

# Legal Aid Reform: Family and Family Mediation Fee Schemes – Analysis of responses

## Introduction

This document provides an analysis of responses received to the consultation *Legal Aid Reform: Family and Family Mediation Fee Schemes*. As well as background and a summary of responses to the consultation it includes a list of respondents to the consultation as an Annex.

Accompanying this paper and published simultaneously is the LSC's detailed response to the consultation entitled *Family and Family Mediation Fee Schemes from October 2007*, which includes the final family and mediation fee schemes. Both documents are available on our website at [www.legalservices.gov.uk](http://www.legalservices.gov.uk). If you have any queries about how to access either of these documents or have any comments about their content, please contact us at the address below:

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## Background

The consultation paper *Legal Aid Reform: Family and Family Mediation Fee Schemes* was published on 1 March 2007 and the consultation period ran until 16 April 2007.

Proposals on family fee schemes were initially consulted on for 12 weeks in July 2006 as part of the consultation *Legal Aid: a sustainable future*. This was a joint Legal Services Commission (LSC) and former Department for Constitutional Affairs (DCA) consultation, which was published at the same time as Lord Carter's Review of Legal Aid Procurement, as it reflected Lord Carter's recommendations. The document *Legal Aid Reform: the Way Ahead*, published in November 2006 was a response to the consultation.

*Legal Aid Reform: the Way Ahead* set out the next steps to the reform programme, announcing a number of changes to the timetable for implementation, and restating the Government's commitment to modernising legal aid procurement in line with Lord Carter's recommendations<sup>1</sup>. Specifically in relation to family work, the 'Way Ahead' committed the LSC to re-consulting on a revised Care Proceedings Graduated Fee Scheme and a revised scheme for Family Help – Private. It was announced that this would take place in early 2007, with the new fee structures for family work being introduced in October 2007.

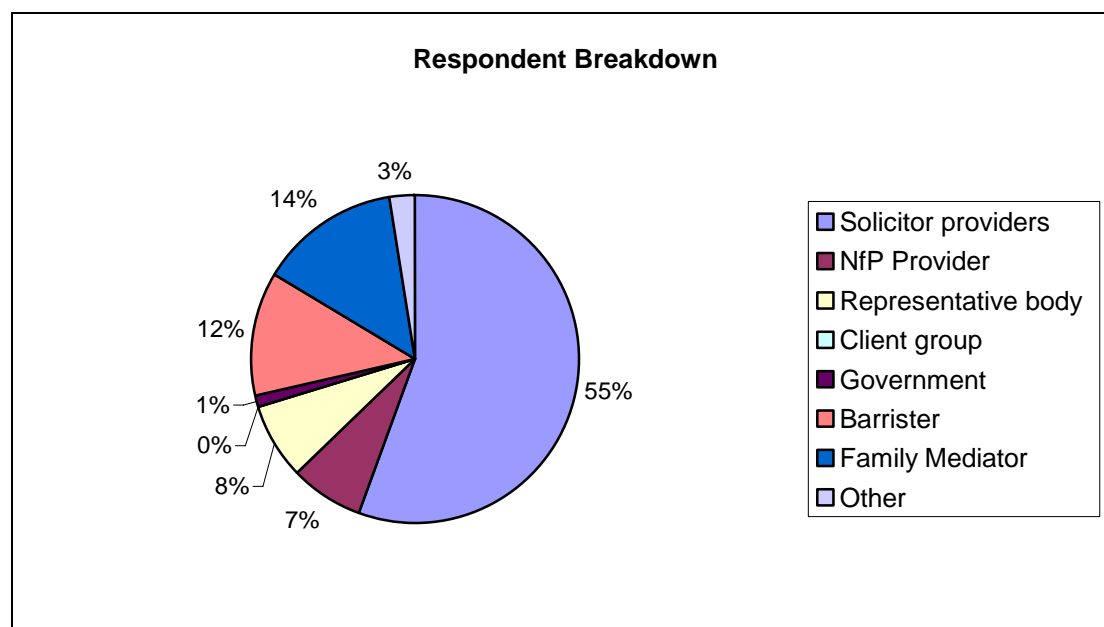
The re-consultation, *Legal Aid Reform: Family and Family Mediation Fee Schemes*, requested comments on certain aspects of the revised fee schemes, and not on parts of the fee schemes that had previously been consulted upon. It also sought comment in relation to new, but minimal, changes to the structure of Family Mediation remuneration. Respondents other than certain listed representative organisations were invited to respond to the consultation through an online consultation response form. This was the first time such a response method had been used by the Commission and an assessment of this approach is set out towards the end of this paper.

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<sup>1</sup> Lord Carter of Coles, *Legal Aid: A market-based approach to reform* (July 2006)

## Summary of responses

A total of 187 responses were received in response to the consultation, of which over half (55%) were from solicitors. The chart below gives a complete breakdown of responses by respondent type. In the following data the term 'NfP Provider' relates to not-for-profit family mediators. A full list of respondents who made their details available can be found at Annex A.



Of those respondents who currently hold LSC contracts, further analysis has taken place to determine their firms' profiles and the likely impact of the proposals on them. A summary of this analysis follows.

### Number of respondents with contracts

Region	Solicitor Providers	NfP Providers	Family Mediators	Total	As % of Total
<b>BIRMINGHAM</b>	1	2	1	4	3.70%
<b>BRIGHTON</b>	5	2	2	9	8.33%
<b>BRISTOL</b>	5	0	3	8	7.41%
<b>CAMBRIDGE</b>	5	0	2	7	6.48%
<b>CARDIFF</b>	3	0	1	4	3.70%
<b>LEEDS</b>	9	1	1	11	10.19%
<b>LIVERPOOL</b>	4	1	0	5	4.63%
<b>LONDON</b>	14	2	0	16	14.81%
<b>MANCHESTER</b>	21	0	3	24	22.22%
<b>NEWCASTLE</b>	7	1	0	8	7.41%
<b>NOTTINGHAM</b>	2	0	1	3	2.78%
<b>READING</b>	5	0	4	9	8.33%
<b>Total</b>	81	9	18	108	100.00%
<b>As % of Total</b>	75.00%	8.33%	16.67%	100.00%	

The above table identifies respondents with a family contract and breaks this down further to show the LSC region where the respondents' firms or services are located. 108 of the total 4,603 contracted family solicitors and family mediators responded to the consultation. The areas from which the greatest numbers of responses were received were Manchester and London, between them accounting for 40% of the total number of responses from contracted providers. Nationally these two regions account for 25% of family supply and are the regions with the largest numbers of contracted providers.

25% of contracted respondents were family mediators and the rest solicitors. This compares to the total provider base where nationally family mediators make up 4.3% of the total family and solicitors account for 95.7%

Virtually all respondents' for whom information was available<sup>2</sup> (almost 98%) are based in urban locations. Rural providers who responded to this consultation are based exclusively in the Bristol and Newcastle regions. The table below details this breakdown.

Nationally, the majority of family legal aid provision (86%) is also based urban locations<sup>3</sup>. Bristol has the largest number of rural providers which account for almost 61% of this region's provider base. In the Manchester region, the proportion of rural supply is much lower, accounting for almost 9% of the region's total family provision.

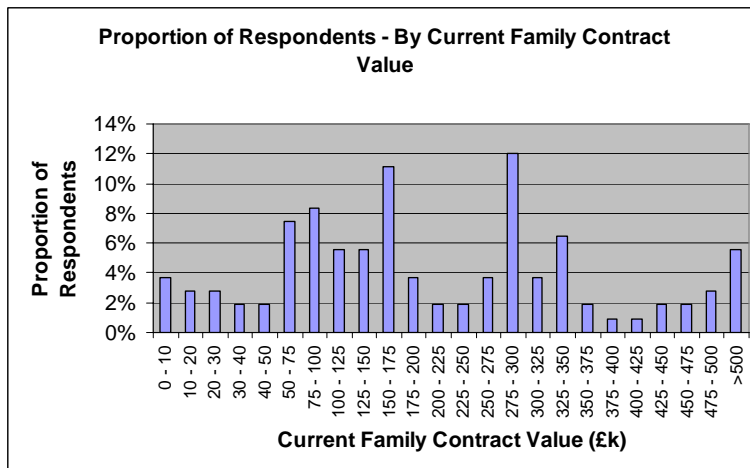
#### **Urban / rural breakdown of contracted consultation respondents**

<b>Region</b>	<b>Rural</b>	<b>Urban</b>
<b>BIRMINGHAM</b>	0.00%	100.00%
<b>BRIGHTON</b>	0.00%	100.00%
<b>BRISTOL</b>	12.50%	87.50%
<b>CAMBRIDGE</b>	0.00%	100.00%
<b>CARDIFF</b>	0.00%	100.00%
<b>LEEDS</b>	0.00%	100.00%
<b>LIVERPOOL</b>	0.00%	100.00%
<b>LONDON</b>	0.00%	100.00%
<b>MANCHESTER</b>	0.00%	100.00%
<b>NEWCASTLE</b>	14.29%	85.71%
<b>NOTTINGHAM</b>	0.00%	100.00%
<b>READING</b>	0.00%	100.00%
<b>Total</b>	2.30%	97.70%

<sup>2</sup> Respondents who provided a firm name and / or address details

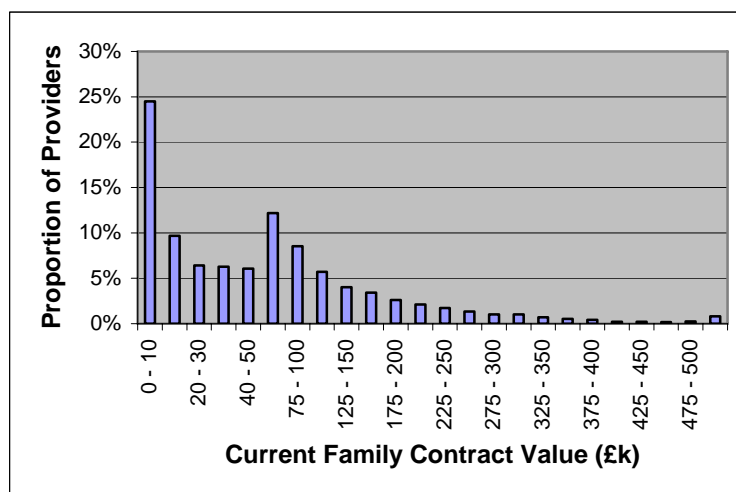
<sup>3</sup> Where provider urban / rural information is available

## Proportion of respondents by current family contract value



Where respondents gave details of their firm name or address, this could be matched with their current Family contract value. The table above shows that 23% of contracted provider respondents currently hold contracts with values of either between £150-175,000 or £275-300,000. This is very different to the national picture where the largest proportion of family providers (24.5%) hold contracts with a value of less than £10,000, as can be seen on the table below.

