be appropriate to take forward but **we recommend that MoJ should review this stage of the process to give clarity about the future role of assessment, SPIPs and MIAMs to build on what works and to promote inter-agency partnership working with the client as the central focus.** The remainder of this note focuses on the next stage, dispute resolution.
70. The overall objective is: *to provide swift, safe and sustainable outcomes for families, through dispute resolution services.* Canada has helpfully set out nine principles that should support this objective:
- minimising conflict as an overarching goal – all services and interventions outside and within the court system are designed to minimise conflict
  - collaboration – all services and family justice professionals are collaborative in their approach
  - client-centred – the family justice system and interventions are designed for and around the needs of the families that use them rather than for the professionals that provide them
  - empowerment of families – families are empowered to assume responsibility for their own outcomes, whenever possible
  - integrated multi-disciplinary services – all services and interventions for families going through separation and divorce are coordinated, integrated and multi-disciplinary
  - early resolution – information and services are available early so problems can be resolved as quickly as possible
  - voice, fairness and safety – people have the opportunity to be heard and all services and interventions are respectful, fair and safe
  - accessible – the family justice system is affordable, understandable and timely
  - proportional – processes, services and interventions are proportional to the interests of any child affected, the importance of the issue and the complexity of the case.

71. For present purposes the key principles here are collaboration and integration of services, where we fall well short, both within the mediation profession and in terms of links between mediation and other professions:

- The current service model of individual mediation services of varying size and quality provides the public with a disparate array of options, highly variable messages and approaches, and a confusing landscape which is hard to navigate. To go to court can seem the more straightforward and understandable option as well as better value.
- The lack of a recognisable regulatory body for family mediators (as the SRA is for solicitors) has contributed to this lack of public awareness and confidence and possibly the development of a model of practice that is unsustainable in the long term.
- There are also issues in how mediation fits into the wider picture of other services for separating couples. For many years now, partly perhaps due to the restrictions of the Legal Aid Agency contract requirements, mediation has existed in a silo away from the other services, meaning that it has not had the opportunity to form local partnerships and consortia that could have led to stronger business models.

72. The weaknesses of the governance of mediation, standards, accreditation and more are now being addressed by the Family Mediation Council following the McEldowney review. All work streams are due to be complete by September this year. The effective completion of this effort is a pre-condition for a strong mediation profession that meets the needs of its clients and is financially sustainable. **We recommend that MoJ should review with the FMC by the end of this year whether and how far the McEldowney recommendations have been implemented and what further action is required.**

73. We recognise however that this may well not be enough and that in any event government and the LAA have a significant part to play in the way it commissions services, including expectations about membership of a professional organisation (where for example it could require direct contributions to the FMC), the requirements for how mediators maintain physical premises (recognising the appearance of on-line mediation as well as costs), and should deliver services and its current policy of running tenders simply on a registration basis i.e. offering contracts to all those organisations that meets its minimum standards. The LAA is due to retender mediation contracts later this year. **We recommend that the MoJ should clarify the elements of the LAA contracts with mediators that would enable it to achieve its strategic objectives.**

74. There are, naturally, divided views on the future structure and governance of mediation. The current arrangements with the six organisations as members of the FMC seems to be favoured by the organisations themselves. Others of us believe that the right model is that mediators should in future subscribe directly to the FMC, which should become the professional regulating body for mediation.

75. Whatever the outcome on this we need now to recognise that dispute resolution is about more than mediation, though that is likely to remain at the heart of it. As described in Annex C other countries have moved or are moving to models in which mediators work with lawyers, psychologists, experts on domestic violence, psychiatrists, financial advisers, therapists and others to deliver a more complete service able to meet the very different needs of couples who are separating. In some

places, Australia for example, these services are brought together in physical centres. In others the partnerships are more virtual.

76. Similar approaches are starting to emerge now in this country. An interesting model in Wales for commercial and civil mediation is something that should be looked into to see if it could be replicated in England. In Devon 'mediation teaming' brings in the appropriate professionals including mediators, lawyers, accountants etc to help resolve couples' differences. The question here is what role government and other regulatory bodies can play in encouraging and guiding developments and removing barriers.

**77. We recommend that government should:**

- **draw on experience here and elsewhere to support pilot projects, likely to be based on existing centres, which could be both physical and virtual;**
- **encourage links between professional organisations so that they consider what changes to protocols and working practices may be necessary to encourage more joined up working;**
- **consider what is needed to encourage the provision of more rounded services;**
- **consider how court-based services and CAFCASS should work in concert with this model.**

## Regulation

78. The FMC Code of Conduct provides that

- *Mediators must not accept referrals from any professional practice with whom they are employed, in partnership or contracted, on a full or part-time basis and which is involved in advising one of the participants on matters which relate or are capable of relating to the mediation, even though the practices are separate legal entities.*
- *Mediators must not refer a participant for advice or for any other professional service to a professional practice with whom they are employed, in partnership or contracted, on a full or part-time basis on matters which relate or are capable of relating to the mediation even though the practices are separate legal entities.*

79. We understand the reasons for these bars and the significant risks that they seek to address. Nevertheless, we recommend that the FMC reviews these provisions and invite it to consider whether there are circumstances in which intra-business referrals could be permitted, subject to safeguards.

