

In-court mediation for family disputes

Research and evaluation
report of in-court mediation trial

August 2010

Acknowledgements

The Legal Services Commission would like to thank each of the mediation services that participated in this trial and provided detailed information, guidance and support throughout the duration of this research. In particular thanks go to Robin ap Cynan, Liz Brown, Adrian Wright and Liz Yates for their significant contributions towards organising and facilitating the Mediation Working Group meetings.

Authors

This trial was developed and evaluated by the Family Policy Team within the Legal Services Commission.

Contents

List of tables

Executive Summary

1. Background	8
2. Aims of the Research Trial	8
3. Scope of the Trial	9
4. Methodology	10
5. Findings	12
- <i>Results</i>	12
- <i>Previous Research and other Models of In-Court Mediation</i>	16
- <i>Analysis of Survey Data</i>	18
- <i>Family Mediation Working Group</i>	21
6. Funding – Value for Money (Cost & Effectiveness Analysis)	22
7. Research Conclusions, Implications and Recommendations	24

Annex 1: In-Court Family Mediation Working Group 'Good Practice Guidelines for Mediators'

Annex 2: Analysis of Survey Data

Annex 3: In Court Mediation Trial Reporting Form

Annex 4: Data Issues

List of Tables

Tables

Table 1: Breakdown of age of clients who were referred to see a mediator at court

Table 2: Conversions and outcomes achieved by parties who had not previously considered mediation, who had considered mediation and those who had previously attempted mediation.

Table 3: A breakdown of mediator time at court across the trial areas

Table 4: Outcomes achieved by the Milton Keynes in Court Model

Graphs

Graph 1: Volume of referrals to a mediator in each of the respective in court trial areas

Graph 2: Nature of the disputes seen by mediators during the trial.

Executive Summary

Policy Background

In 2007 a 'Working Group' made up of representatives from Her Majesty Court Service (HMCS), Cafcass, the LSC and the Judiciary looked at revising the current President's Private Law Programme (PLP). The objective of the PLP is to reduce delay and support more effective outcomes at the first hearing in contact and residence cases. The Working Group came up with a number of proposals and recommendations designed to provide a framework for a consistent national approach to the early resolution of the issues in Private Family Law, whilst enabling local practices and initiatives to be operated within the framework.

Although In Court family mediation it is not a formal part of the revised framework, the Working Group considered that it would be a useful adjunct to support early resolution of disputes. The LSC therefore developed a trial scheme to facilitate in-court mediation in 5 areas selected by the PLP Working Group, which were Birmingham, Sheffield, Milton Keynes, Reading and Plymouth alongside the revised PLP. The trial operated in the Family Procedure Courts (FPC) and County Courts (CC) from the end of June 2009 until 31st December 2009.

As part of the trial mediators were available at court on days when private law children cases were listed so referrals could be quickly made to a mediator by the court, if the judge and Cafcass felt it was appropriate to do so. The referral was not for a compulsory mediation session, rather to establish if mediation might be suitable as a way of trying to resolve the dispute.

The aim of the trial was to more effectively understand the benefits and obstacles of offering clients an alternative dispute resolution process at court.

Methodology

The evaluation encompassed multiple perspectives, using a variety of research methods to examine the use and outcomes of in-court mediation and the processes involved. This report draws upon quantitative and qualitative data from mediators, as well as detailed surveys of specific target groups, discussions at mediation working groups and a cost and effectiveness analysis.

Key Findings

- Where mediation took place 71% of parties reached a full agreement or were able to narrow some of the key issues in dispute.
- 73% of parties who were referred to an assessment meeting with a mediator proceeded to mediation even though mediation itself remained voluntary.
- In 43% of the cases clients had not previously considered the use of mediation, which suggests there are a considerable number of clients who could potentially benefit from the use of mediation once provided with the opportunity to do so. This highlights the importance of increasing clients knowledge of mediation at the outset of a case.
- Strong rates of agreement were still found where parties had previously considered mediation, suggesting that having a variety of routes into mediation, at different stages in the life cycle of a dispute can be valuable as parties benefit from mediation at different times depending on their own circumstances.

- The average time spent in court by the mediator per day was 3 hours 43 minutes.
- Where mediators were at court only 38% of their time was spent actually assessing parties for suitability of mediation or undertaking actual mediation.
- The average cost of assessment and initial mediation for those cases that reached agreement in the trial was £1,757

Conclusions and Recommendations

This trial has demonstrated the value of having mediators available at court to support and achieve more proportionate dispute resolution. The trial highlighted that the model used was an expensive way of providing mediation and would not achieve value for money if rolled out nationally as it is not the most cost-effective way of providing the service.

To give the mediation costs some context, the work at court usually covers assessment meetings, which are remunerated under LSC contracts at £130 and a single mediation session, which costs £168. If agreement is reached £126 is payable. Therefore, the costs are £1,757 compared to £424 under normal circumstances meaning this model is 4.1 times more expensive as a way of delivering mediation.

The average cost of a Private Law Children certificate in 2008/09 was £3,000. However when making a comparison to the in-court mediation costs it is important to factor in that there have already been legal representation costs incurred as well

Any scheme taken forward will need to consider the most cost effective way of delivering the service. In addition it will need to consider the viability and desirability of having mediators at court and the development of an appropriate triage/referral system that will allow early identification of suitable cases and facilitate more referrals to mediation away from the court.

Initially there was a lack of referrals made from the court. However, the trial was able to formalise the role that mediation can play at court and helped improve relations between Cafcass, court staff and the judiciary, through close co-working. This led to better understanding of how the respective roles of each profession could compliment each other, leading to a wider range of options available for clients and more referrals to mediation. This resulted in better outcomes being achieved for clients that could be more reflective of their individual needs.

In total 71% of mediations closed reached a full or partial agreement on the issues in dispute. This highlights the benefits of having mediation available to parties at a variety of stages throughout the dispute life cycle, as parties will benefit from mediation at different times. Of the clients who attended an assessment, 43% had not previously considered mediation, 42% had previously considered mediation and 8% had actually attempted mediation. In these cases strong rates of agreement were still achieved, 67% and 71% of cases reaching a full agreement or a narrowing of the issues respectively.

Judicial endorsement of mediation was also found to be highly persuasive for many clients and was helpful in encouraging parties to more actively engage in mediation, which can often be too quickly dismissed by clients due to a lack of understanding of the benefits it can offer compared to a contested hearing.