## Distribution of Family Contract Value for all Family Providers



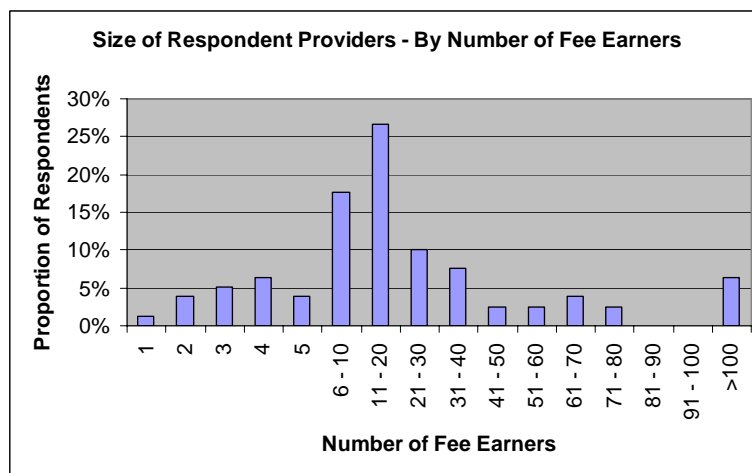
## Responses to consultation questions

### General

Solicitor respondents were asked the two general questions about their organisations.

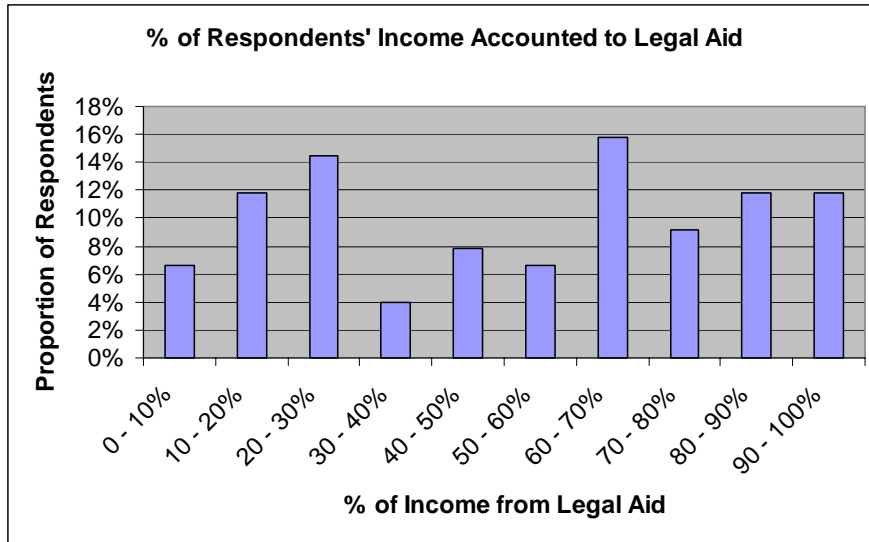
#### **Q.1 How many fee earners are there at your organisation?**

The table below shows the proportion of contracted respondents' income that comes from legal aid, where this information was provided in the response. From the information provided, over 55% of respondents receive at least half of their income from legal aid. Almost 24% of those respondents who provided information (primarily solicitors) received 80% or more of their income from legal aid.



#### **Q.2 Approximately, what proportion of your organisations income comes from legal aid?**

Of those respondents who provided information about the number of fee earners, some providers gave information relating to their whole firm, where as others gave information specific to their family department. This, together with the widely differing sizes of legal aid Family solicitor and mediation practises, is likely to account for the variance between the numbers of fee earners reported by respondent providers.



**Q.3 Do you wish details of your response to be withheld? If yes, please provide reasons**

This question was asked in accordance with our duty under the Freedom of Information Act 2000. We will consider requests to withhold information given in answer to this question when responding to any FOI request relating to consultation responses.

**Care Proceedings Scheme**

**Q.4 Do you consider the supra regional groupings at Level 3 appropriate?**

No. of responses	Yes	No	N/A
121	21%	68%	11%

The response to this question tended to depend upon where in the country the respondent was located, and therefore upon the fees that they would be paid. All representative bodies disagreed with the proposal. The rationale for the regional variations was queried and there were some concerns expressed as to where the boundaries between regions were drawn.

A number of respondents based in Cambridgeshire and Suffolk, for example, thought they would be more appropriately grouped under the South region than under the Midlands. Those based in the North West and North East regions in particular were concerned that the different levels of proposed fees did not take into account comparative efficiencies. It was also argued that it was irrational to pay a solicitor in the North so much less. A number of suppliers based in rural areas within the South West and North Wales were concerned that specific issues faced by rural

practitioners had not been properly taken into account and their additional travel costs were not reflected in the fees.

38 of the respondents considered a national fee to be more appropriate than the proposed supra regional groupings, being of the view that the work undertaken is the same and should therefore be remunerated at the same rates. The majority of those advocating a national fee suggested that a London/South East circuit weighting should also be applied.

Resolution stated that one of the justifications given for the proposals was that they prepared the way for best value tendering. However, they argued that the parameters within which best value tendering would operate had yet to be discussed and as such it was premature to propose regional groupings.

Some respondents suggested a need to better understand cost drivers and the differences between firms and devise a more sophisticated structure. The LAPG responded: *“the answer is not to split the country into regions but to get to the bottom of differences between firms.”*

A few respondents disagreed with this proposal on the basis that the work was not suited to a standard fee regime, suggesting that the importance of these proceedings meant that payment by hourly rates would be more appropriate. Some expressed concern at the fee levels arguing it would result in more junior, inexperienced practitioners undertaking care proceedings work.

**Q.5 Do you agree with the proposal to only pay half the fee where the client is not involved throughout the case?**

<b>No. of responses</b>	<b>Yes</b>	<b>No</b>	<b>N/A</b>
123	2%	94%	4%

53 respondents were of the view that a party being joined at the second hearing did not significantly reduce the amount of work that has to be undertaken on their behalf, and that often the same amount of work has to be compressed into a shorter period of time.

Respondents tended to be of the view that most clients who miss the first hearing are joined relatively early in proceedings. A number of examples demonstrating that parties often do not become involved in proceedings until after the first hearing were provided. Among those most frequently cited were a father who has been served with notice of proceedings and upon attending the first hearing is advised to consult a solicitor, and an alleged perpetrator of abuse who is given leave to intervene and thereafter plays a large role in the proceedings.

It was highlighted that most of those who are joined apply for party status to seek residence or otherwise contribute to the future welfare of the child and that

placement in the extended family is likely to be preferable to the care system and would additionally result in potential savings to the public purse.

It was widely felt that the majority of clients who disengage do so at a late stage in proceedings and that in any event the judicial preference is for solicitors to remain on the record in case the client should re-engage at a later date: *“By their very nature, adults involved in child care proceedings often have very chaotic or disorganized lives and may drop in and out of the proceedings.”*

28 respondents were of the view that this approach would discourage solicitors from taking on clients part way through a case as it would not make business sense. 20 expressed their concern that clients who were joined or needed to change solicitor would be unable to find representation in these circumstances. Some respondents considered that this would discourage solicitors from withdrawing from a case and act as a disincentive to settle cases early.

A number of respondents agreed that there should be a reduction of some sort in the fee but there was a call to define in more detail where a client is not involved throughout the case and to clarify the point at which the client is considered to cease giving instructions. Concern was expressed that halving the fee was too simplistic an approach - the rationale for halving the fee was challenged by 30 respondents. A wide range of alternative suggestions were put forward ranging from reducing the fee by 50% if the party is joined after the Case Management Conference, reducing the fee by 50% if the client is involved for half or less of the required hearings, a payment of two thirds, a payment of three quarters and an apportionment between the two solicitors based upon the work done.

However, most respondents were of the view that level three fees should be paid regardless of party status throughout. 30 respondents, including the Association of Lawyers for Children (ALC) and LAPG, suggested that by halving the fixed fee the gains produced through swings and roundabout would be removed, asserting that reducing fees based on client behaviour was incompatible with the fee structure.

#### **Q.6 Do you agree with the approach of having a single stage at Level 3?**

<b>No. of responses</b>	<b>Yes</b>	<b>No</b>	<b>N/A</b>
122	54%	39%	7%

Most respondents agreed with the approach of having a single stage at level 3. 10 respondents considered that this would make the system simpler, 16 were of the view that it enabled greater flexibility, particularly in light of previous proposals based around the Judicial Management Protocol: *“This would appear to be more flexible than linking stages to the Protocol as this is not always followed.”*

10 of those who said they disagreed with this approach acknowledged that it simplified the scheme but objected on the basis of the level of fees. Similarly, number of respondents agreed with the approach in principle but disagreed with the fee levels or the fact that it seemed to come at the price of halving fees in certain circumstances. Other comments suggested uplifts should be available and that there should be a move to graduated fees for hearings. The FLBA commented that there needed to be genuinely graduated fees that took account of complexity and the type of case.