80. We believe that Outcomes Focussed Regulation means that a solicitor could make out the case for an in-house referral to a mediator if they can justify it, but clearly there are risks around confidentiality and privilege. We recommend that the Law Society clarifies the position with the SRA, with a view to providing guidance to solicitors.

**81. We also believe it would be right for the Law Society and the SRA to consider whether the regulations should enable solicitors to see both parties together where they want that, for example when they have mediated.** We understand the concerns that lead to this restriction. But we note that in Scotland the parties can see a lawyer together, before, during or after the marriage has ended to make what is in effect a contractual agreement on the children / financial arrangements will be if they separate or have separated. Their agreement is checked by their own lawyer and lodged in a registry. The court in Scotland is unlikely to divert from what was agreed. The possible advantages of developments along these lines are worth reviewing particularly as work continues to follow up the Law Commission's recommendations on ancillary relief.

## Hearing the Voice of Children and Young People

82. The Family Justice Review emphasized the importance of implementing child-inclusive DR processes, and called for more focus and training for professionals to ensure that children's right to have their voices heard is upheld. The Task Force wanted to know whether and how children's voices are heard in mediation currently. Two members of the Task Force (Professor Janet Walker and Angela Lake-Carroll). Their full report is being published separately. In addition they have provided Annex D to this report.
83. It proved challenging to obtain a clear picture of the extent to which mediators hear children's voices directly, but the evidence they gathered indicates that children and young people are rarely provided with the opportunity to be heard and child-inclusive mediation is rarely undertaken. We understand that some 396 mediators registered with the FMC have been trained to offer direct consultation with children, yet few do so. The reasons given include: inadequate training, supervision and resources; uncertainty about the availability of legal aid funding for child-inclusive work; out of date standards and protocols; the lack of a coherent framework for hearing children's voices; concerns about confidentiality and privilege; and polarised views about the efficacy and purpose of involving children in adult matters. Even when children are included in mediation it is usually as an aid to parental decision-making rather than an opportunity for children to express their views. The decision to include children is driven by adults (parents and practitioners) and not by children's right to participate in proceedings that impact on their future.
84. The incontrovertible evidence from England and Wales and across the globe is that children and young people want the opportunity to be heard and to participate in a variety of ways. Moreover, child-inclusive DR practice elsewhere, particularly in Australia, New Zealand and Canada, has found that this can promote more durable outcomes, reduce parental conflict, significantly enhance the co-parental relationship and the relationship between children and both their parents. Members of the Family Justice Young Peoples Board made a strong case to the Task Force for being given comprehensive information, being given options to participate, and being heard, particularly in mediation. Current practice does not meet their demands and their voices are easily marginalised.
85. **We recommend that options to include children should be urgently reviewed and that steps should be taken to: improve training and supervision for DR practitioners; update guidelines and protocols, including resolution of confidentiality and privilege concerns; ensure that authoritative information and support services are available for children; and to improve methods for accurately recording the numbers of mediators and others trained and engaged in child-inclusive practice.**
86. **In addition, there is an urgent need to review the culture which tends to exclude children and young people and to address the misperceptions about the purpose of hearing children's voices. We recommend the establishment of a small, interdisciplinary group, tasked to undertake the actions listed above, ensure that the FJYPC Charter is updated to include mediation, and provide a coherent blueprint for hearing children's voices in DR processes in future.**

## **Annex A**

### **Task Force Membership**

David Norgrove – Chair

Sarah Lloyd (Director) – Family Mediation Council

Hugh England (Chair and Independent Member) – Family Mediation Council

Dominic Raeside – Family Justice Council

Mark Paulson & Elaine Richardson – Law Society

Anthony Kirk QC – Family Law Bar Association

Christina Blacklaws – Consultant

Professor Jan Walker – Newcastle University

Professor Anne Barlow – Exeter University

Mavis Maclean – Senior Research Fellow, Oxford University

Angela Lake-Carroll – Mediator

John Loram – Mediator

Ian Rispin – Wikivorce

Professor Elizabeth Stokoe – Loughborough University Professor of Social Interaction

Kate Shiner and Jan Salihi – Ministry of Justice, Family Justice Policy Unit

Kate Horner – Ministry of Justice, Communications and Information Directorate

Adam Lennon – HMCTS

Eleanor Druker / Glyn Hardy – Legal Aid Agency

### **Task Force Finance Sub-Committee**

David Norgrove

Angela Lake-Carroll – Mediator

John Loram – Mediator

Caroline Bowden – Mediator

Elaine Richardson – Solicitor/Mediator

Christina Blacklaws – Consultant

Beverley Sayers – Family Mediation Association

## Annex B

### Options considered by the Task Force

Proposal	Reason for rejection
<p>Court Fees proposals:</p> <ul style="list-style-type: none"> <li>• consideration of fee remission</li> <li>• refund for applicants who had considered mediation</li> <li>• fee increase to dissuade court applications</li> </ul>	<p>The Task Force acknowledged that low court fees were a possible incentive for the public to make applications to court rather than choose mediation. Increasing court fees or administering a fee remission for those who had attempted mediation and still wanted to apply to court would in some cases provide a further incentive for applicants to go to a MIAM/mediation and perhaps encourage the second person to engage.</p> <p>However, these proposals were considered and rejected by the Task Force:</p> <ul style="list-style-type: none"> <li>• the risk that fee remission could in fact encourage some people to apply to court;</li> <li>• it would penalise those who were not suitable for mediation but were also not eligible for legal aid or fee remissions;</li> <li>• court fees are already relatively low compared to other costs;</li> <li>• the second person would still incur costs for mediation if not legally aided but would not have opportunity to receive fee remission</li> </ul>