Clear direction by the judiciary along the lines of *'you should know your children better than anyone. Why do you think someone who doesn't know your family at all*

(like me) should make decisions about it? The chances are no one will like my decision. It would be better to at least try and agree something. You might well be surprised: most people manage to agree at least something and many everything' was found to be particularly powerful in encouraging engagement with mediation and helped refocus the minds of the parents on the real needs of the children rather than their own needs/agenda following the breakdown of their relationships.

Although mediation has been used successfully where referrals have been made, further consideration needs to be given to the most effective models of delivery that will facilitate greater use of mediation, which will undoubtedly have to vary from region to region. The feedback from the trial is that mediators, the judiciary, Cafcass and court staff will have to work closely to develop effective referral processes that meet the individual needs of their own court area, based on a variety of local factors such as court resources, pressures and listing practices and actual court facilities, local geography and client catchment, and the resources and capacity of the local mediation services available. This was demonstrated by the successful model adopted by Milton Keynes County Court, which developed over time in order to meet the particular needs in that area.

The LSC would not be able to fund assessments and initial mediation for non-eligible clients where both parties are privately funded on an on-going basis, as this would require significant changes to the Funding Code and result in a substantial increased cost to the legal aid fund (even taking into account the savings from cases that settle earlier). If legal aid for assessment meetings and initial mediation was extended nationally so it was free for all parties, it could lead to undesirable consequences, whereby clients are encouraged to wait until they get to court to attempt mediation, as it is provided for free.

Recommendation 1

The LSC will not roll out the In Court remuneration model piloted under this trial due to the high costs involved to expand such a model across each key family courts in England and Wales. It became clear during the trial that in order to facilitate the availability of mediators nationally schemes would need to be set up locally in order to be tailored to a court areas specific circumstances and needs. Many such schemes have already successfully been set up using the LSC mediation contracts and we would expect future schemes to be developed within the parameters of this funding.

Recommendation 2

Having mediators available to parties involved in court proceedings has proved beneficial in supporting the early resolution of family disputes. The LSC will continue to encourage and support the development of in court or court-referred schemes through authorising outreach at court and having flexible arrangements to aid the objectives of the Revised Private Law Programme and will maintain a register of all such schemes across England and Wales. The LSC will also undertake an information campaign about the role of mediators and how mediation can compliment the work of the other profession within court, which can be rolled out alongside the PLP, which commenced from 1st April 2010.

Recommendation 3

The Family Mediation Council/Family Mediation In Court Working Group in conjunction with the Family Justice Council to consider the further development of guidelines for mediators, judges and Cafcass on effective models of mediation in a court setting and on cases that may be suitable for a referral to mediation, in order for clients to find out about how mediation can support them to reach agreements and

determine suitability. This could support the draft 'Good Practice Guidelines for Mediators' already developed by the Mediation Working Group; Resolution 'Guidelines for Mediator working with or at Court,' which have both been approved by the Family Mediation Council and 'Information for Judges' being drafted on behalf of the Family Justice Council.

Any schemes that get developed will need to be mindful of a potentially changing landscape as the DCSF and MoJ consultation paper '*Support for All: the Families and Relationships*' Green Paper published on 20th January 2010, which explores the potential of compulsory consideration of mediation for all parties, not just those legally aided before parties are allowed to issue proceeding in private family law children matters. Although mediators will still be required to act as a safety net under these proposals the timing of the previous consideration will have an impact on the number of cases that come before the court.

1. Background

- 1.1 In 2007 a 'Working Group' made up of representatives from Her Majesty Court Service (HMCS), Cafcass, the LSC and the Judiciary looked at revising the current President's Private Law Programme (PLP). The objective of the PLP is to reduce delay and support more effective outcomes at the first hearing in contact and residence cases. The Working Group came up with a number of proposals and recommendations designed to provide a framework for a consistent national approach to the earlier resolution of the issues in Private Family Law, whilst enabling local practices and initiatives to be operated in addition and within the framework.
- 1.2 The Revised PLP Trial was designed to assist parties to reach safe agreements where possible, to provide a forum in which to find the best way to resolve issues in each individual case and to promote outcomes that are sustainable, in the best interests of children, and that take account of their perspectives.
- 1.3 The Revised PLP Trial put in place a number of requirements to support these aims, including the setting of earlier first hearing within 3-4 weeks, rather than the current 4-6 weeks; the completion by Cafcass of more comprehensive safeguarding checks prior to every first hearing; Cafcass attendance at every first hearing to provide advice and assistance to the court and the parties, as well as a more tailored and proportionate approach to requests from the court to Cafcass for Section 7 welfare reports in order to refocus resources to support the PLP key elements.
- 1.4 Although In Court Family mediation is not a formal part of the revised framework as such, the Working Group considered that it was a useful adjunct. The LSC therefore developed a trial scheme to facilitate in-court mediation in 5 areas selected by the PLP Working Group, which were Birmingham, Sheffield, Milton Keynes, Reading and Plymouth alongside the revised PLP. The trial operated in the Family Procedure Courts (FPC) and County Courts (CC) from the end of June 2009 until 31st December 2009.
- 1.5 The revised PLP is being rolled out nationally from 1st April 2010 and it is expected that all courts will be compliant by August 2010.

2. Aim of the Research Trial

- 2.1 The aim of the trial was to more effectively understand the benefits and obstacles of offering clients an alternative to contested family court hearings to support more proportionate disputes resolution and test models of delivery.
- 2.2 The LSC have always encouraged the use of mediation at any time during family proceedings in order to assist parties to resolve family disputes. Research shows that agreements reached through consensus have a better chance of lasting than those imposed by the courts, are more cost-effective and are resolved much more quickly¹.

¹ Legal Aid and mediation for people involved in family breakdown – National Audit Office – Report by the Comptroller and Auditor General- 2 March 2007

3. Scope of the Trial

- 3.1 As part of the trial mediators were available at court on days when family cases were listed for first hearings so referrals could be quickly made to a mediator by the court, if the judge and Cafcass felt it is appropriate to do so. The referral was not for a compulsory mediation session, rather to establish if mediation might be suitable as a way of trying to resolve the dispute.
- 3.2 The assessment meeting involved the mediator meeting with the clients (either together or separately) to discuss whether mediation was suitable in light of the nature of the dispute, the circumstances and the clients. Domestic abuse screening is also undertaken to ensure the safety of the client. This is in addition to the risk assessment work undertaken by Cafcass. Another purpose of the assessment meeting is to provide clients with information on what mediation is and how they can benefit from resolving their dispute through this process.
- 3.3 In order to ensure that that maximum number of clients were given the opportunity to consider mediation under the trial the LSC developed a remuneration structure specifically for the purposes of the trial that was based on mediators time at court, irrespective of the number or financial status of the clients seen.
- 3.4 Payments were based on 2.5-hour blocks of work per mediator present at court. If a mediator spent more than 2.5 hours at court on a given day then 2 block payments would be claimable.
- 3.5 There was some mediation at court that followed on from the assessment meeting process, in an attempt to either narrow the issues or settle where possible. It was envisaged that if mediation were considered suitable, in most cases it would require more than one session and would mostly take place away from the court.