Some respondents expressed concern that the single stage meant that the exceptional costs threshold was higher than it might otherwise be, increasing the risk to the solicitor.

**Q.7 Do you agree with revised proposals around acting for more than one child on the same case?**

<b>No. of responses</b>	<b>Yes</b>	<b>No</b>	<b>N/A</b>
117	54%	39%	7%

The majority of respondents agreed with the revised proposals for acting for more than one child on the same case and welcomed the exceptional case limit of two times the fee payable. There were some calls for there to be a limit on the number of children that should be acted for under this provision whilst others were of the view that cases involving large sibling groups would reach the exceptional case limit. The Law Society anticipated that cases acting for more than two children would reach the exceptional case threshold but asked that if implemented this approach be kept under review to ensure that this was the case.

The reasons for disagreeing with this proposal were mixed. Some were of the view that there should be a further refinement of adding another stage to allow different rates for acting for one child, for two children and for more than two children. Others suggested that the fee should increase with the number of children represented, or a further half fee for acting for a third child.

Some queried the arrangements when it became necessary for another solicitor to represent one of the children or when an additional child was born during the proceedings. Some respondents highlighted the powers of the court to direct separate representation.

The ALC queried the higher fees for children based on historical data, suggesting that this may be due to those representing children doing a greater proportion of advocacy given the undertaking as a Law Society Panel member.

18 were of the view that fees based around the number of children were too simplistic and that other factors such as the children's ages and relationships had equal impact on costs.

**Question 8: Do you agree with the revised proposals around acting for more than one parent in a case?**

No. of responses	Yes	No	N/A
117	27%	72%	1%

A small number of respondents felt these proposals were an improvement on the original proposals. 3 respondents referred to their representative body's response to this proposal. The Law Society, LAPG, and the Association of Lawyers for Children (ALC) were broadly in favour of this proposal.

20 respondents pointed out that representing both parents in a case would be extremely rare. 43 respondents raised grave concerns around the relationship between the proposed fees for acting for more than one parent, and any potential conflict of interest in acting for both parents. It was argued that a conflict of interest could arise at any point through the case, causing both parents to seek alternative representation. On the basis of the proposal to pay half the fee where a client transfers solicitor it was felt that this would significantly impact on the incentive to recognise a conflict of interest: *"There are rarely cases where there is not a professional conflict acting for more than one parent due to child protection issues and domestic violence. If you are being paid more some solicitors may be tempted to artificially ignore these conflicts."* The ALC echoed this point.

Respondents generally felt that best practice called for parents to always have separate representation, as this avoided any conflict of interest between the two parents arising at a potentially crucial stage in the hearing process. Some respondents felt that it would be more appropriate to encourage separate representation by having a separate fee for each parent, or possibly a separate fee for consideration of a conflict of interest. Further, one respondent stated that the proposal could encourage behaviour that would breach Human Rights: *"A parent is entitled to the right of family life which could be considered to be denied if his or her right to a fair trial is impeded by insistence on one solicitor acting for both parents."*

8 respondents raised concerns around the LSC monitoring for conflicts of interests, and felt that the courts' role and the rules of professional conduct were sufficient to address this issue. A small number of respondents felt the approach was too simplistic, and would not reflect what happens on an individual case.

In terms of the levels of the fees, 6 respondents agreed with the proposals but felt the fees should be higher. Of those that did not agree with the proposals because of the level of the fee, some felt that the fee scheme should remunerate one parent with

one fee regardless of whether both parents are represented by the same solicitor. Others, including the Family Justice Council stated that as in multiple children cases the fee should be 50% higher rather than 25% higher, arguing that the work involved in representing two parents was equal or even greater to that of representing two or more children. Additionally 11 respondents felt that as they had not had access to the data on which the fees were calculated, the fee levels were flawed.

Linked to the representation of parents, there were some calls to extend Level 2 to make it available to those with parental responsibilities, other family members and foster carers who may be suitable to take care of the child. The ALC further commented that the trigger for this level should be the instigation of child protection conference procedures rather than notification from the local authority of their intention to issue proceedings.

**Question 9: Do you agree with the definition of advocacy? If not what amendments would you suggest?**

No. of responses	Yes	No	N/A
115	17%	81%	2%

The Law Society, LAPG, FLBA, ALC, and the Family Justice Council all stated that preparation for advocacy should be excluded from the standard fee. 62 respondents overall stated that preparation for advocacy should not be included in the standard fee. Some respondents felt that unless preparation for advocacy was excluded from the standard fee it would create an incentive to instruct counsel to undertake contested hearings, as it would be more cost effective. Respondents wanting solicitor advocacy to be encouraged, argued that if counsel were instructed more often, it would subsequently increase overall costs to the LSC. It was felt that this proposal was against the previously stated aim of treated solicitors and barristers on an equal footing for advocacy work.

A number of respondents stated that the preparation involved for advocacy was different from that undertaken in conducting the case, and as such should be remunerated separately. It was argued that the proposal to exclude preparation for advocacy displayed a misconception about how an advocate works: *“There is a stark difference between perusing a document upon receipt for content and perusing the same document in anticipation of advocacy, often requiring cross referencing to other documents filed and preparing submissions, examination and cross examination.”*

Some respondents proposed excluding some elements of preparation for advocacy and including others. One suggestion was that preparation for hearings lasting half a day or more be excluded from the scheme. One respondent went further and suggested that the fee scheme should cover only administrative areas of work such as correspondence and phone calls.

17 respondents felt that counsel's entitlement to claim for preparation for advocacy should be extended to solicitors undertaking advocacy since they are providing the same service. It was generally felt that the proposal was discriminatory against solicitor advocates, financially disincentivising them to conduct lengthy and complex hearings. Some barrister respondents stated that without the inclusion of preparation work in advocacy the quality of representation would fall, on the assumption that a poorly prepared advocate would not present the case well.

A number of respondents did not agree with the definition of advocacy for a range of reasons other than the exclusion of preparation. 6 respondents stated that the definition was too narrow and should include protocol meetings and negotiation at court. 2 respondents were concerned at travel being included, as this tended to be outside the solicitor's control, whilst another felt this was the correct approach. 2 respondents stated that the Panel uplift should continue to be paid on all work. 6 respondents felt that because the proposals on advocacy fees for intended implementation in April 2008 had not been finalised, the LSC should consult further.

**Question 10: Do you agree with the proposed approach to payment where a client changes solicitor?**

No. of responses	Yes	No	N/A
119	8%	84%	8%

All representative bodies that responded to this question did not agree with this proposal. Some respondents felt that this proposal presented providers with a financial risk as it was not something that solicitors could control, and that clients would often withdraw at the end of a cases rather than mid point. A number of respondents, including the LAPG added that the proposal was financially unfair and the full fee should be payable in order that providers could benefit from the swings and roundabouts principle: *"In our experience clients change for 2 fundamental reasons: they realise that their solicitor is not competent...or they regard the advice they have been given as unpalatable... Whatever the reason there is no swings and roundabouts effect, as there is a tendency for clients to migrate from poor solicitors to good ones. This wholly penalises better firms."*

36 respondents, including the Family Justice Council, stated that this proposal if implemented would have a negative impact on client access, with solicitors refusing to undertake these types of cases and clients going unrepresented. 13 respondents specifically stated it would be uneconomical to take on cases for half the fee. *"Half the fee would be hopelessly inadequate. No solicitor will take on such a case as he too will lose money."* A number of respondents felt that the proposed approach was too arbitrary and was not flexible enough to adapt to individual cases. Additionally, and linked to responses to question 8, 5 respondents felt that it was unfair to financially penalise solicitors where a conflict of interest arises, which would again be outside the control of providers.

In relation to situations where quality of advice is an issue, one respondent suggested that solicitors generally should be more robust about clients transferring, but there should be a form of escape mechanism where the client has been badly served. 5 respondents felt that some restrictions on clients' ability to change solicitors during the case should be implemented rather than trying to tackle the issue through remuneration.

14 respondents suggested that a more appropriate approach would be to have either a range of fees available based on the stage the individual case reaches, or to allow discretion in the proportion of the fee paid to each solicitor. This was echoed in the FLBA's response. A few respondents suggested having an allowance for the second solicitor to read through the case, as it was very unlikely that there would be no duplication of effort required where a case transfers from one solicitor to another.

7 respondents raised questions about how this proposal would affect the exceptional case limit or how it would work where a solicitor would be acting for both parents, and suggested that there should be more consultation on this.

### **Family Help – Private**

**Q 11 Do you agree with the approach to calculating whether a case is exceptional?**

<b>No. of responses</b>	<b>Yes</b>	<b>No</b>	<b>N/A</b>
134	7%	80%	13%

A number of respondents took the opportunity to comment on the scope of the scheme as part of this question. 6 respondents stated that Rule 9.5 cases should be excluded because they are quasi public law proceedings. The ICACU Referral List of Specialist Child Abduction solicitors (representing 16 firms) said that Child Abduction cases should not be included in the scheme because they are conducted and commenced in a different manner i.e. they are governed by international treaties as well as domestic legislation, proceedings are issued only in the High Court and need to be issued and dealt with speedily. It was also argued by several respondents that since it was acknowledged that the majority of these cases would be exceptional, they should be excluded from the scheme. The FLBA added that child abduction cases were remunerated as public law cases under the FGF scheme.