Proposal	Reason for rejection
<p>Various mediation pilots that would include:</p> <ul style="list-style-type: none"> <li>• additional/extended fees for solicitors to refer to mediation;</li> <li>• an option for increasing the fee to mediators for financial and all issue mediations;</li> <li>• pathways appointment for the second person to access initial guidance;</li> <li>• support package provided by solicitors to give advice in connection with mediation – remunerated at the same rates as mediators get for a MIAM;</li> <li>• initial help and assistance from lawyers to explain the mediation process and if mediation is successful they could go on to receive help with mediation</li> <li>• one-off fee to a lawyer for a triage meeting plus referral to mediation.</li> </ul>	<p>All proposed pilots were considered by the Task Force and were commended for their innovative and imaginative ideas but were rejected:</p> <ul style="list-style-type: none"> <li>• pilots were generally 12–18 months long which was not in line with the immediate need to increase the uptake of mediation;</li> <li>• the component parts of many of the pilots are being taken forward under awareness raising and inter-agency working as well as part of various DWP Innovation Fund projects.</li> </ul>
<p>Reinstate the remuneration for mediation services for contacting second party i.e. the Willingness Test.</p>	<p>This was a popular proposal in both the web chat and Dialogue The Task Force acknowledged that mediation services face additional administrative burdens in pursuing a reluctant party.</p> <p>However, it would need primary legislation to restore the payment. The Task Force has instead recommended an increase in the mediators MIAM fee to reflect the change in function and additional resources required.</p>

Proposal	Reason for rejection
<p>In court mediation to be paid for if directed by the court at first hearing / free mediation if recommended during the court process, e.g., after first hearing.</p> <p><i>NB: court can only direct a party/parties to a MIAM now on basis that it is not satisfied with the reason for self exemption</i></p>	<p>The Task Force discussed in-court mediation and acknowledged that it could save court time for all involved if parties were able to reach agreement on the day (or in subsequent sessions) and return to conclude, if desired, with a consent order. However, the Task Force decided against recommendations in relation to in-court mediation:</p> <ul style="list-style-type: none"> <li>• parties unlikely to have requisite paper work with them in order to conduct mediation</li> <li>• paying for MIAM / mediation in court presents a perverse incentive: applicants could strategically self exempt knowing that the judge could direct them / both parties to a free MIAM.</li> <li>• profession is keen not to have mediation linked to the court process but to maintain its independence.</li> </ul>
<p>LAA should freeze repayment plans until the market improves.</p>	<p>The Task Force accepts that this proposal could provide a short term breather for struggling services while the market recovers and referrals increase. However, reducing the level of financial control to manage payments and recover overpayments would create risks to public funds and leave the LAA open to criticism from the National Audit Office.</p> <p>The LAA is considering how it can convey messages to Contract Managers to be sensitive in negotiations and use the flexibility that the Rules allow.</p> <p>In addition, an exception process is already in operation which providers faced with real financial difficulties can call upon through their Contract Manager to extend the maximum terms of repayment. Where providers enter into this exception process LAA will work with the provider to agree a repayment plan which takes into account the provider's financial position and is based on what the provider believes is affordable.</p>

## Administrative / Procedure Options

Information at court / from court	
Court foyers to be information hubs directing the public to mediation providers and information about mediation.	<p>While this is not a recommendation in the main report, the Task Force is aware that:</p> <ul style="list-style-type: none"> <li>• HMCTS is looking at this in wider context for all information provision in courts;</li> <li>• All courts have now been sent information about the new Family Mediation Council web site and will be provided with a continuing supply of hard copies of mediation posters and leaflets to display.</li> </ul>
Letter from the judge to all applicants and respondents early on in the process highlighting expectation to engage in mediation process.	The Task Force considered this idea to have merit and is pleased that MoJ is pursuing the idea, building on what happens already in some areas of the country.
Letter / leaflet handed to Applicant and/or Respondent at the first hearing explaining why case is being adjourned / parties directed to find out about mediation	This also has merit and is being looked at by HMCTS.
Could mediators submit consent orders to the court as happens in civil mediation?	Further investigative work is required on this proposal to establish what the civil practice is and what legislative requirement, if any, would need to be implemented.
Record in any court order that the applicant or respondent (or both) attended MIAM / went to mediation.	The Task Force understands that this proposal is with the Judicial College to consider – no action to report at present.
Children’s voices should be heard more in mediation; could the paramountcy principle be imposed on all forms of dispute resolution?	See Annex D – paper by Professor Jan Walker and Angela Lake-Carroll on the voice of the child. The paper proposes that a <i>small</i> interdisciplinary task group (perhaps along the lines of the Chief Justice of Australia’s Children’s Committee) should be established to consider how best to extend good practice, co-ordinate disparate approaches and provide a coherent blueprint for hearing children’s voices in future.
Implement proportionality and a ‘financial yardstick’ in finance applications whereby the court must refer the case to mediation when the legal costs reach ‘a clearly understood but approximate benchmark’ as a proportion of the value of the dispute.	The Task Force considers this proposal outside of its remit but suggests that it should be considered further by the Ministry of Justice with input from the Judicial College and the LAA on the practicalities of implementation and impact on legal aid.