4. Methodology

Limitations

4.1 As the trial was for 6 months it was not possible to track the agreements reached through mediation to see how long they last and whether clients return to court at a later stage. Therefore this does not form part of the objectives of this study.

Selection of Court Areas

4.2 The PLP Working Group selected all the court areas where the trial took place namely Birmingham, Sheffield, Milton Keynes, Reading and Plymouth where the trial operated. Milton Keynes had been operating an in-court mediation scheme since 2004 and continued to operate under the remuneration arrangements for that model i.e. standard mediation contracting arrangements for work undertaken rather than payment for time spent at the court. It was therefore possible to test two models of delivery.

Plymouth – County Court and Family Proceeding Court
Sheffield - County Court and Family Proceeding Court
Reading - County Court and Family Proceeding Court
Birmingham - County Court and Family Proceeding Court
Milton Keynes – County Court

Services Involved

4.3 The following services were involved in the In-Court Mediation Trial:

- Birmingham & District Family Mediation Services - *Birmingham*
- Lupus Mediation - *Wolverhampton*
- Accord – *Cornwall*
- South West Mediation - *Exeter*
- Devon Family Solutions Ltd - *Exeter*
- Berkshire Family Mediation Service - *Reading*
- Cotton Mediation - *Sheffield*
- Hallam Mediation - *Sheffield*
- Focus Family Mediation –Tofields - *Sheffield*
- South Yorkshire Family Mediation Service - *Sheffield*

4.4 Focus Family Mediation and Mediation MK participated under a different remuneration model in the Milton Keynes County Court and analysis of their data has been undertaken separately (see Section 5).

Data Collection

Standard Trial Reporting Forms

4.5 In order to assess the general findings of the in-court mediation trial, standard reporting forms were developed. These were designed to capture key information about each occasion mediators spent time in court. The standard reporting forms required mediators to account for their total time spent in court, time spent with clients, client demographic information, the work type information and the outcome of cases (see Annex 3 for a copy of the form) and were submitted on a monthly basis by the services involved in the trial.

- 4.6 From the standard reporting forms we were able to generate quantitative results and look at the relationships between a range of different variables. There were some data issues, which are set in Annex 4.
- 4.7 Of the 10 mediation services involved in the trial, Berkshire Family Mediation Service had been undertaking mediation at court prior to the beginning of the trial. Therefore it is important to bear in mind that the services involved in the trial have varying levels of experience of working in a court environment and this may account for some of the regional differences seen in the data.

Semi-structured surveys

- 4.8 Having reviewed the information generated from the standard reporting forms over the course of the trial, it became clear that there were some areas of the trial that we needed additional information. We decided to send out semi-structured surveys so all those involved in the trial could clearly outline their views and experiences to provide additional understanding to the information generated from the standard reporting forms.
- 4.9 We wanted to know how many cases were listed in court on any given day and we looked to gain the views of Cafcass representatives, Judges and court staff in order to gain multi dimensional perspectives on the success of the trial. Two surveys were created; one specifically for mediators/mediation services involved and another one aimed towards Cafcass representatives, Judges and other court staff who had involvement in the trial.

Size of Sample

- 4.10 The trials in the different regions all commenced on slightly different dates following negotiations between the courts and the local mediation services on appropriate arrangements. In each area the trial lasted for 6 months between the end of June 2009 and 31st December 2009.
- 4.11 During the trial there were 273 referrals to a mediator in order to assess the suitability of mediation for resolving the dispute.

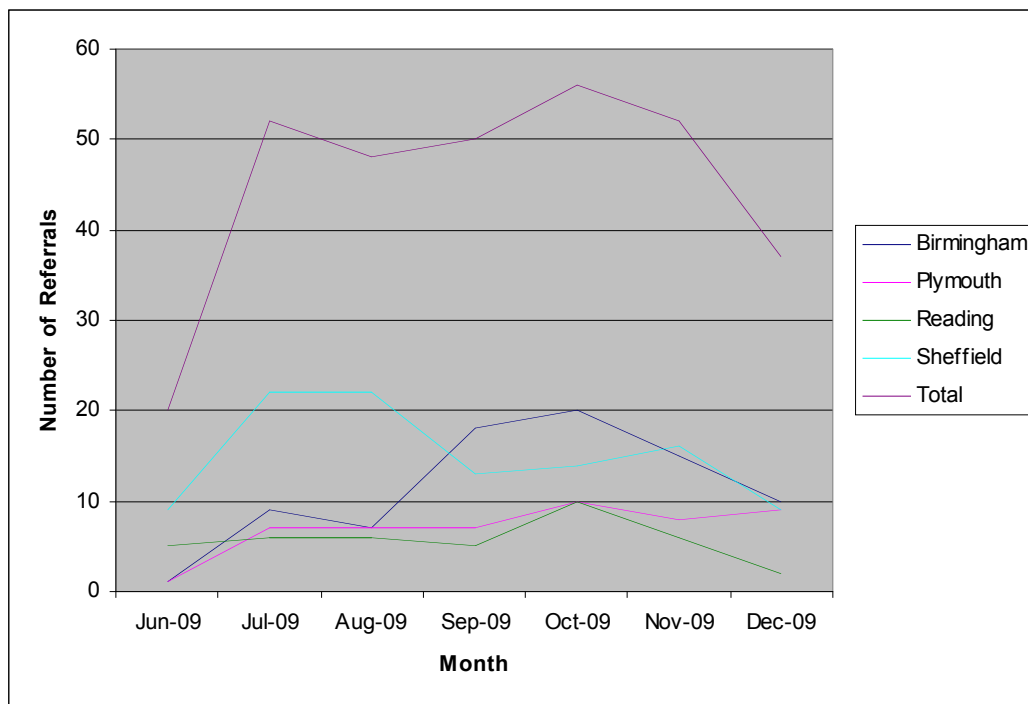
5. Findings

5.1 The following section looks at the key findings from the submissions received from individual services, the results of the surveys and outcomes from the Family Mediation Working Group, which was set up to discuss issues and share best practice.