Many respondents including the representative bodies stated that the three times exceptional case limit should be lowered to two times to ensure a consistent approach to that proposed in the care proceedings scheme. It was argued that the financial risks were too great for suppliers particularly in financial cases where many cases were predicted to be at just under the three times limit. 3 respondents made the point that in finance cases the statutory charge applies and the funds are paid back to the Commission in any event. 3 respondents said that solicitors would not

know at outset whether cases would be exceptional and therefore bore the risk if the case was not exceptional.

28 respondents including the FLBA, the Law Society, LAPG and Resolution said that SIPs should be taken into account when calculating whether the case is exceptional, stating that as SIPs are paid in cases that are by definition exceptional it would be unjust to exclude them from the calculation. One barrister respondent suggested that an exceptional case should be defined by the nature and complexity of the case and the number of experts involved rather than by cost. 3 respondents suggested that many solicitors were unfamiliar with the FGF scheme and that the bureaucracy involved in calculating whether a case is exceptional at the various trigger points would be enormous.

One respondent queried whether where there were Children and Finance issues the three times threshold was based on three times both fees. 2 respondents said that the case limit for VHCC should be changed.

**Q. 12 Do you consider the supra regional groupings at Level 3 appropriate?**

<b>No. of responses</b>	<b>Yes</b>	<b>No</b>	<b>N/A</b>
133	17%	63%	20%

A large number of respondents reiterated their comments to question 4. Similarly to the corresponding question on the care proceedings scheme, responses were linked to the region respondents were based in. For example, 62% of South West suppliers agreed with the proposals whereas 0% of North West suppliers agreed. The Law Society disagreed with the regions but stated that the higher cost of the South Eastern circuit must be recognised. Resolution also advocated a national fee with an uplift for the South Eastern circuit.

The Law Society raised the issue that the proportion difference in fees across the regions was different at different levels. Northern providers argued that suppliers in the North may have billed less because of the approach of solicitors rather than lower overheads and that they should not be penalised for comparative efficiencies.

Several respondents stated that the regions were too large and simplistic and covered various approaches to cases by courts and lawyers. Several respondents considered the proposed regions arbitrary and inconsistent and wanted further justification and information on why they had been selected. It was suggested that if regional boundaries were used then they should be defined by the traditional LSC office boundaries.

The FLBA considered the proposal to have a detrimental effect on advocates given that outside London they often had to travel greater distances to courts. 1 London based mediation supplier commented that regional fees should also apply to mediation services.

**Q.13 Do you consider the London uplift at Level 2 and 3 appropriate?**

<b>No. of responses</b>	<b>Yes</b>	<b>No</b>	<b>N/A</b>
131	30%	39%	31%

There were mixed views amongst representative bodies to this proposal. Whilst the Law Society, LAPG and Resolution were broadly in favour, some concerns were raised. Resolution commented that the implication was that the London uplift would not necessarily be permanent, as it would be kept under review, and that this was not helpful to providers who needed a steady state. This was echoed by a number of other respondents. ALC disagreed with the proposal on the basis that the fees were too low. Although the FLBA agreed with the principle of a London uplift it argued that this should not be at the expense of creating substantial disparity in fees with practitioners further north.

Two respondents queried why it was appropriate to employ a London uplift for private family work but not for the care proceedings scheme. 15 respondents agreed with the London uplift in principle but not based on a supra regional structure: *“Although the concept of a London uplift is generally considered appropriate this is only on the basis of national fees applying.”*

Those that disagreed with the regional fees tended to disagree with the London weighting. Two respondents based close to London in Slough and Grays argued that further consideration should be given to practitioners in their position whose costs were viewed as being as high as London.

One respondent made the point that if a London uplift at Level 2 and 3 applied then there should also be an uplift at Level 1, especially for DV cases.

**Q.14 Do you agree with the approach to domestic violence at Level 1 appropriate?**

<b>No. of responses</b>	<b>Yes</b>	<b>No</b>	<b>N/A</b>
124	44%	35%	21%

Several respondents queried initial funding for other emergency applications, for example how the work carried out prior to the exercise of devolved powers such as taking instructions and completing forms would be paid given prohibited steps orders to s37 are covered by Level 3. The Law Society suggested that since not all work leading to an application for emergency representation can be recovered on assessment, it should be covered by the Level 1 fee. It was noted that there has been confusion in the past about how this is paid for – on certificate or as a new matter start – and a number of respondents called for clarification in the Funding Code and guidance. The Law Society suggested that children and finance cases that

involved domestic violence were more time intensive and should therefore be paid at hourly rates.

Three respondents said that the fee should be higher as detailed instructions often need to be taken before the clients decides whether to take proceedings. Additionally, it was argued that those with domestic violence issues were especially vulnerable and may require advice on other remedies and related matters such as housing and benefits. One respondent suggested that further consideration needed to be given to other areas covered by Level 1 given that domestic violence is *“not the only urgent or complex matter dealt with at Level 1.”*

The LAPG suggested that domestic violence should be completely excluded from the scheme. A number of respondents suggested that if this approach was followed there should be a lower exceptional limit, as it was highly unlikely that three times the fee would be reached in these cases.

Many respondents used this question to respond to the proposal in relation to the divorce fee. A number of respondents commented that the fee was insufficient to undertake the work and four respondents queried whether the LSC intended to remove divorce from scope in the near future.

Some respondents queried what would happen with divorces that involved people who do not speak English or those who married abroad. The LSC has indicated that the fee only covered issue and respondents were concerned about service where there were further complications.

One respondent considered the amendment to the Level 1 fee to be a substantive departure from proposals within the original consultation issued in July 2006, which implied that undefended divorce and judicial separation were covered by Level 2.

**Q 15. Do you agree with the scope of children cases at Level 2?**

<b>No. of responses</b>	<b>Yes</b>	<b>No</b>	<b>N/A</b>
133	5%	83%	12%

Most respondents felt that Level 3 should commence at the issue of proceedings. In response to the proposal that, save in exceptional circumstances, solicitors should not attend conciliation appointments respondents commented that it was inappropriate to expect clients to attend what is effectively a court hearing without legal representation. It was argued that much work is undertaken at the conciliation appointment, which is considered part of the legal process, and clients must be accompanied to prevent agreement to unsustainable orders.

ALC raised the issue that there is an increasing move towards direct involvement of children and young people themselves within the conciliation process and that the proposals do not fit with this development.

Responses received indicate that there is huge variation in how conciliation appointments are conducted across the country. In some areas it is unheard of for solicitors to attend, whereas in other areas it is unheard of for the solicitors not to attend. Elsewhere it depends on the case and the issues involved. In York and the East Midlands respondents stated that conciliation appointments did not exist.

Several respondents raised the issue of domestic violence and said that representation at the first directions hearing can be crucial, particularly for clients who have experienced domestic violence and are frightened of attending court without a solicitor. It was perceived that the attendance of a solicitor allows their case to be put without the client coming face to face with their abuser. There was a suggestion that in any case involving domestic violence, Level 3 representation should be granted for the first directions appointment and the fixed fee increased to cover the additional work. An alternative suggestion was that advocacy should be allowed to be claimed separately at an hourly rate including, if appropriate, a 15% uplift in addition to the fixed fee.

Two respondents stated that the proposal may lead to unfairness if one of the parties is privately paying and brings a solicitor to the appointment, and that the proposal could only work if there was a rule that no representation was required for either party. The North Wales Resolution Regional Committee asked: "*Why should justice be tapered for legally aided clients?*" Others argued that there should be a discretionary ability to apply for representation for clients with a disability.

Four respondents queried how solicitors should deal with going on record, as they would not get information from the courts about hearing dates. It was also queried how fees would be paid and documents would be served.

Many respondents raised the issue that the proposal would cause delay at the courts. Several respondents queried whether we had consulted with the judiciary who it was felt would have to spend longer on each case and deal with increased numbers of litigants in person. Further arguments around delays were provided through the assertion that most conciliation appointments are at the first directions hearing so courts may list a further hearing to enable parties to attend with representation - if solicitors were able to give legal advice there and then draft agreed orders for court, then the matter could be settled and finalised in one day. Respondents commented that no regard appeared to have been given to how Directions would be agreed in the event of non-settlement, when Guardians may be appointed and expert reports ordered.

Mediators were concerned about the change in the timing of referral to mediation, commenting that by the time clients have been to the conciliation appointment they may be more bitter than before. One respondent noted: "*It is at odds with the NAO*

report and fails to acknowledge the qualitative difference between ADR pre-proceedings and during proceedings.” In addition, it was argued that the other party often sees the issuing of proceedings as an adversarial step and therefore it may be harder for mediation to work thereafter.

**Q. 16 Do you agree with the concept of a higher fee where settlement is achieved at Level 2 in children cases?**

No. of responses	Yes	No	N/A
130	37%	54%	9%

The main concern raised by respondents in relation to this proposal was that it could create a possible conflict between the solicitor and client. It was argued that the solicitor would need to explain to the client that they would receive a higher fee for settlement and this would create a tension with the client, which could potentially negate the advice to settle. This was the view of the LAPG who said that the focus should be on achieving right results for clients rather than a particular result at a particular time.

Eight respondents felt that it would lead to inappropriate settlements that would not last, leading to subsequent applications. Linked to this, four respondents queried how a settlement is defined and what happens when a “settled case” comes back a few months later. The LAPG stated it could put children at serious risk of harm. ALC commented that the approach of a higher settlement fee was inappropriate in the context of children.