## Publicity & Awareness Options

<b>Communication Activity</b>	
The CB7 should be expanded to cover engaging the respondent, customer journey, etc.	This is being taken forward by HMCTS who plan to develop a questionnaire / user survey to assess usefulness of CB7 at different user journey points.
Marketing Toolkit for mediation providers.	This has been produced by the MoJ and was provided to the FMC in April to post on their website and to promote to the mediation sector. This has been supported by a public information poster, video and leaflet also being made available for mediators to use to promote family mediation. These have also been sent to the FMC to host and promote.
Investigate how the FMC website can be developed as the single site to contain all mediation information: videos and communications materials etc.	During the early part of 2014, MoJ project managed and funded the FMC to revamp their website and develop the 'find a mediator' service finder. This is now in place.  Development now continues on the public and professional facing pages on the website.
Effective use of language in promoting family mediation – positive messaging; promoting consensus not conflict; information is clear about separate MIAMs etc	MoJ has worked closely with Professor Liz Stokoe (a social interaction academic) on the ongoing development of products – the mediation leaflet and poster as well as the draft letter to applicants and respondents to encourage mediation. MoJ has also engaged the services of the Behavioural Insight team to increase the use of 'nudge' techniques in communication products.
Effective Message Placement: including text on family mediation in OGD leaflets, letters etc in Surgeries, libraries, Registrar Offices, benefits, Lone Parent Advisers	Communication on mediation continues – recent activity has been to revise the script for call handlers on the Child Maintenance Options helpline as well as a letter from Simon Hughes MP to all MPs about family mediation and legal aid availability – this was sent on 10 June.
There should be more stakeholder engagement to promote mediation in different sectors.	Stakeholder engagement on mediation continues. In the last few months, MoJ has: <ul style="list-style-type: none"> <li>• Organised the Mediation Task Force, the Ministerial Roundtable, the Web Chat and the online Dialogue;</li> <li>• Recorded a podcast with Simon Hughes for the Law Society;</li> <li>• Provided information for the Association of Employee Assistance Providers to share with their members;</li> <li>• Provided information on mediation for CAB / Advice Now / AdviserNet.</li> </ul>

**Research Options**

Research on how mediation works in other jurisdictions.	See Annex C for paper provided by Professors Anne Barlow and Jan Walker.
Collate good local practice / existing initiatives / pilots.	This is an ongoing piece of work – the Local Family Justice  Boards have been asked for activity on mediation in their areas.

## Annex C

### International Comparisons

Professor Janet Walker and Professor Anne Barlow

1. Most countries do not collect robust statistics about the extent to which separating and divorcing couples use dispute resolution services, including mediation. Because take-up of mediation has been lower than anticipated, several jurisdictions have taken steps to increase the proportion of couples accessing dispute resolution services and reduce the numbers going to court. The evidence suggests that the cases going to mediation are becoming more complex and involve higher levels of family dysfunction, including domestic violence and mental health issues, which have implications for mediation training and practice.

#### Australia

2. Australia has developed one of the most comprehensive approaches to family justice and DR processes. Sixty-five Family Relationship Centres (FRCs) were established as part of a wider body of reforms in 2006 to bring about a cultural shift away from litigation towards cooperative parenting. The FRCs were designed to: strengthen family relationships; help families stay together; and assist families through separation. They provide information and referral services on parenting and relationships to intact families, and information, referral, advice and dispute resolution services to separating and separated families to help them reach agreement on parenting arrangements without the need to go to court.
3. The FRCs were achieved by creating and expanding community-based services run by not-for-profit, non-governmental organisations. A significant financial investment by the government enabled the collaboration of a raft of services, helplines and specialist programmes. The centres were designed to provide a point of entry, triage and referral to these services and to be a major provider of family mediation. An attempt at mediation is mandatory before filing unless an exemption exists. Mediation is provided free of charge in the FRCs which have become a focal point for the continued development of child-sensitive dispute management services that can be locally tailored and of constructive partnerships with a range of community services, lawyers and the courts, characterised by a high level of trust and cooperation. Two initiatives underpin this: the 'Better Partnerships' program provides access to early and targeted legal information and advice for families attending a Family Relationship Centre, and the Coordinated Family Dispute Resolution (CFDR) program involves a multi-disciplinary, intensively case-managed process in which parents who report a history of family violence are supported to attempt mediation. This involves partnerships between family mediators, publicly funded legal services, family violence centres and men's support services. Each parent can access legal support and advice as well as a specialist family violence professional or men's support professional and input from a child consultant where relevant, in the provision of child-inclusive mediation. The cultural shift in Australia sees lawyers and FRC practitioners working together towards a common goal of dispute resolution. Interdisciplinarity is a key

concept and Australia has established a network of registered family relationship practitioners including mediators, lawyers and others skilled in addressing complex separation-related issues. All the preliminary intake and assessment work and the child-focused information sessions are free of charge and no one can be refused a service on the grounds of cost.