Findings from In Court Submissions

5.2 There were on average 6-8 cases listed a day for first hearings between the FPC and CC, and during the 6-month period mediators were present for a total of 264 days. On this basis it means there were approximately 1,584 cases listed. Therefore, approximately only 17% of cases got referred to mediators for assessment during this time.

Graph 1: Shows the volume of referrals to a mediator in each of the respective In Court trial areas



5.3 In most areas, particularly Birmingham, referrals increased month by month, which has been explained by those involved as being due to the development of better understanding of the trial by the various professional involved. There was a dip in December, but this was an anticipated trend as the number of cases listed drops in the run up to the holiday period.

Client Profile

5.4 During the trial 43% of clients seen were aged between 35-49 and 36% of clients were aged 25-34 (see below table). Most clients were white British (77%) with 3% Black or Black British Caribbean and 3% Asian or Asian British Pakistani.

Table 1: This table shows the breakdown of the age of clients who were referred to see a mediator at court

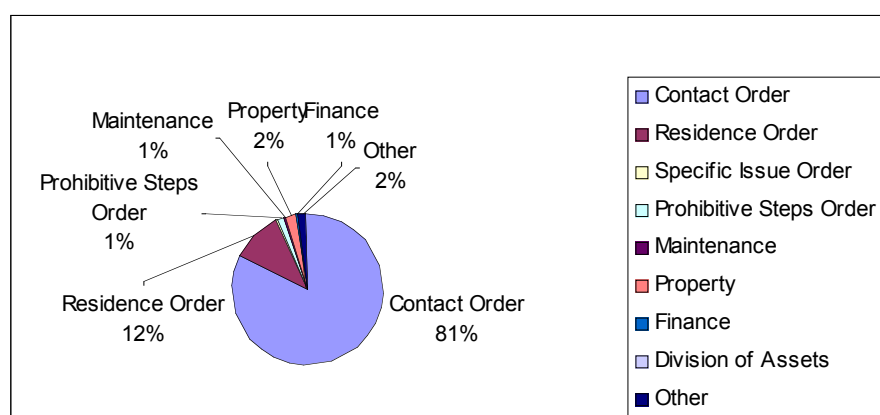
Age of clients	No of clients	%
0-16	0	0%
17-24	61	11%
25-34	193	36%
35-49	231	43%
50-64	19	4%
65+	2	0%
Unknown	30	6%
Total	538	100%

5.5 If we compare the profiles of the ages of clients under the trial to national mediation trends, there were a greater proportion of younger clients who participated at court. In the trial 11% of clients were aged 17-24 and 36% were aged 25-34, compared to 9% and 27% respectively. Nationally, 51% of clients were aged 35-49 and 11% were aged 50-64 compared to much lower levels under the trial of 43% and 4%

Screening and Suitability

5.6 During the trial there were 273 referrals made to a mediator in order to undertake an assessment of suitability. Of these cases, 73% went on to participate in mediation itself, which compares favourably with national non-court based mediation statistics, where 68% convert from an assessment meeting to mediation.

Graph 2: This graph shows the nature of the disputes seen by mediators during the trial.



5.7 In 43% of cases mediation hadn't previously been considered by the clients, which suggest there are a number of clients who have the potential to benefit from utilising mediation as a way of resolving their dispute. Although public funded clients are required to consider the use of mediation before being able to

receive funding to issue family proceedings, there is no equivalent obligation placed on private funded clients.

Outcomes

Table 2: Shows the conversions and outcomes trends achieved by parties who had not previously considered mediation, who had considered mediation and those who had previously attempted mediation.

	Mediation not attempted (N) by either parties	Mediation considered (C) by both parties	Mediation attempted (A)	One party has previously considered mediation the other has not (e.g. N and C)
Cases where assessments were conducted at court	110	109	23	31
All Mediation that commenced at court, included those that may have continued away from court	73%	69%	87%	55%
Of those Mediations closed to date, full or partial agreement was reached in court compared to all assessments undertaken	47%	67%	71%	60%
Of those Mediations closed to date, full or partial agreement was reached in the following proportions of cases	79%	67%	71%	60%

5.8 The above table shows that marginally more assessment meetings were undertaken by parties who had not previously considered mediation before. Where they took place, conversion rates to mediation were high and in the cases that have subsequently closed, positive outcomes for the parties were achieved in 79% of cases.

5.9 Where mediation had previously been considered conversion rates were again high as were positive outcomes, which were achieved in 67% of cases. This highlights the value of mediation being accessible at various stages during the life cycle of a dispute for clients.

5.10 Where mediation had previously been attempted conversion rates to mediation were extremely high (87%), but this is to be expected, as the parties had already indicated a willingness to participate in the process. Outcome rates also remain high with full or partial agreement being achieved in 71% of cases of cases that closed. It is believed that this could be because a referral to mediation too early in the process can be ineffective for some parties, as the feelings and emotions attached to the relationship breakdown are too raw with high levels of conflict still present. For others it could be that it is only once they are actually present at court that they realise they have no control over the outcome of the dispute and thereby welcome the opportunity of regaining some element of control over the matter through mediation.

- 5.11 Where mediation was arranged to take place away from the court, parties attended further mediation sessions in 69% of cases. Therefore providing parties with the opportunity to discuss and consider mediation at court was a useful way of encouraging clients to proceed and engage in more substantive longer-term mediation.
- 5.12 There were 62 cases that went on to more substantive mediation away from court. Of these 36 have subsequently closed (23 (64%) reached an agreement) and we await the outcomes of the remaining 26 cases.

Saving Court Time and Reducing Delay

- 5.13 Where mediation is successful at the first hearing it saves court time and avoids delay in children cases, which is a key principle of the Children Act. In section 1(2) it states:

'In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child'.

- 5.14 A limitation of this trial has been that it has not possible to consider the longer-term impacts of any agreements reached and therefore the actual time saved by the court and the reduction in delays achieved. However, from research undertaken by Joan Hunt and Alison Macleod 'Outcomes of applications to court for court orders after parental separation or divorce²' the average duration of a case was 11 months and over a third of completed cases (35%) took more than a year, and 6% more than two, which suggests mediation could bring about significant savings to time and delay.
- 5.15 Nevertheless, if mediation is successful in reaching full agreements there may still be additional hearings to review how things are working and we have not been able to establish whether any agreements reached don't subsequently breakdown resulting in a return to court. Therefore, no firm conclusions can be drawn from this trial about the savings to the court time and reductions in delay of having mediators available at court in the longer term.