Five respondents viewed this proposal as a financial penalty for firms with difficult clients and advocated that providers should be paid for work done and not penalised for instructions given. Several respondents including LAPG said that in order to achieve settlement work needs to be front loaded and the settlement fee was insufficient to compensate for this: *“The economics of this system will require them [providers] to do the bare minimum required at this level and proceed to contested litigation in all but the most easily settled cases.”*

Several respondents said it was insulting to solicitors to insinuate that they do not already try and settle appropriate cases. Some respondents pointed out that if the exceptional case limit is applied to the enhanced fee then it will be harder for a case to be exceptional where it settles and a solicitor may end up receiving the settled fee rather than the sum of the work actually done. ALC raised the issue that where there are children and finance issues the exceptional case threshold should apply to the fixed fee for each part of the case rather than children and finance fees combined.

Respondents that agreed with the proposal said that it was right that the higher fee reflects the skill and experience needed to persuade parties to settle a case: *“The better the job the greater the reward, a concept that has been missing from public funding until now.”* The Law Society supported the proposal provided that the fee

was higher or the exceptional case was lowered. They also asked whether Level 2 would cover Collaborative Law.

**Q.17 Do you agree with the scope of finance cases at Level 2?**

No. of responses	Yes	No	N/A
128	28%	53%	19%

Many respondents disagreed not necessarily with the scope of finance cases at Level 2 but with the level of the fee, which they viewed as being too low. It was argued that this would subsequently prevent providers from advising clients properly. One respondent commented that the work could not be done within the fee without employing a mediator; another that it provided no incentive to settle.

22 respondents argued that financial cases should not be included within a fixed fee scheme on the basis that the statutory charge would arise in the majority of cases and as such the cost to the Fund would be comparatively insignificant. Whilst the LAPG agreed with the definition of Level 2, they argued that there was so much difference between finance cases so as to make them unsuitable for a fixed fee scheme.

Some respondents queried what the scope of Level 2 would mean for those firms who followed the pre-action protocol, which was likely to lead to more work through emphasis on areas such as voluntary financial disclosure. Whilst some respondents recognised that where there were substantive negotiations the case would become exceptional, it was argued that firms would still effectively receive a pay cut for this work as it would attract Legal Help rates rather than General Family Help rates.

Six respondents considered that Level 2 should not include the issuing of proceedings for purposes of a consent order, arguing that there were often several hours of preparation involved and as such it would more appropriately be covered by the Level 3 fee.

There were mixed views around the link with mediation at this level. Some considered that the inclusion of Help with Mediation within Level 2 would discourage this service as it would no longer be exempt from the statutory charge. The fees were also perceived to be inadequate to support clients in mediation; respondents predicted that this would result in pressure on solicitors to issue proceedings in order to increase their fees. Whilst some respondents suggested that the requirement to consider mediation was at too late a stage, others felt that the proposals would encourage alternative dispute resolution such as mediation. However, one barrister respondent commented that *“mediation for ancillary relief is far too frequently inadequate”* and that matters were better resolved by specialist advocates.

A small number of respondents suggested that there should be additional advocacy at Level 2 payable by hourly rates, arguing that in some courts it was routine practice

for clients to attend a directions hearing before a consent order is approved, where either party is unrepresented.

**Q.18 Do you agree with the concept of a higher fee where settlement is achieved at Level 2 in finance cases?**

No. of responses	Yes	No	N/A
126	33%	49%	18%

A number of those answering yes, agreed to the proposal in principle but again felt that the fees were too low, and in some instances would do little to disincentivise the issuing of proceedings. The Law Society suggested that: *“the fee should be increased to Level 3 and the escape level reduced to twice the standard fee.”* Many of the concerns expressed in response to question 16 on children cases were echoed in responses to this question. One of the biggest concerns amongst those disagreeing with the proposal was that it was unfair to impose a financial penalty for not settling a case when it would often be for reasons outside the provider’s control – they were bound to act according to a client’s instructions or, for example, the other side might not be cooperating. Another concern was that it would lead to a potential conflict of interest between the solicitor and client, and that it would not always be in the client’s best interest to settle. Some respondents suggested that rather than having a higher settlement fee there should be bolt-ons for specific areas of work such as preparing a consent order.

One respondent suggested that if the aim was to encourage more appropriate referrals to mediation it might be better for cases to qualify for the higher settlement fee where it has been resolved through the use of mediation.

Three respondents argued that they encouraged settlement as standard practice and that a proposal to pay a higher fee where cases were settled implied that they did not presently do all they could to settle a case prior to the issue of proceedings.

**Q.19 Would there be any justification for splitting the Level 3 children fee?**

No. of responses	Yes	No	N/A
128	25%	52%	23%

Some respondents argued that at Level 3 there would often be more than one hearing and that the fees should reflect this. One respondent commented that *“where there are private law issues concerning children it is often better that there should be an incremental approach, such as building up contact, which inevitably leads to review hearings and no final hearing ever taking place,”* and that provision should be made for the increased work in such cases. Others argued that there was a wide range of work between conciliation and the final hearing and that it was too simplistic to cover this through a single fee. One respondent suggested that there

should be different fees according to the level of case, the level of court and the issues involved. Others suggested, along similar lines, that there should be a higher fee for complexity such as if the opponent were unreasonable or the case involved a litigant in person.

It was also suggested by four respondents that the Level 3 children fee be structured along similar lines as that proposed for finance cases with a Level 3a covering the conciliation appointment and higher fees available where cases were settled.

Some respondents expressed concern about the dividing line between Level 3 and the final hearing, arguing that it is not always easy to identify the final hearing in children cases, and that for example, a number of hearings specified as final hearings turn out to be interim hearings.

Those agreeing with a single level at Level 3 tended to do so on the basis that, unlike in finance cases, there was not an established sequence of hearings. It was also recognised that practice was likely to differ according to the court. The Family Justice Council commented that the fee scheme already seemed overly complicated, but expressed concern that the fees did not necessarily reflect the work covered by this level, arguing that cases would not always develop on an incremental basis towards the final hearing.

A number of respondents who thought that there would be no justification for splitting Level 3 for children cases took the opportunity to voice concerns around proposals that attendance at the conciliation appointment would not be paid for.

**Q. 20 Do you agree with the proposed stages for finance cases at Level 3 and the defining line between 3a and 3b? If not, what do you suggest?**

<b>No. of responses</b>	<b>Yes</b>	<b>No</b>	<b>N/A</b>
123	16%	55%	29%

33 respondents disagreed with the defining line between Levels 3a and 3b on the basis that the Level 3a fee was considered too low and not reflective of the work entailed. A number of respondents stated that there was often a considerable amount of work prior to the Financial Dispute Resolution (FDR) hearing. ILEX commented that no consideration had been given of work up to the first directions appointment (FDA) which could typically include the issuing of proceedings, preparation of a Form E, preparation for the Statement of Issues and questionnaires, taking instructions, attendance at FDA and considering and responding to documents from the other side. It suggested that Level 3a should conclude prior to the FDA rather than prior to the FDR, many other respondents agreed that the conclusion of Level 3a should be earlier. These concerns were echoed by a number of respondents and representative bodies including the FLBA and The Law Society. The Law Society suggested that a bolt-on or additional stage should be made

available for attendance at the FDA. Others suggested that the defining line remain the same but the fee be increased to better represent the work involved.

One respondent suggested there be a difference in fees for those cases that convert to the FDR at the first appointment and those where both an FDA and FDR take place as the latter involved considerably more work. A further argument was that the perceived low fee for Level 3a provided no incentive to settle prior to the FDR hearing. A number of respondents suggested that one way to counter this would be to have a single fee at Level 3; one respondent described the proposals to split Level 3 as “unnecessarily complicated.”

17 respondents disagreeing with the stages repeated arguments voiced in question 17 that finance cases should be paid at hourly rates given that the LSC would be in a position to recoup a significant amount to the Fund through the application of the statutory charge.

A number of respondents agreeing with the defining line commented that they felt that fees were too low or that they disagreed with the concept of this work being covered by a fixed fee.

**Q.21 Do you agree with the concept of a higher fee where settlement is achieved in finance cases at Level 3?**

No. of responses	Yes	No	N/A
122	31%	42%	27%

35 respondents answering this question referred back to their answers to questions 16 and 18, which asked about a higher settlement for Level 2 children and finance cases respectively. Therefore, a number of the same concerns were raised to this question the most common being that a higher settlement fee would create a conflict between the solicitor and client and that it was unfair to impose a financial penalty on firms if they were unable to settle a case due to factors outside of their control. Those disagreeing with the proposal expressed a preference for one fixed fee regardless of the outcome. One respondent suggested that there should be provision to claim hourly rates for advocacy, with an uplift for Panel members, to bring the proposals into line with those for care proceedings work.

One mediation provider again suggested that the higher fee should only be payable where mediation was employed to settle the case. The FLBA expressed concern about those cases where counsel rather than the solicitor achieved settlement at FDR. It suggested that a settlement supplement be incorporated into the scheme whereby when settlement occurred as a result of the FDR the supplement should be payable to whichever advocate conducted the FDR.

Two respondents suggested that there should be a higher settlement fee available at Level 3a as well as 3b. Once again a number of those agreeing with the proposal qualified their response through stating that the level of fees was too low.

**Q.22 Do you agree with the proposed approach to payment where a client changes solicitor?**

No. of responses	Yes	No	N/A
126	10%	65%	25%

16 respondents referred to their answer to question 10, relating the proposed approach to payment where the client changes solicitor to that in the Care Proceedings Scheme. Six respondents felt that without the guidance on when a transfer of a solicitor was appropriate it was difficult to answer this question from an informed perspective. The Law Society again stressed that if this was perceived as being a major issue, the LSC should issue regulations that addressed this.