4. As FRCs were rolled out nationally, the numbers using DR processes increased significantly and court applications decreased. Outcomes are positive. Some 60 per cent of divorcing parents self-manage their disputes with minimal intervention, some 20 per cent are likely to benefit from mediation and a further 12 per cent who have serious problems might manage to mediate. The estimate is that between 20 and 30 per cent of parents might be able to settle disputes via the FRCs. Many parents continue to access mediation post-divorce, when situations change or disputes remain unresolved.

## **New Zealand**

5. Mediation has been a central element in family law cases for over 30 years, led primarily by the judiciary and closely linked to the courts. The data indicate that approximately 24–30 per cent of divorce cases have used mediation, with an increasingly upward trend, and a reduction in matters requiring disposal by the court. Family law reforms implemented in 2014 now require parents to attend a Parenting Through Separation course and a new Family Dispute Resolution Service (FDR). The Parenting Through Separation Programme is funded by the MoJ, but parties are expected to contribute equally to the cost of the FDR service unless they meet certain financial criteria. Only when the Parenting Programme and attendance at the FDR service have been completed are parties allowed to file in the court, unless there are exemptions such as cases involving domestic violence and urgency (e.g. imminent relocation by a parent). The reforms are intended to empower people to resolve their own parenting matters outside of the court system. The new FDR service will be fully funded by government for those who meet the income threshold for civil legal aid and it is estimated that about 60 per cent of people will be eligible. The cost to others is about \$897 NZ per case. The FDR service is supported by a free Family Legal Advice Service. A new family justice website has been launched as a first port of call for family issues. The assessment stage of the FDR service will check to ensure that people and their disputes are suitable for mediation and includes screening for domestic violence. From October 2014 there will be new powers to direct people to attend a DV assessment and non-violence programme where appropriate.
6. In effect, the reforms render dispute resolution mandatory in the majority of cases. Three bodies have been approved to provide FDR and practitioners are required to have at least five years of family mediation experience or in an associated profession. If a dispute does proceed to court judges have the option to order fully subsidised counselling if they believe this will help the parties. Improved information services, a simplified three-track-court system and new, simpler forms are expected to reduce the need for lawyer involvement in straightforward matters, although judges will be able to allow lawyers to participate in settlement conferences.

## Canada

7. Provinces in Canada have been offering subsidised mediation and information services for many years. In Ontario, for example, three hours of free mediation is offered on the day of the court hearing, and attendance at a Mandatory Information Program is required (about 75% actually attend). In Quebec, up to six sessions of mediation are available to first time litigants free of charge. Parties revisiting a settled matter or seeking variation of a court order are entitled to three free mediation sessions. In British Columbia, free mediation services are provided in Family Justice Centres and Justice Access Centres. The Justice BC website provides comprehensive information on the services available, including a free three-hour Parenting After Separation Program, access to Parenting Coordinators, and a Family Maintenance Enforcement Program. The FJCs in BC provide counselling, mediation, emergency and community referrals, all free. As of 1 January 2014, all DR professionals (lawyers, mediators, parenting coordinators and arbitrators) are required to meet high quality training standards set out in new regulations. Mediate BC has set out revised standards of conduct for mediators. In BC, a 'Notice to Mediate' programme permits any party in family law proceedings to compel another party to enter into mediation for at least one session. This 'Notice' can be used at any time between 90 days after the filing of the first response and 90 days before the date of trial. Once the 'Notice' is served, the parties must jointly agree on a mediator within two weeks and the mediation session must take place within 60 days of service.
8. Increasingly, attendance at a Parenting After Separation programme is required as the first step in the process, prior to making an application to the court, before information about mediation and DR services is given. This serves to focus parents minds on the needs and best interests of their children and encourage them to agree arrangements if at all possible. A Road Map for Change was published in 2013 with a view to promoting interdisciplinary cooperation and the increased use of early DR services across Canada by 2018.

## The USA

9. There are numerous initiatives in the USA, all of which focus on bringing a range of services together in a single point of entry. For example, the Resource Centre for Separating and Divorcing Families in Denver, Colorado, provides legal services, financial planning services, mediation, therapeutic support, individual counselling, adult support groups, children's support groups, co-parenting courses etc. A visiting judge can approve written agreements to avoid parties having to go to court. Each party completes an intake form and a personalised plan is drawn up, tailored to the unique needs and circumstances of the family. The RCSDF offers its programme on a sliding scale fee. The minimum fee for one hour of services is \$15 USD and the maximum is \$50 USD.

## Europe

10. Many countries in Europe encourage the use of mediation services wherever appropriate. For example, Germany offers publicly funded mediation, although take-up is said to be low (3–5% of divorcing couples); in Bulgaria, many judges and lawyers train and practice as mediators and mediation is regarded as a cheap and effective means of avoiding litigation. Mediation is also provided free in Ireland. Sweden and Norway have each developed comprehensive approaches to DR.