Mediator Time at Court

- 5.16 The average time spent in court by the mediator per day was 3 hours 43 minutes although the most time spent at court on a single day was over 7 hours 30 minutes and the lowest was 30 minutes.
- 5.17 In total, mediators were in attendance at court for 933 hours and undertook assessments and mediations for 359 hours. This means that where mediators were at court only 38% of their time was spent actually assessing parties for suitability of mediation or undertaking actual mediation itself. When mediators were not directly seeing clients they tended to use their time constructively either familiarising themselves with the way the court operates, attending hearings or building more constructive working relationships with the various profession's at court to develop better levels of understanding about the respective roles that each could provide for the benefit of the court.

² Sept 2008 –Oxford Centre for Family Law & Policy Development of Social Policy and Social Work – University of Oxford

Table 3: A breakdown of mediator time at court across the trial areas

In Court Area	Time Spent in assessment meetings and mediations in hours	Time Spent at Court in Hours	% of time spent with clients
Birmingham	81 hrs 8mins	421 hrs 10mins	19%
Plymouth	57 hrs 20mins	151 hrs 35mins	38%
Reading	87 hrs 45mins	131 hrs	67%
Sheffield	132 hrs 30mins	230 hrs 4mins	57%

5.18 From the above table Reading has the most efficient use of time at court, although this is to be expected as Berkshire Family Mediation service has maintained a presence in the court for a number of years prior to the commencement of the trial and as a consequence has established a stronger referral network within the court. This highlights the benefit of having an established referral network in terms of ensuring efficient and effective use of mediator time at court.

Previous Research and other models of In-Court Mediation

Milton Keynes In-Court Scheme

5.19 In 2004 Milton Keynes County Court developed an In-court Mediation Scheme with 3 LSC contracted services. Funding for this scheme was under LSC standard family mediation contract arrangements so that assessment for both parties would be funded as long as one client was eligible for legal aid. Any subsequent mediation would be funded for the legally aided client only and mediation for private clients was undertaken pro bono or by charging private rates.

5.20 There was on average 8 cases listed per day and an effective triage system was developed over time to filter clearly unsuitable cases, to ensure mediators' time at court was efficiently utilised via more intelligent court listing practices. The District Judge would usually make the referral personally and hand responsibility back to the parties in the hope of encouraging a solution to be reached via mediation.

5.21 The mediation agreement was amended to waive confidentiality to the extent the couple agreed, so that a brief report could be presented to the District Judge where appropriate. If mediation was successful and everything was fully resolved, or if it was partly successful and interim arrangements were agreed, those arrangements would usually be noted in the court file. Some cases continued away from the court where more substantive mediation was required and possible. Certain cases were also listed for review, which gave the applicant who may be reluctant to lose an element of court supervision, the reassurance of knowing that their application could be revived if necessary.

5.22 Between March 2007 and April 2008 there were a total of 314 cases listed at Milton Keynes County Court and 172 were assessed for their suitability for mediation. Mediation actually commenced in 147 cases with 116 cases achieving a successful outcome for the client either through a full agreement or the narrowing of issues.

Table 4: Outcomes of the Milton Keynes In Court Pilot

Total cases listed at court	314		Percentage of all applications
Cases where mediation assessment conducted	172		55%
Mediation Commenced	147	85.5% of assessments	47%
Mediation Successful	116	79% of mediations	37%

5.23 Under this model 55% of cases listed were referred to an assessment and 85.5% progressed to actual mediation. Where mediation took place 79% achieved a full or partial agreement between the parties.

5.24 This model highlights the value of more effective triage of cases for suitability as conversion rates are much higher in terms of total cases listed and assessments and in the conversions of assessment meetings to mediations (85.5% compared with 73%) and in terms of the number of full or partial agreements reached (79% compared to 71%).

5.25 However, the model in Milton Keynes has been in place since 2004 and has been adapted over time to ensure it is as efficient and effective as it can be. Therefore the model is far more established and professionals operating within the court are much more familiar with its practice. When the scheme was initially set up it experienced the same issues as those experienced in some of the trial areas and it for this reason this model will influence models taken forward.

Cambridge Family Mediation Service In-Court Scheme

5.26 Under this trial in 2005 a stall was set up in the public waiting area of the County Court for the busiest 3 hours on Section 8 Children Act 1989 (children application) days for a period of 10 months following an initial 3 month trial period. Information leaflets were made available and interview rooms were used to ensure privacy for more detailed exploration of domestic violence and child protection issues. Explanations of the principles of mediation and the likely cost were provided and appointments were made where required at the mediation service on a different day. Details were then passed to the court to allow the judge to adjourn the case until mediation had been attempted.

5.27 During the trial 41 cases were assessed and 18 went on to mediate and 9 of these had complete or partial resolution at mediation with minimal further judicial involvement. Of those cases assessed for suitability 44% went on to mediate with 50% reaching some form of agreement.

5.28 The sample was too small to draw any definite conclusions but did demonstrate the potential value of making mediators available at court, but highlighted the difficulties in establishing stronger links, professional trust and understanding between the Judiciary, court staff and Cafcass in order to maximise the number of clients who could get referred to mediation, which remained modest during the trial period.

Other Court Related Mediation Schemes

5.29 In other court areas such as Stafford, different schemes have been developed at the request of the local judiciary which don't actually have any assessment and mediation undertaken at court. Under the Stafford model, where a case is

considered potentially suitable for mediation it is adjourned for 4 weeks subject to the consent of the clients and the c100 and any supporting information is then faxed to the mediation service within 24 hours. An assessment will then take place and the mediation service will fax or email the outcome of the assessment 72 hours before the adjourned date. If mediation is ongoing the case will be adjourned for a further 8 weeks.

- 5.30 The scheme guarantees that mediator time is effectively utilised with no unnecessary waiting around at court by the mediator, which is an expensive aspect of the current trial model.
- 5.31 It is clear that the success of schemes such as this rely even more than in court mediation schemes, on good communication with an understanding by judges, mediators, Cafcass and other practitioners of what different interventions can achieve and those cases that may be suitable. The workability and benefits of the scheme are heavily reliant on judges and Cafcass as they will be responsible for making assessments as to whether a case is appropriate for consideration of mediation before making a referral. By maintaining distance between the court and the mediator, this model potentially perpetuates the risk that certain referrals won't make mediation and some cases may lose momentum as a result.
- 5.32 The LSC will continue to closely monitor the outcomes of these cases and the levels of referrals achieved. The outcomes of these schemes will be considered as we develop the final structure.