Broadly, most respondents agreed with the approach proposed at Levels 1 and 2, but were concerned about the impact of the proposal at Level 3. Seven respondents stated that it was unfair to penalise firms because the client did not like the advice they received or if a conflict of interest arose. Seven respondents stated that the approach would impact on client access, as the fee would be too low to encourage solicitors to undertake work for a client who has changed solicitors mid-case: *“If the solicitor has to pay for this, the solicitor in practical terms will refuse to take on the client who wants to change solicitors even for a good reason which will leave that client unrepresented.”* Some respondents stated that in financial cases the costs of the statutory charge protected the legal aid fund from risk.

It was felt that the proposed approach was too arbitrary, and would be unfair to both solicitors involved in most cases. Respondents disagreeing argued that a 50/50 split of the fee would in no way match the work done on a case nor reflect the stage a case had reached at the point of transfer.

One alternative approach suggested was that there should be discretion on the part of the providers. Four respondents proposed that a Level 3 fee should be payable to each solicitor.

20 respondents proposed that rather than paying these cases under the fixed fee scheme, hourly rates should be claimable where this situation occurs. It was felt that this approach would ensure that neither solicitor lost any income on the case.

**Q.23 Do you agree with the levels at which the statutory charge will be applicable? If not what approach would be preferable?**

No. of responses	Yes	No	N/A
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127	30%	48%	22%
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Five respondents referred to their representative body’s response to the proposal. The FLBA and ILEX were broadly supportive of the proposal. However, both LAPG and the Law Society felt that the charge should be based on the costs of the case rather than the price paid for the work. The Law Society also commented that the proposed approach would result in an increased administrative burden for providers.

As a result of Help with Mediation being incorporated into Family Help, 18 respondents, largely family mediators, felt the proposal was at odds with the promotion of mediation and would lead to fewer clients opting for mediation. One respondent stated that exempting cases involving mediation from the statutory charge would help promote mediation and support the findings of the NAO Review. An alternative approach was suggested whereby the statutory charge only applied in cases that proceeded to litigation.

In terms of what the statutory charge should be based on, 24 respondents felt that the most appropriate basis would be to apply the charge to the actual costs of the case rather than the standard fee applicable. As one respondent stated: *“the cases should be remunerated on an hourly basis not a fixed fee. This is so that the clients liability to the fund is directly proportionate to the assistance that the state has given.”*

In terms of complexity of the proposals there was an equal split between those who felt that the proposals simplified the current situation and those who felt that the proposals were more complex.

A number of amendments were suggested to what the charge should cover. Five respondents raised concerns with the current application of the statutory charge to domestic violence and children cases, expressing dissatisfaction that under this proposal this would continue.

One respondent suggested that the statutory charge should apply only at Level 3; one suggested that it should apply at Level 1 as well; whilst another suggested that it should apply to Level 2 cases where property is recovered. Additionally, another respondent commented that the statutory charge should only apply to the finance cases at Level 2 adding: *“I would suggest only in exceptional cases as an incentive to settle early in less complex cases.”* Three respondents suggested that the exemption of the statutory charge should be moved further into the process, so that more cases would be encouraged to settle at an earlier stage.

**Other Issues**

**Q.24: Do you agree with the proposals for how POAs will operate?**

No. of responses	Yes	No	N/A
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105	34%	44%	22%
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Of those who disagreed with the consultation proposals for the operation of POAs, the primary reason given was that those cases remunerated under a fixed fee should receive 100% rather than 75% of money owing on account as there would no longer be bills to assess. Respondents including the LAPG indicated that it would, however, be appropriate to maintain payments on account in exceptional cases at the 75% level.

Other concerns raised in relation to the proposed system were that cashflow would be adversely affected by following this route, as well as concerns from 8 respondents that the proposed system would be more complex than the current one.

Of those respondents who supported the proposed approach, few gave detail of their reason for this. In some instances though, support for the proposal was qualified, most commonly by the assertion that there needed to be provision for early level 1 and 2 payments. The Law Society welcomed being able to apply for a payment on account after three months although noted the removal of automatic payment of £250 plus VAT on the issue of a certificate, and requested that exceptional cases be paid promptly.

A number of respondents also made reference to the unique identifiers. Most were in favour of the proposal but were uncertain whether the proposed system would produce identifiers unique to each client. One respondent made the point that firms would need to have sufficient notice in order to amend their IT systems.

## **Mediation**

### **Q.25 Do you consider it is appropriate for the LSC to continue to pay for Willingness Tests?**

<b>No. of responses</b>	<b>Yes</b>	<b>No</b>	<b>N/A</b>
95	75%	7%	18%

The majority of respondents considered that the funding of this work needed to continue. The key reason given for this was that Willingness Tests were viewed as necessary for engaging with clients, which was considered essential for mediation to take place. National Family Mediation (NFM) commented: *“Services support the continuation of payment for the willingness test and welcome the LSC’s acknowledgement of this work.”*

Concerns were raised that the proposed fee of £25 would not be sufficient to cover the work services are actually doing to get clients to participate in mediation. Additionally, respondents noted that no allowance had been made for the increases in inflation since this fee was introduced.

**Q.26 Do you consider increasing the standard fee for assessment meetings, in order to provide a more holistic service, will assist clients in dealing with their problems and increase the number of clients who proceed to mediation? If not, say why not and what alternatives you would suggest.**

<b>No. of responses</b>	<b>Yes</b>	<b>No</b>	<b>N/A</b>
93	60%	14%	26%

The majority of respondents agreeing with this proposal did so on the basis that they felt the assessment meeting to be an extremely important part of the process in engaging clients and welcomed recognition of this through an increase in the fee. The realignment of the fees paid for assessment meetings together was also welcomed by many respondents.

17 respondents expressed concern about the level of fee proposed for this work, commenting that the increase in time was insufficient to fully engage with clients. Some respondents, including the NFM, suggested that assessment meetings should be paid at the same rate as mediation. It was noted by payband C providers that they were only getting a slight increase for assessment meetings based on their current rates.

Two respondents linked this proposal to the mediation referral point, expressing concern that if the timing of the assessment meeting changed and it occurred once proceedings had been issued, it was likely to limit its chances of success.

**Q.27 Do you agree with the new apportionment of mediation payments, for the different work types? If not, what amendment to the distribution of payments between work types would be more appropriate?**

<b>No. of responses</b>	<b>Yes</b>	<b>No</b>	<b>N/A</b>
91	29%	36%	35%

Many respondents generally agreed with the new apportionment of mediation payments and felt the changes to Agreed Proposals were appropriate. There was recognition that there will always be cases that are more complicated and pay less and cases that will be simpler and pay more, but over the course of the contract these would even themselves out.

11 respondents believed that the rates paid for children cases, particularly multi-session cases should be paid at a higher rate in line with Property and Finance (P&F) to reflect their difficult and stressful nature. The Family Mediators' Association (FMA) questioned the fees in child only cases based on their research. Other respondents felt that the fees for Property and Finance should be increased due to the complexity of the issues involved.

A number of respondents also raised concerns about the differences between P&F and All Issues Mediation (AIM) cases in terms of multi-session rate and agreed proposal rates. It was felt that the writing of a Memorandum of Understanding for P&F and for AIM are only slightly different, and the difference between both P&F and AIM compared to child issues is far greater in terms of face to face time and the time spent on writing up agreed proposals.

Again, concerns were raised about the fees not reflecting increases in inflation since the fees were originally introduced in December 2002.

**Q.28 Do you consider that Direct Consultation work should be funded differently?**

<b>No. of responses</b>	<b>Yes</b>	<b>No</b>	<b>N/A</b>
94	53%	13%	34%

53% of respondents felt that alternative funding arrangements should be implemented for this specialist area of work, which requires specific training and expertise. Concerns were raised by the Law Society and by other respondents about the small sample of data that we used to determine our position and our inability to record cases where direct consultation has been used. Some services gave some additional information on the appropriate increase in time in order for this work to viably take place, although again this was based on a very limited sample.

The volume of cases using Direct Consultation with Children varied considerably between mediation service respondents. It was because of this that many respondents felt it was appropriate to have a separate payment system rather than increase the general mediation time across all child related cases. It was suggested that this would also allow the LSC to monitor this usage.

There were two separate ideas put forward on how this should be funded. The first was a one-off additional payment per case either for an hour or the equivalent single session fee to undertake this work paid via disbursements. The other was through the introduction of a new work type with up to an additional 3 hours/sessions being allowed for this work.

Respondents commented that a number of services have not been reporting any direct consultation with children work to us. NFM informed us that all NFM services that do direct consultation do so with external funding or free of charge. Research by NFM found that additional time of 1.25 sessions based on 90 minutes per session length was sufficient.

FMA envisaged at least 3 sessions dealing with the consultation process; a preparation session, a direct consultation session, and at least one session to

provide feedback to parents, which are additional to the standard mediation sessions required.

Services highlighted the importance and the potential benefits of involving children in the mediation process and that this would be in line with Government policy. However, one respondent questioned whether a mediator is properly equipped to engage in direct consultation with children.

**Q.29 Is the parties returning to mediation after a gap of 3 months since the matter was closed, the correct approach for determining whether the matter be treated as an entirely new application? If not, please explain why.**

No. of responses	Yes	No	N/A
92	58%	11%	31%

A significant proportion of respondents agreed with our proposals on this area. The Law Society described it as a *“pragmatic, sensible and welcome provision.”* It was felt that this approach would help avoid administrative complications. The FMA commented that it would be unfair to expect a mediator to start again on work but not be able to make a fresh application. A number of respondents felt that the mediator should have discretion to determine whether a new application could be opened sooner, should the circumstances be appropriate.

It was recognised that any arrangements for mediation under their contract specifications needs to be consistent with those introduced under the family scheme. Resolution called for parity in the time lapse available to solicitor organisations to open new matter starts.