## Norway

11. Mandatory mediation was introduced here in 1991. Today, the general rule is that all married and cohabiting parents with children under 16 who separate must attend at least one compulsory hour of mediation which is provided free of charge to all. Free mediation can be extended routinely by a further three hours, initially, where there seems to be prospect of agreement. There is a ceiling of seven hours free mediation provision. A divorce will not normally be granted where there are children under 16 unless mediation has been attempted. Entitlement to an extended child allowance from the state is also conditional upon the parties proving that they have participated in the extra-judicial mediation process. Normally, parties must attend together, but the mediator can decide they should attend separately or with a representative and these strategies are used in domestic violence situations. Norwegian research in 2011 shows 75% of all cases settle through mandatory mediation, although 50% of these couples had reached agreement prior to attending. Of this last 'already agreed' group, 60% reported that mediation had resulted in a more thought-out and detailed agreement. Means-tested legal aid is also available to couples before and after mediation and is available for representation at court.
12. Since 2004, the court has had a duty to assess at every stage of the trial process if and to what extent an amicable solution might be achieved and to undertake the necessary measures to achieve it. At a preliminary hearing, the parties are informed – through an expert in child welfare – of the legal and practical consequences of further legal action. The court can then order a new extra-judicial mediation process; it can appoint expert advisors not only to participate in the preliminary discussions, but also to conduct separate discussions with the parties and/or the child(ren) or to investigate the actual circumstances; it can meet with the child(ren) separately or, where necessary, with the assistance of a further expert or another appropriate person; it may also have separate communications with the experts involved; and finally, the court may give the parties the opportunity to test out a preliminary settlement for a specified period of time – where necessary with the participation of an advisor having appropriate expertise – while at all times granting the parties the right to discontinue the test period and recommence legal proceedings. While the traditional investigative activities performed by expert witnesses in the court process are not publicly funded, the state funds intermediary and advisory activities performed by experts in connection with attempts to reach a mediated resolution.
13. The success of mediation following its initial introduction led to its expansion at the expense of the public purse. It seems expenditure cuts are in train that will reduce the extent to which mediation and expert advice within it is freely available to all. Mediation is provided by family counselling services. Mediators can be appointed from other professions, including the clergy, lawyers, and school psychologists. Of the 25% of all couples whose cases do not settle through mandatory mediation, two thirds settle through 'post-court proceedings' mediation. The remaining third go forward for judicial disposal. Thus just under 10 per cent of all cases go to court for judicial disposal.

## Sweden

14. Mediation in Sweden, known as Cooperation Talks is offered free via social services. Most parents (90%) reach agreement either by themselves or with the help of a mediator. Co-mediation is the usual model used, but mediation in Sweden does not include public funding for financial matters.

## Ireland

15. In Ireland, family mediation is provided free of charge to all and can be accessed through the Legal Aid Board of which the Family Mediation Service is now a part. There is no recent data as regards the performance of the Family Mediation Service in Ireland available. However, recent qualitative research undertaken in 2010 indicates that although mediation does seem to be used primarily to resolve disputes relating to children, there are issues around the service being overburdened and under-resourced. Interestingly, Collaborative Law is also available through legal aid in Ireland and a recent qualitative study in 2013 indicates that this is used more for financial issues and is higher cost. However, it has achieved a move towards a more general 'collaborative approach' to resolution of family disputes.

## Factors Linked to Increased Use of Mediation

16. Several factors in the countries discussed above contribute to the increased use of mediation:
- mediation is provided free at the point of entry
  - there is some element of mandation in some countries to attend a parenting programme and or a mediation meeting
  - a triage system involving a range of experts enables appropriate referral to a range of support services and DR options
  - mediation is offered as part of an interdisciplinary, integrated approach to DR which requires collaboration and cooperation amongst family law practitioners, where legal advice and mediation go hand-in-hand – most jurisdictions make increasing use of online services, thereby increasing flexibility and reach
  - an emphasis on the provision of integrated, front-end DR services

## Annex D

### Hearing the Voices of Children and Young People in Dispute Resolution Processes

Professor Jan Walker and Angela Lake-Carroll

The Family Justice Review endorsed the importance of ensuring that the 1989 UN Convention on the Rights of the Child (UNCRC) is upheld in all DR processes and recommended more child focus and better training for professionals to offer choices to children and young people about ways in which their voices can be heard. Moreover, the Review made it clear that child-inclusive mediation should be available to all families seeking to mediate. The UNCRC comment on Article 12 in July 2009 outlined the parameters on the child's right to be heard. These included the avoidance of tokenistic approaches, understanding children's participation as a process (not a one-off event), and the adoption of processes that are transparent, informative, voluntary, relevant, inclusive, safe and sensitive to risk, respectful and accountable.

A substantive body of research portrays a consistent message: children and young people do not want to be kept in the dark about proceedings, interventions and decisions that will impact on their future, and want to be told what is happening, given clear, age-appropriate information, and have their voices heard, believed and respected. A qualitative analysis of 35 studies undertaken in 11 countries in the last 20 years<sup>9</sup> has concluded that children and young people want to be given the opportunity to be involved in some way in the decision-making process but that one size does not fit all. Meaningful interactions between family members is key to ensuring that children's involvement is authentic. Research also indicates that giving children a voice can significantly improve outcomes: agreements reached are more durable; the parental alliance is improved; father-child relationships are better; and parents co-parent more cooperatively. While it is usually regarded as preferable for parents to talk and listen to their children, parents in distress about the ending of their relationship rarely feel able to do this in a constructive, child-centred way.