Analysis of the Survey Data

- 5.33 In total there were 21 responses received for the Mediator survey, and the majority of responses were from mediators involved on the trial (86%). The remaining respondents answered on behalf of their Mediation Service (14%). Four additional responses came from the Judiciary and Cafcass. For more information on the structure and approach to the survey as well as detailed analysis see Annex 2.

Key Findings

What aspects of the trial worked well?

- Many mediators felt that being part of the trial formalised the mediation service's role at court and improved working relations, professional trust and appropriate boundaries with Cafcass, court staff and the judiciary through close co-working and education, leading to better understanding of their respective role and the outcomes achieved.
- Mediators were of the view that the immediacy of any active encouragement from the judge was found to be very powerful in ensuring clients engagement in the assessment meeting and facilitating more constructive mediation. Where the DJ informs the clients in line with agreed protocol that they "are the experts about their children and therefore should be the decision makers" it helped focus the minds of the clients. Mediators felt that by providing clients time and space to attempt to make their own decisions, with help to focus on the children's needs rather than their own in this way proved to be extremely effective as they start to see it as a last ditch attempt to assist them to avoid an imposed adjudicated outcome, so they are able to retain control of their own family processes and relationships.

- The Judiciary felt that mediators had needed time for to adapt to working in the more pressurised court setting and some felt that more directive mediation should be used.
- For a significant proportion of parties, the fact that they were able to mediate at Court meant that they achieved a desired outcome on the day, rather than having to wait for CAF/CASS to prepare a report. Some mediators reported that a client benefited from having their legal advisor available to them at stages during the mediation as it supported the management of their expectations and helped formulate greater levels of consensus between the clients concerned.
- Some clients had previously tried mediation, but this second chance was often welcomed, as being at Court had focussed their minds sufficiently for them to re-consider mediation and appreciate its merits and what it offered.

What were the main obstacles to referrals to mediations in court?

- Many mediators felt there was a lack of an agreed protocol with the Court and Cafcass about how mediation can be more effectively utilised within the court environment, and a general lack of understanding as to what mediation is, the protection it is able to offer clients and how it works most effectively.
- Some members of the judiciary were initially of the view that mediation could and should be geared toward achieving "quick fixes" on the day, which is more in line to in court conciliation and more directive forms of mediation, rather than the traditional models of mediation used by the mediators.
- The majority of mediators, judges and Cafcass officers felt there were no issues with sharing information discussed as part of mediation. As part of mediation practice standards the mediators are not allowed to disclose what is discussed at mediation without the consent of the clients unless there are child protection issues. This had the potential to create difficulties if clients were unwilling to permit such disclosure. However, this was primarily a theoretical issue rather than a practical issue as clients were generally happy and expected what was discussed at mediation to be relayed to solicitors and judges.

What aspect of the trial could have been improved? How could this be achieved?

- Three key themes emerged in terms of what could be improved from a mediator perspective. The first was more effective early identification of appropriate cases where a referral to assess suitability should be made. This would allow for more efficient court listings to ensure better use of mediator time. Mediators were of the view that they could either be directly involved in the decision making process along with the Judge and the Cafcass officer in order to determine those cases that were clearly not suitable for mediation or that there should be more education for Cafcass and the Judiciary on mediation so they were better informed to make these decisions in advance.
- Mediators also believed more information could be provided to them in advance in terms of the lists and applicable C100 form although there are issues around client confidentiality.
- The third theme was to make clients more aware of in court mediation prior to attending so they knew what to expect. Although representatives from

mediation services, the judiciary, Cafcass met to discuss the trial of the PPLP it was done at a national level and it highlighted the importance of ensuring that arrangements were adapted for local needs and worked in particular courts. One suggestion from a mediator was that the letters informing clients of the hearing date should make it clear that they might be required to consider mediation. This letter is sent out in Stafford and the Midlands

Do clients prefer to mediate in court or away from the court?

- One mediator felt that it was necessary for mediators to adapt mediation models so they could better meet the needs of clients within the court environment as it was not always viable for it to take place away from the court due to circumstances. Therefore mediators needed to develop more appropriate models that could be more responsive to the particular circumstances of clients in court.
- From the Judges surveyed there was mixed views about whether there was preference for mediation to take place at court. One felt that the majority of cases were suitable for mediation and in theory these could be undertaken outside court, but felt the benefits of in court mediation were significant, mainly because there is a Judge controlling the process which means that if no progress is made directions can be given immediately which avoids any undue delay for the child. They considered that the fact that a Judge maintains control, overseeing the process encourages the parties to settle. Other judges were more inclined to adjourn the hearing if the parties were willing to attempt mediation in order to tackle the underlying problem of the dispute.
- One of the key issues for the mediators was the lack of time at court. Mediators would often need to see other clients who were also listed that day or the time permitted only allowed them an hour at most in which to discuss the matter with the clients and start some initial mediation to establish some common ground and potential areas of compromise.
- It was broadly agreed between all the mediators that the atmosphere away from court is far less hostile and pressurised, so less stressful for clients and thereby more conducive to open discussion and mediation.

Did mediation continue when arranged to take place away from the court?

- Based on the mediators/mediation services experiences, the findings from the surveys showed that of those who preferred to continue with mediation outside of court, most of them did attend further mediation sessions (69%). Therefore providing parties with the opportunity to discuss and consider mediation at court was a useful way of encouraging clients to proceed and engage in more substantive longer-term mediation.

Should more directive forms of mediation take place at court?

- Many mediators were of the view that mediation as typically practiced away from court was considered to have the right balance of direction and dialogue and that more directive mediation had the potential to perpetuate any power imbalances between the parties.
- However, other mediators felt they should be flexible in their approach when seeing cases with a high level and long history of conflict needs. When time is limited, as is often the case (particularly if both clients do not want to use

mediation out of Court, say, if not eligible for PF), then there is a tendency, (which needs monitoring), to become more directive with clients.

- Respondents from the Judiciary and Cafcass felt that judges should have greater powers to direct clients to mediation as well as mediators using more directive forms of mediation itself as it would avoid unnecessary excuses being raised by the parties and could help lead to greater a number of agreements being reached.

Experiences of working with other professionals in a court based setting.