### **Funding Code**

**Q.30 Do you agree that General Family Help, Help with Mediation and Help at Court in family cases should be replaced by Family Help?**

No. of responses	Yes	No	N/A
101	44%	39%	17%

Some respondents agreed that the introduction of Family Help would simplify administration although there were others who felt that the introduction of Family Help (Higher) and Family Help (Lower) would itself be confusing. Most of the comments from those respondents who disagreed related to the proposed abolition of Help with Mediation and that as a result the exemption from the statutory charge for the part of the work previously covered by this level of service would also disappear. The Law Society commented: *“It is the experience of many mediators and solicitors that the existence of this package [of legal aid mediation with Help with*

*Mediation] operates to bring many clients into mediation who might otherwise not mediate.”*

Some respondents also commented on the potential increase in work, which could be carried out under Level 2, and was therefore controlled work. It was argued this meant that hourly rates were effectively being reduced.

Four respondents objected to the use of the term “help” throughout the consultation. They suggested that the legal services provided should be described as advice rather than help.

**Q.31 Is the distinction between Family Help (Lower) and (Higher) appropriate?**

No. of responses	Yes	No	N/A
102	21%	59%	20%

11 respondents disagreed with the point at which a matter would be required to be referred to mediation. Mediators were particularly concerned that the compulsory referral point in children cases would now be after the first appointment when they felt that the parties’ views were likely to have become entrenched.

A number of solicitors raised concerns that the issue of proceedings and first appointment in private law children cases would be covered by Family Help (Lower) ie. controlled work. Some were concerned about the idea of sending clients to the first CAF/CASS conciliation appointment without legal representation for any subsequent directions hearing and also referred to the answers given to question 15: *“Clients should not be jettisoned at the doors of the court for ‘conciliation’ meetings. In many situations the other party will be represented as they are privately paying and the applicant will not have equality of arms.”* There were also concerns raised about the point at which solicitors would go on record in private law children cases where proceedings had been issued under Controlled Work.

**Q.32 Are the proposed criteria for Family Help appropriate? What other criteria could be considered?**

No. of responses	Yes	No	N/A
98	30%	36%	34%

A number of respondents were of the view that the criteria for Family Help (Lower) should include a referral to mediation. Applying the criteria at level 3 was thought to be too late in the process. As in question 31 there was also concern about representation at the first appointment in private law Children Act cases.

A few respondents also raised a concern about the definition of a serious family dispute. One respondent commenting that all cases concerning children are serious.

One respondent disagreed with the proposal on the basis that *“there is too much emphasis on settlement,”* reiterating concerns expressed in response to specific questions on higher settlement fees in the Family Help scheme.

**Q.33 Do you agree with the point at which the mediation referral criteria applies under the new scheme and what changes, if any, should be made to the current exemptions from that requirement?**

No. of responses	Yes	No	N/A
104	25%	55%	20%

Mediators particularly disagreed with the point at which the mediation referral criteria should be applied (14 of the 17 who responded). There was concern that the mediation point, particularly in children cases, was too late in the process, allowing attitudes to become entrenched. It was their view that mediation should be more generally encouraged.

Responses from solicitors suggested that consideration of whether mediation was appropriate in domestic violence cases should be carried out by a solicitor who already had a relationship with the client. Resolution commented: *“We think there are some dangers in this and that it would put further obstacles in the path of victims of domestic abuse trying to escape an abusive relationship. This is not a criticism of mediators’ ability to screen for domestic abuse but a concern that this procedure will add further delay and could, in more serious cases, further victimise the victim by making him or her jump through procedural hoops in order to access the courts.”* Most mediators thought that consideration of mediation in domestic violence cases could be undertaken by the mediator.

A few respondents thought that the proposal to change the exemption where a hearing date has already been set within 8 weeks to 4 weeks was too tight for financial cases where it was argued substantial paperwork needs to be prepared for the first hearing.

**Impact Assessment**

**Q.34 Do you agree with the draft regulatory impact assessment for the Family Fees Schemes?**

No. of responses	Yes	No	N/A
83	7%	52%	41%

11 of those respondents disagreeing with the proposals did so on the basis that they felt the data used to predict financial impacts was flawed. A number of respondents commented in light of their own estimates of the potential financial impact on their firms, expressing concern that they would experience a reduction in income as a

result of the proposed schemes. Some respondents argued that this would subsequently lead to a reduction in the availability of providers to give advice to clients. The LAPG’s response encapsulated these concerns, stating there had been “no assessment of the risk of being left with inadequate supply.”

Other respondents highlighted concerns around the negative effect of the reforms on NfPs. The North Wales Resolution Regional Committee and Law Society responses both examined regional impacts. The former argued that proposals would have a detrimental impact on North Wales providers, which in turn would affect bilingual clients in rural areas. The Law Society expressed concerns at the lower fees proposed for providers in the North and Midlands. The FLBA was critical of the fact that no assessment of the impact on the Bar had been undertaken, predicting a reduction of income for its members and subsequently fewer barristers being prepared to undertake legal aid work.

In terms of the equality and fairness of the proposals, there was criticism from the Family Justice Council that the LSC had failed to properly acknowledge the concerns of BME providers. It predicted that the proposals would have a disproportionate impact on BME owned providers which in turn would be detrimental for BME clients who, it asserted, would tend to seek advice from BME practitioners. The Family Justice Council further argued that case times of BME clients were more likely to be longer as a result of language issues and BME clients in the North in particular would suffer due to the lower Family Help fees proposed for that area. It also argued that BME owned firms would be unable to benefit from the concept of swings and roundabouts as they tended to be small or medium sized and as a result would be unable to take on sufficient caseloads. Additionally, concern was expressed that the location of BME owned firms meant they would be unable to consolidate any reduction in legal aid income through an increase in private client work.

Most of those agreeing with the proposals made no further comments. One mediation provider commented: “We agree to the extent that the draft regulatory impact assessment of the LSC recognises that some NfP providers may have to withdraw as a result of the proposals made.”

**Q.35 Do you agree with the draft regulatory impact assessment for the Family Mediation proposals?**

No. of responses	Yes	No	N/A
79	6%	32%	62%

Responses to this question reiterated concerns expressed in response to question 34. Four respondents predicted that the disproportionate negative impact on NfPs would translate into reduced access to mediation services for clients. There was some criticism of a perceived failure to distinguish sufficiently between the impact on NfP and for profit providers. The Law Society commented that it had concerns but had not had the opportunity to answer assertions made in any depth.

## **General Comments**

A total of 62 respondents completed the General Comments section of the online consultation. General comments were made both in respect of the consultation process and the fee scheme proposals.

### **Fee scheme proposals**

Of those respondents who gave general comments in relation to the fee schemes, the most commonly expressed view was from family mediators who were concerned about the referral point for mediation. Five respondents raised concerns that the proposals would make legal aid work unviable for firms and would ultimately reduce access to justice for clients.

Other views expressed by small numbers of respondents included opposition to fixed and graduated fees in principle and concern that NfP mediators would be particularly badly affected. Three respondents felt that the LSC has listened to and acted upon views that had previously expressed. One respondent expressed support for the principles behind the reforms.

### **Consultation process**

69% of comments received in this section related to the consultation process itself. Of these, the views most commonly expressed were concerns that the online response form was in effect limiting the scope of the consultation (18%), and that respondents had difficulty in completing the online form or difficulty in saving, printing or emailing their finished response (27%). Indeed, some respondents expressly indicated that they would have preferred to have responded in a different format, for example, by way of an email attachment or by fax.

A number of respondents made suggestions about what would have improved the online consultation process. These included the addition of an alternative such as 'not sure' to the required Y, N or N/A responses which were felt not always to be appropriate; the inclusion of a 'save for later' button; clearer indication of when the response was going to be submitted; and larger response boxes to help respondents review their response.

## **Assessment of online consultation process**

The online consultation form included a section for respondent feedback. Overall, 49% of respondents found the process helpful or very helpful, whilst 34% of respondents found the process unhelpful or very unhelpful, and 17% found the process no different. The table below shows the feedback by respondent type.

<b>Feedback</b>	<b>Barrister</b>	<b>Family Mediator</b>	<b>NfP Provider</b>	<b>Other</b>	<b>Representative body</b>	<b>Solicitor providers</b>
Very Helpful	1	7	3	1	1	11
Helpful	1	10	4	1	0	32
No Different	5	0	3	0	1	16
Unhelpful	5	3	3	0	0	20
Very Unhelpful	3	2	0	0	0	11

The LSC opted to undertake this consultation exercise primarily online in order to increase efficiencies in the process and reduce the burden on administrative resource. Given the compatibility of this approach with administrative cost savings and the fact that feedback has been largely positive, there is a clear benefit in running future consultations exercises online. Where this option proves viable in future consultation exercises, we will carefully consider feedback received around how the process could be improved in designing the online forms.

## Conclusion and next steps

1. This consultation process forms part of a series of consultations on legal aid reform, emanating from Lord Carter's Review and *Legal aid: a sustainable future* published in July 2006. An unprecedented number of responses were received to the original family fee proposals. We welcome the interest and engagement shown by stakeholders both in that consultation and in subsequent discussions, which have helped inform the development of revised family fee proposals. The benefit of the feedback that stakeholders have provided is demonstrated by the fact that a number of respondents to this consultation recognised that we had listened to previous concerns raised in devising revised proposals. Resolution commented: *"We recognise and welcome the attention the LSC paid to our earlier comments on the previous fixed fee proposals and are pleased that the proposals have been significantly amended, in particular the revised structure for private law work has taken into account a number of our concerns."*
2. We are grateful to those individuals and organisations that have taken the time to respond to this follow-up consultation. A number of useful comments and suggestions were received that have had effect on the final fee schemes. We have had to consider concerns expressed in the context of our objectives of achieving future sustainability of the legal aid system, ensuring access to services for clients and value for money to the taxpayer.
3. We have produced our detailed response to the consultation, entitled *Family and Family Mediation Fee Schemes from October 2007*, as an accompanying document to this analysis. The response includes details of where we have made amendments to our proposals and sets out the final fee schemes. It is available on our website at [www.legalservices.gov.uk](http://www.legalservices.gov.uk).