### Current Mediation Practice, Standards and Training

The CEOs of the mediation providers were asked about current child-inclusive practice and the numbers of mediators trained to work with children. It appears that few, if any, data are available. Nevertheless, the FMC informed us that 396 mediators on its register have trained to provide direct consultation with children. Despite this, our discussions with a number of mediation services revealed that very few children and young people participate in any way in the mediation process. Some mediators involve children maybe once or twice a year at most. Reasons given as to why this is such a rare activity included that the training received from approved providers is insufficient and supervision is lacking; there are perceived problems with the way legal aid payments are handled, which

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<sup>9</sup> Birnbaum, R. and Saini, M. (2012) *Research on Social Work Practice*, Sage, <http://rsw.sagepub.com/> accessed 2 June 2014.

acts as a disincentive to work with children; one or both parents will not give consent; it places too much pressure on the child; lack of mediator confidence; the child will not participate; and parents and practitioners have misgivings about the efficacy of involving children and young people, particularly in respect of confidentiality and privilege. We concluded that hearing children's voices directly is a minority activity, a finding confirmed by Barlow *et al.*<sup>10</sup> While the majority of mediators operate in a child-focused way – encouraging parents to focus on the needs and interests of their children – few hear directly from children and only do so when it is deemed to be helpful to parental decision-making in difficult cases and as a way of helping parents who are stuck. The decision to involve children is taken by adults and not regarded as the right of the child.

Currently, direct consultation with children requires the permission of both parents and the consent of the child, so refusal by one parent can eliminate the child's choice to participate. There are elaborate rules about confidentiality and some mediators regard this as a particularly thorny issue. Current practice requires mediators to assess very carefully with parents if, whether and how their child being offered an opportunity to be consulted directly is going to be of assistance to the family as a whole and for the child or children in particular. We know that parents are often opposed to involving children or might choose to do so for the wrong reasons.

We suggest that issues of confidentiality need to be considered urgently if the child's right to participate is to be taken seriously. Overall, there is not at present a sufficiently clear framework within the family justice system or in law to protect the privacy and confidentiality of child-inclusive mediation or to afford children and young people the benefit of a straightforward and confidential means of expressing their views without the risk of a breach of their trust in their parents or in the professionals who seek to assist them.

In the few cases in which children are involved in mediation, there appear to be variations in practice: either the mediator who conducts the mediation process also consults with the child and relays their views and perspective to their parents; or a second mediator or other professional (child psychologist/similar) consults with the child and relays the child's views and perspectives in the mediation process; or the Court provides an opportunity for those in proceedings to meet with a mediator to consider their child being consulted and if so, the mediator provides feedback to both parents and court; or children and young people's lay advocates consult with the child and provide feedback to the mediation process (a hitherto untested model).

Three of the mediation member organisations (FMA, NFM and Resolution) of the FMC offer training in child-inclusive mediation and all adhere to the policy standard and guidelines originally published by the former UK College of Family Mediators and latterly adopted by the FMC. This document has not been reviewed since 2002. Training currently consists of a minimum of two full days of face to face training with pre and post-course assignments or learning. Mediators are assessed throughout the course (usually by the trainers). We understand that membership organisations also offer 'follow-on' days for practitioners to review and refresh their practice but these days are not mandatory. Some trainers and mediators have commented that the training should be extended in both time and content and that there should be compulsory annual CPD requirements.

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<sup>10</sup> Barlow, A., Hunter, R., Smithson, J. and Ewing, J. (2014) *Mapping Paths to Family Justice*, University of Exeter.

## Best Practice Elsewhere

Our enquiries in other jurisdictions indicated that while there is commitment to hearing children's voices, in practice the implementation is patchy. While in some jurisdictions, children are routinely given the opportunity to be heard and judges are trained to talk to children, in others, child-inclusive mediation is gaining ground, supported by robust research evidence as to its efficacy. But the overall picture is one of good intention rather than positive action.

### ***Australia***

Since the mid 1990s, the changes in family law processes in Australia have encapsulated the need to better understand children's experiences of separation and divorce and to ensure more meaningful inclusion of children in dispute resolution. Family law reforms here also offer a welcome opportunity to influence family restructuring and reduce the level of distress experienced by children and young people. Child-inclusive mediation has been advocated as a way of addressing the research evidence that highlights potentially poor outcomes for children when parental conflict is unresolved. Child-inclusive mediation includes consultation with the children by a trained and supervised specialist, ensuring that the mediation process includes each child's 'story' and reflects their psycho-developmental needs. The child consultant provides feedback to the parents and assists them to understand their children's needs. Children may be offered a follow-up session with the consultant at the end of mediation, to share outcomes and messages from their parents.

Research comparing child-inclusive with child-focused mediation outcomes demonstrates important additional and enduring benefits for children and their parents in terms of positive post-separation family relationships and greater commitment to agreements reached; moreover, children have fewer fears and fewer depressive symptoms. This model of child-inclusive mediation offers children a safe avenue to express their views and contribute to agreements which are developmentally sensitive. It embraces the psychology of family transition and confirms the potential for children's voices to re-align parents to higher levels of co-operation and shared decision-making.<sup>11</sup> These findings are particularly significant in the light of the expectation in this country that parents will share responsibility for the parenting of their children whenever possible, drawing attention as they do to the importance of ensuring that shared parenting arrangements are informed first and foremost by the child's developmental needs, and are not made solely on assumptions about parental rights and each parents' expectations of what shared parenting might look like. The data point to the importance of understanding and taking account of the developmental and relationship context around shared parenting and to the contribution children and young people can make to aiding parents' understanding.