- In certain areas there did seem to be some confusion on the part of some solicitors and court staff, as to the role of the mediator; some mistakenly believing that mediators at court were Officers of the court or worked for Cafcass directly, and thereby under a duty to provide a report to the court. Others were unaware of the mediator's duty of confidentiality to the clients, which often created certain tensions between the staff concerned.

Family Mediation Working Group

5.34 As part of the Trial, a Family Mediation Working Group was set up (including mediators, the LSC and member of the Judiciary) to facilitate the sharing of best practice across the trial areas and to identify any problems and obstacles which prevent referrals to mediation and to consider whether a protocol could be adopted nationally for developing In-Court or Court Referred mediation schemes across England and Wales.

5.35 The main obstacles identified by the Working Group and supported by the research include:

- General lack of understanding at court of what mediation is, the protection it is able to offer clients and how it can compliment the role of the other professions at court.
- Lack of involvement of mediators directly or mediator training to support judges and Cafcass in determining whether a referral to a mediator should be made.
- Earlier triage/filtering of those cases most suitable for a referral in order to manage court lists more effectively and make better use of mediator time at court.

5.36 The Mediation Working Group suggested that the draft guidelines in Annex 1 for mediators could help overcome the issues identified by the trial to achieve more effective In-court schemes or court referred schemes moving forward.

6. Funding – Value for money (Cost and Effectiveness Analysis)

- 6.1 Funding for the trial under this model was based on the time spent by the mediator at court and not the number of clients supported. As only 38% of mediator time (358 hours) was spent in actual assessments or mediation with the parties it meant that the average cost per mediation was significantly higher than paid under the Family Mediation Contracts. The average cost of assessment and initial mediation for those cases that reached agreement in the trial was £1,757.
- 6.2 To give the mediation costs some context, the work at court usually covers assessment meetings, which are remunerated under LSC contracts at £130 and a single mediation session, which costs £168. If agreement is reached £126 is payable. Therefore, the costs are £1,757 compared to £424 under normal circumstances meaning this model is 4.1 times more expensive as a way of delivering mediation. A substantial amount of these additional costs for successful mediation can be accounted for by the fact that much of the time mediators were funded to be present at court was not fully utilised to assist clients resolve their disputes more proportionately.
- 6.3 If there was more effective triage in place, the average costs per case would come down. However, this assumes that current costs reflect mediators being present at court throughout the day. In fact the average time spent at court was 3 hours 43 minutes. Therefore, any additional cases referred to a mediator will inevitably lead to a proportionate increase in costs if the LSC continues to remunerate based on time at court, as each case should take a minimum of an hour.
- 6.3 There were also additional costs of those cases that proceeded to more substantive mediation away from the court under normal LSC contracting arrangements which are not taken into account in the above figures.
- 6.4 The average cost of a publicly funded certificate in private law family children proceedings 2008/09 was £3,002 so the respective savings per case for the LSC would be marginal if we assume an element of the certificate costs would already be incurred for the solicitor's preparation leading up to the first hearing whether mediation is attempted at court or not.
- 6.5 To roll out this particular model in the 4 court areas concerned would cost the LSC approximately £180,000 or £45,000 per court area. To replicate this model nationally across the current 337 family related courts across England and Wales would increase costs to the LSC of approximately £11-15million per annum when current expenditure on publicly funded mediation is £13.8m.
- 6.6 The LSC will not be able to fund assessments and initial mediation for non-eligible requirements where both parties are privately funded on an on-going basis, as this would require significant changes to the Funding Code and the primary function for legal aid funding. If assessment meetings and initial mediation is extended nationally whereby it is free for all parties, it could lead to undesirable consequences whereby clients are encouraged to wait until they get to court to attempt mediation, as it is free.
- 6.7 In most cases it would be more appropriate and beneficial for the clients to consider mediation at an earlier stage. Having mediators available at court should be a safety net or last chance for clients and any funding model should not be to the detriment to the earlier use of mediation. This would have the effect of increasing the cost of mediation for clients and the LSC as legal advice and some

initial court costs would be incurred prior to the reaching of agreement via mediation. Therefore any model will need to strike the balance for providing the additional opportunity for parties to participate in mediation but should not change the focus from earlier resolution where possible.

7. Research Conclusions, Implications and Recommendations

- 7.1 This Trial has highlighted the benefits to clients and the courts of referring to mediation in order to support earlier more proportionate resolution of family disputes concerning children.
- 7.2 Initially there was a lack of referrals made from the court. However, the trial was able to formalise the role that mediation can play at court and helped improve relations between Cafcass, court staff and the judiciary, through close co-working. This led to better understanding of how the respective roles of each profession could compliment each other, leading to a wider range of options available for clients and more referrals to mediation. This resulted in better outcomes being achieved for clients that could be more reflective of their individual needs.
- 7.3 Judicial endorsement of mediation was also found to be highly persuasive for many clients and was crucial in encouraging parties to more actively engage in mediation, which can often be too quickly dismissed by clients due to a lack of understanding of the benefits it can offer compared to a contested hearing.
- 7.4 Clear direction by the judiciary along the lines of *'you should know your children better than anyone. Why do you think someone who doesn't know your family at all (like me) should make decisions about it? The chances are no one will like my decision. It would be better to at least try and agree something. You might well be surprised: most people manage to agree at least something and many everything'* was found to be particularly powerful in encouraging engagement with mediation and helped refocus the minds of the parents on the real needs of the children rather than their own needs/agenda following the breakdown of their relationships.
- 7.5 Having mediation as an option at court gave 43% of clients an opportunity to consider mediation for the first time. Although public funded clients are required to consider the use of mediation before being able to receive funding to issue family proceedings there is no equivalent obligation placed on private funded clients.
- 7.6 However, clients were also prepared to reconsider the use of mediation at court, as 42% of clients who went to an assessment meeting with a mediator had previously considered mediation before and 8% had already attempted mediation.
- 7.7 All parties and their individual circumstances are different and the family justice system needs to reflect this fact in relation to how it can best utilise alternative dispute resolution models, in order for parties to be able to benefit from mediation or any other form of dispute resolution technique at different stages, during the life cycle of proceedings.
- 7.8 In some cases parents' relationships can become more acrimonious during family proceedings, perpetuated by the adversarial nature of the family justice system, so a referral need to take place pre proceeding to avoid this. Whereas, for some parties a referral to mediation too early in the process can be ineffective, as the feelings and emotions attached to the relationship breakdown are too raw with high levels of conflict still present. Therefore having mediation available at a later stage is still necessary.
- 7.9 Likewise, for many other parties the realisation of an imposed decision, which could either go in there favour or against them, becomes more apparent only

once they are at court and they then welcome the opportunity of regaining some element of control over the matter through mediation, particularly if the judge encourages this option and gives clear direction for them to do so.