## **Consultation coordinator contact details**

If you have any complaints or comments about the **consultation process** rather than about any topics covered by this paper, you should contact the Legal Services Commission's Consultation Coordinator, Holly Perry on 020 7759 0000.

Alternatively, you may wish to write to the address below:

**Holly Perry**  
**Consultation Coordinator**  
**Secretariat**  
**Legal Services Commission**  
**85 Gray's Inn Road**  
**London**  
**WC1X 8TX**

If your complaints or comments refer to the topics covered by this paper rather than the consultation process itself, please direct them to the contact details provided at the introduction of this paper on page 1.

## **The Consultation Criteria**

The six consultation criteria as set out in the Cabinet Office Code of Practice are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation coordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

## List of respondents (Annex A)

Below is a list of respondents to the consultation. Some responses were submitted anonymously and three respondents asked for their details not to be disclosed.

Name	Organisation Name
Judy Earle	3 Paper Buildings
Lucy Hendry	3 Paper Buildings
Nicola Martin	3 Paper Buildings
Emma Freeman	7 Harrington Street Chambers
Angela Donen	A B Mediation
Wendy Hewstone	Access Law LLP
Yvonne Payne	Afirm Ltd.
Alan Bean	Anthony Collins Solicitors, on behalf of Birmingham Child Care Lawyers Group
Murray Heining	Association of Law Costs Draftsmen
	Association of Lawyers for Children (ALC)
Mr J Bull	Atkins Hope
Linda Walker	Atteys
	Baily Gibson
Bob Phillips	Barrett & Thomson
Jane R Williams	Bay Family Mediation
Stephen Hollamby	Bennett Griffin
Linda Pullinger	Birchall Blackburn
Mrs A Green	Birchall Blackburn
Margot Moffitt	Blackett Hart and Pratt
Maud Davis	Blacklaws Davis LLP
Nigel Bowman	Bowman's Family Law Solicitors, on behalf of Leeds Representatives of Children in Court
Ian Bloxham	Bristol Family Mediation
Maeve Egan	Bristol Family Mediators Ass Ltd
Stephanie Marshall	Burke Niazi Solicitors and Advocates
H. Young	C R Burton & Co
	CAFCASS
	Cafcass Cymru

Name	Organisation Name
Vanessa Stirum	Chadwick Lawrence LLP Mediation Services
Christine Bispham	Chambers of David Steer QC
Clive Baker	Chambers of David Steer QC
Mary Compton-Rickett, on behalf of the Family Dept of Chambers	Chambers of David Steer QC
Christopher Miller	Chambers of Gillian Brasse and Sarah Forster
Ronan O'Donovan	Chambers of Sarah Forster & Gillian Brasse
Leo Curran	Chambers of Tim Lamb QC & Richard Tyson
Philip Bennett	Child Law Partnership
Graeme Bentley	Church Bruce Hawkes Brasington & Phillips
David Willans	Clarendon Chambers
Gillian Walker	Cleveland Family Mediation Service
Heather Profit	CMA Mediation
	Cobleys LLP
Carol Davies	College Chambers
Derek Marshall	College Chambers
Jenny Lewington	Coventry & Warwickshire Family Mediation
Chris Myles	Crombie Wilkinson
Catherine Evans	David & Snape
Jonathan David	David & Snape
Elsbeth Thomson	David Gray Solicitors
Andrew J Perrigo	Davison Flynn Boscoe & Partners
Monica Cockett	Devon Family Mediation Agency
Bethan Jones	Elwynn Jones, on behalf of, North Wales Resolution Regional Committee
	Eskinazi & Co
Neil Puttock	Ewing Hickman and Clark
Jeni Styring; Paul Ewings; Pauline Lloyd	Ewings & Co
	Family Justice Council
	Family Law Bar Association (FLBA)
Dorothy Knight	Family Mediation Hull & District
Penelope Dunne	Family Mediation in Sussex
Jennifer Cragg	Family Mediation Manchester Ltd

Name	Organisation Name
H F J McLean	Family Mediation Service
	Family Mediators' Association
Bridget Lindley	Family Rights Group
Adele Wilkinson	Family Solutions
Ananda Hall	Fisher Meredith
Mary Banham-Hall	Focus Family Mediation Ltd
Mark Harrison	Foley Harrison
Vanessa Priddis	Foot Anstey
David Milburn	Forbes Solicitors
Dawn Baker	Forbes Solicitors
Gill Carr	Forbes Solicitors
Harry Butler	Forbes Solicitors
Judith Wright	Forbes Solicitors
Rebecca Voss	Forbes Solicitors
Rubina Vohra	Forbes Solicitors
Sarah Moore	Forbes Solicitors
Shirley Wignall	Forbes Solicitors
Tracy Davies	Forbes Solicitors
	Foster and Partners
Catherine Iliff	Fosters Mediation
Ann Wallace	Godolphin Chambers
M Stewart	Graham & Rosen
Penny Logan	H C L Hanne & Co
Susan Harlow	H C L Hanne & Co
Gilva Tisshaw	Hamnett Osborne Tisshaw
	Hamnett Osborne Tisshaw
Andrew Campbell	Hampshire Family Mediation
Mairead McKeever	Harmony Mediation

Name	Organisation Name
Carol Harney	Harney & Co
Robert Hart	Hay and Kilner
Lib Skinner	Hereward and Foster solicitors
Lucy Verity	Hornby and Levy
Jonathan Whybrow	Howells
Sue Colven	Howells
Lorraine Schaffer	Institute of Family Therapy
	Institute of Legal Executives (ILEX)
Mrs Mary Rodak	JBHS Family Mediation Service
Julie Armstrong	JD Spicer & Co
Cathie Halliday	Jewels Solicitors
Joan Ferguson	Joan Ferguson & Co.
Chris Blackburn	John Whittle Robinson
Siwan Edwards	Keene & Kelly
Bridgit Pointer	Kent Family Mediation Service
Angela Riley	Laceys Mediation
Kenneth Clarke	Laceys Mediation
Mike Greenleaves	Laceys Mediation
Lesley Baker	Lambda Mediation
John Paton	Lancashire Family Mediation Service
Christopher Lavery	Laverys
Philippa Mercer	Laverys
	Law Society
Elen Davies	Lawrence Davies & Co
	Legal Aid Practitioners' Group (LAPG)
Leona Daniel	Leona Daniel Solicitor
Sarah Orrell	Leonard Gray Solicitors
Helen Broughton	Liverpool Law Society
	London and South East Regional Manager's forum

Name	Organisation Name
C S Reynolds	Margaret Reynolds Solicitors
Mr Stephen Broadhurst	Messrs Fairweather Stephenson & Co
David Jockleson	Miles & Partners
Phillip Walsh	Miles & Partners
Martina Longworth	Moody and Woolley Solicitors
Helen Broughton	Morecrofts Solicitors
	Myer Wolff
	NAGALRO
	National Family Mediation
Mary Mullin	National Youth Advocacy Service
Hilary Freeman	Nelsons
Jenny Lewington	NFM Midland Managers Group
Denise Ingamells	North East London Family Mediation Service
Siwan Edwards, on behalf of His Honour Judge Davies	North Wales Family Justice Council
Naomi Angell	Osbornes
Colin Morgan	Pallant Chambers
Jenny Carter	Patterson Glenton & Stracey
Annette Lowen	Paul Robinson Solicitors
Caroline Massey	Poole Alcock LLP
John Wilson	R. J Knaggs & Co on behalf of R. J Knaggs & Co, Brown Beer Nixon Mallon and Appleby Hope & Matthews
Jonathan Fail	Rawsthorns Solicitors
Marie Wigham	Rawsthorns Solicitors
Nicola Guite	Rawsthorns Solicitors
Sahida Ahmed	Rawsthorns Solicitors
Sarah Blackmore-Squires	Rawsthorns Solicitors
	Resolution

Name	Organisation Name
Helen Blackburn	Reynolds Porter Chamberlain LLP, on behalf of ICACU Referral List of Specialist Child Abduction solicitors
Corrinne Short	Richmonds
Sanchita Hosali	Rights of Women
Anne M Bell OBE	Rougemont Chambers
Samantha Little	Russell-Cooke
Bernadette Willems	Simon Bergin Mediation
Miss Gillian Wright	Smith and Graham Solicitors
Kash Mahmood	Solicitorhelp
Sue Hollywood	South Staffordshire Family Mediation Service
Peter Marshall	Stephens & Scown
Caroline Dixon	Stevens
Sue Haseltine	Sussex Family Mediation Service
Lesley Saunders	Thames Valley Family Mediation Service
Kirti Patel & Sarah Palmer	The Children's Legal Practice Limited
Neil Robinson	The Mediation Centre
Julie Shrimpton, Patrick Towey, Ian Walker	Tozers
Jane Marston	Travis Marston & Co
David Barnes	Vickers & Co
Sarah Jane Lynch	Wake Smith
Stephanie Smith	West Yorkshire Family Mediation Service
Dinah Loeb	Westgate Chambers
Alison M White	White & Co
Lee Galvin	Wilkin Chapman
Alexis Walker	Wilkinson Woodward Mediation Services
Simon Pugh	Wilson & Co
S Smith	WYFMS
Carol Pritchard	Yates & Co
Andrew Lorie	
Bob Willis	
J Swift	