Like all DR processes this model it is not appropriate in all cases. Careful screening is essential to ensure that parents are willing and have the capacity to manage and engage in the process. It is not appropriate in cases where extreme conflict has characterised the parental relationship for over a year, nor where one (or both) parent(s) has serious mental health issues. The development of a comprehensive, piloted and validated assessment

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<sup>11</sup> See, McKintosh, J., Wells, Y., Smith, B. and Long, C. (2008) Child-focused and child-inclusive divorce mediation: Comparative outcomes from a prospective study of post-separation adjustments, *Family Court Review*, 46(1), 105–124; McKintosh, J., Smyth, B., Kelaheer, M., Wells, Y. and Long, C. (2011) Post-separation parenting arrangements: Patterns of developmental outcomes, *Family Matters No. 86, AIFS Journal*.

tool (DOORS) which can be used by all practitioners across the family justice system is proving to be an important way forward in ensuring consistency in screening.

### **New Zealand**

A similar model of child-inclusive mediation has been implemented in New Zealand, experimenting with different ways of involving children, either using the mediator or a child consultant. Evaluation has found a higher level of satisfaction for children and for parents when, previously, parents had struggled to establish a constructive co-parenting relationship.<sup>12</sup> Children and young people preferred to meet with the mediator who was working with their parents rather than with an independent child consultant, and they appreciated being included more directly in the mediation discussions. This model has also achieved very positive results for families.

Overall, child-inclusive mediation models in other jurisdictions have shown not only that it is possible and realistic to include children in the dispute resolution process but also that the key is not simply to hear the voice of the child but to allow the child to participate in a way that is meaningful, respectful and safe.

### **Options for the Future**

We asked members of the Family Justice Young People's Board (FJYPB) for their views about what is needed in future. Not surprisingly, all of the young people expressed strong views about the importance of children and young people being given information and having the opportunity to talk to someone about what is happening to them and their family, and to have a say in their future, if they wish. One young person summarised cogently all the responses we received about what would help children and young people when their parents separate: having someone to talk to who is neutral in proceedings; having their voice heard and being aware that they have been listened to; and being informed about the process of separation and receive all necessary information in a child-friendly way. The young people were clear that information should be available about the changes that will happen, coping strategies, what to expect, the emotions they might experience and how conflict might be resolved. While there is information on some websites (e.g. CAF/CASS) young people indicated that "it is near impossible to find out what is happening as adults never want to tell children." Young people want access to a range of professionals, not just mediators or judges, as most parents will probably not consult a mediator or come before a judge. Nevertheless, there was unanimous agreement that mediators should talk to children of all ages.

Mediators clearly need a range of skills to include children of all ages and to be confident in giving children a choice about how they would like to communicate, perhaps through writing things down if they would prefer not to talk directly. The clear message is that children and young people would like to be given options so that each child can choose how they would like to communicate with the professionals involved and to do what is most comfortable for them. The young people expressed clear views about the importance of confidentiality and would not want mediators or judges relaying information to parents unless the young person has given permission. Nevertheless, the young people see some benefits in being included in a mediation family session, perhaps towards the end of the process when arrangements for the future are being made, but this kind of

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<sup>12</sup> Goldson, J. (2006) *Hello, I'm a voice, let me talk: child-inclusive mediation in family separation*, Families Commission Innovative Practice Report, No. 1/06, New Zealand.

meeting needs to be handled sensitively to ensure that it is not upsetting for the parents or the child. In summary, the FJYPB young people have made a very strong case for being given information, both general and specific, being given options to participate in family law proceedings, which include direct consultation in mediation or with the judge, and being heard.

We are aware that there are initiatives here that offer children the opportunity to meet with the mediator, and supporting child-inclusive mediation with the offer of a range of linked services for children and parents is a helpful way to ensure meaningful provision for children. Existing resources are not joined-up, however, making it difficult for children and young people to find a pathway that is easy to navigate.

The Task Force enquiry has found that current mediation practice does not give due weight to children's right to have their voices heard and to participate if they wish to do so. A number of steps will need to be taken to change existing practice and culture. These include a review of: the training provided for mediators and other practitioners to undertake direct consultation with children; the guidelines and protocols for providing children with options to be heard and to participate in dispute resolution processes, including resolution of confidentiality and privilege concerns; methods for accurately recording the numbers of mediators trained and engaged in child-inclusive practice and the prevalence of children's involvement; the authoritative information provided for children and young people; and the direct services for children and young people which can provide support, helplines and advice. The FJYPB charter should also be reviewed to include mediation.

Perhaps the most important change, however, is one which addresses the barriers to hearing children's voices and professional concerns which inhibit child-inclusive approaches. Further in-depth work needs to be undertaken to fully scope existing child-inclusive practice, determine best practice approaches, ascertain the benefits of these models and disseminate the learning; and more interdisciplinary debates are needed to agree how to afford children and young people their rights. We propose that a small task group should be appointed to consider how best to extend good practice, co-ordinate disparate approaches and provide a coherent blueprint for hearing children's voices in future.