- 7.10 These conclusions are supported by the findings of this trial. Where mediation had not previously been considered positive outcomes were achieved in 79% of cases compared to 67% where mediation had previously been considered and 71% where mediation had been attempted. This highlights the benefits of having mediation available at a variety of stages throughout the dispute cycle and dispels the theory that once a case comes to court many of the disputes are too entrenched and too high conflict for mediation to be successful.
- 7.11 In total 71% of mediation closed reached a full or partial agreement on the issues in dispute, which demonstrate the positive role mediators' can play in helping parties to reach agreements on areas of dispute.
- 7.12 For mediators the experience of making assessment and undertaking initial mediation at the court presented significant professional and logistical challenges compared to mediation undertaken back at their mediation service. The court environment was more hostile and stressful for the clients, with time constraints and the need, particularly at the outset, to manage some judicial and legal expectations on what could be achieved in the available time given. It was the view of mediators that they needed to have considerable experience in order to deal with these additional pressures so they could adapt their approach to achieve positive results for the clients.
- 7.13 Consideration was given to the desirability of more directive mediation to reach agreements. Concerns were raised about how more directive models could lead to a head-banging approach, which could perpetuate any power imbalances. Research undertaken by Professor Hazel Genn 'Twisting arms: court referred and court linked mediation under judicial pressure' (Genn *et al*, 2007) has already highlighted that in court conciliation in civil matters may secure agreements, although the underlying conflict is not resolved in the medium to longer term and any agreements reached are more likely to breakdown as a consequence.
- 7.14 Mediators were concerned that more directive family mediation risks undermining three key mediation principles, that it is voluntary, it is impartial, and the decision-making rests with the participants. Others felt that sacrifices of traditional models needed to be considered in court-based mediation, as time was limited thereby requiring a stronger degree of direction.
- 7.15 Although there was some disagreement between mediators about the use of more directive forms of mediation to achieve settlement at court, there was agreement that new models of mediation could be developed to better facilitate mediation at court although ideally many felt most cases would benefit from more substantive mediation away from court in order to identify more longer term solutions to the dispute and the reasons behind them.
- 7.16 This model has proved to be an expensive one for facilitating in court mediation and providing funding to all parties irrespective of means is unsustainable longer term, but it has allowed the LSC and mediators to test operational elements of the scheme and get a more detailed understanding of what works and what doesn't. It has also generated a significant amount of judicial interest in the area, which will support any similar schemes that get developed in future. The learning and protocol developed from this study will support more effective models.

- 7.17 What has become clear is that any model adopted in a given area needs to address is how the volume of referrals to assessment can be increased compared to the number of cases listed to be heard on a given day.
- 7.18 There needs to be more strategic listing of cases through some form of triage system that allows those cases that are potentially more suitable for assessment to be listed together to minimise unnecessary mediator time at court. The Milton Keynes model was able to demonstrate the effectiveness of this model as 55% of cases listed on the days mediators attended court were referred for assessment compared to approximately 17% across the other court areas.
- 7.19 In terms of facilitating this triage the judge, Cafcass and the mediator, could undertake this approach collaboratively, or the judge and Cafcass, following training by mediators, could undertake this function. It could also be possible for the C100 forms to be shared with the mediation services so that assessments could be undertaken prior to the first hearing. These latter approaches could aid the schemes where cases are then adjourned and referred to mediators away from court rather than undertaken at court itself. Deciding on an appropriate criteria and strategy for achieving this could be work to be taken forward by the mediation profession/In Court Mediation Working Group. The draft 'Good Practice Guidelines' provide the foundations for this work for mediators.
- 7.20 One of the key concerns of the latter model is that referrals might be limited as the mediator won't have sufficient opportunity to develop more constructive and complimentary working arrangements if they are not present at the courts.
- 7.21 It has also become clear that any in-court mediation or court referred scheme taken forward will need to be flexible and non prescriptive in regards to how they will operate locally. Clearly the same scheme will not work in all areas as they all have their own specific needs and requirements. For many mediation services it will not be viable for them to have mediators present to cover all major courts and it is arguable whether there is sufficient mediators to replicate this model across all areas of the country. Therefore mediation services will need to work closely with the local judiciary, Cafcass and court staff to find the right balance of the models discussed above that best meet their areas own requirements.

Recommendations

Recommendation 1

The LSC will not roll out the In Court remuneration model piloted under this trial due to the high costs involved to expand such a model across each key family courts in England and Wales. It became clear during the trial that in order to facilitate the availability of mediators nationally schemes would need to be set up locally in order to be tailored to a court areas specific circumstances and needs. Many such schemes have already successfully been set up using the LSC mediation contracts and we would expect future schemes to be developed within the parameters of this funding.

Recommendation 2

Having mediators available to parties involved in court proceedings has proved beneficial in supporting the early resolution of family disputes. The LSC will continue to encourage and support the development of in court or court-referred schemes through authorising outreach at court and having flexible arrangements to aid the objectives of the Revised Private Law Programme and will maintain a register of all such schemes across England and Wales. The

LSC will also undertake an information campaign about the role of mediators and how mediation can compliment the work of the other profession within court, which can be rolled out alongside the PLP, which commenced from 1st April 2010.

Recommendation 3

The Family Mediation Council/Family Mediation In Court Working Group in conjunction with the Family Justice Council to consider the further development of guidelines for mediators, judges and Cafcass on effective models of mediation in a court setting and on cases that may be suitable for a referral to mediation, in order for clients to find out about how mediation can support them to reach agreements and determine suitability. This could support the draft 'Good Practice Guidelines for Mediators' already developed by the Mediation Working Group; Resolution 'Guidelines for Mediator working with or at Court,' which have both been approved by the Family Mediation Council and 'Information for Judges' being drafted on behalf of the Family Justice Council.

Any schemes that get developed will need to be mindful of a potentially changing landscape as the DCSF and MoJ consultation paper 'Support for All: the Families and Relationships Green Paper published on 20th January 2010, which explores the potential of compulsory consideration of mediation for all parties, not just those legally aided before parties are allowed to issue proceeding in private family law children matters. Although mediators will still be required to act as a safety net under these proposals the timing of the previous consideration will have an impact on the number of cases that come before the court.