

## **Tightening the family mediation exemption assessment under family legal aid: a consultation**

### **Introduction**

This is the post-consultation report on the Legal Services Commission's (LSC) draft proposals to tighten the family mediation exemption assessment published on 5 August 2010.

### **Overview of the Exemption Proposals**

At present in any private family law case where at least one of the parties is publicly funded, a client's lawyer is required to consider whether the case in question is suitable to be put forward for a mediation assessment. The assessment meeting with a mediator does not necessarily lead to the case going through to actual mediation, but helps explain what mediation is, the benefits it can offer compared to contested proceedings and considers whether the circumstances of the dispute are suitable for mediation.

As part of the initial process, before putting a case forward for mediation assessment the client and their solicitor must first consider a list of exemptions that set out some of the circumstances where a case would not be suitable for mediation. This process helps ensure that clients are not forced to go through a mediation assessment when it is clear that the circumstances of their case should only be handled by the court.

The Government believes that some of the exemption reasons currently available for consideration by solicitors, as set out in the Funding Code Guidance are too broad and outdated and may divert cases away from mediation unnecessarily.

It was therefore proposed to remove certain exemptions, which were considered as unfairly preventing individuals from receiving information about the mediation process and deciding whether this would be a more suitable way to resolve their dispute.

The exemption reasons that we proposed to remove from the CLSAPP7 'Suitability for Family Mediation' form were as follows:

*Exemption – Due to any disability, inability, or restriction on client where they are unable to travel to a mediator.*

*Exemption – Where due to any relevant disability or inability of client there are no mediators available with appropriate facilities.*

*Exemption – The client, the client's (ex) partner or other party to the dispute to the case is living abroad.*

*Exemption – The client, the client's (ex) partner or other party lives further away from a mediation service than a 45-minute journey.*

*Exemption - Where no willingness test is done and there is no mediator available for an assessment Meeting within 10 working days.*

*Exemption - Where the mediation service is required to undertake the willingness test and there is no mediator available to hold an assessment meeting within 15 working days of the date of first contact with the service.*

## **Summary of Responses**

A total of 7 written responses to the draft contract documents were received. Of these 6 were from the main Representative Bodies, including The Law Society, Resolution, Family Mediator Association, College of Mediators, National Family Mediation and the Family Law Bar Association with one from an independent mediation service.

## **Responses to the consultation**

*Question 1: Do you agree with the proposed changes to the exemptions? Please provide reasons for your answer.*

*(7 responses- 4 in favour, 2 partially in favour and 1 against)*

Most respondents were in favour of the proposals to tighten the exemption reasons, citing the ability of solicitors to still be able to contact the LSC for authority to exempt their clients if the circumstances were such that mediation was clearly inappropriate, whilst at the same time allowing as many people as possible to find out about the benefits of mediation as a way of resolving their disputes more proportionately without the need to resort to contested court proceedings.

Many respondents were of the view that the exemption reasons under review were continuing to be disproportionately relied upon under the existing system preventing clients from receiving information about the family mediation process and welcomed steps to encourage a greater range of clients to find out about mediation in order for them to make informed choices as to how to resolve their dispute. They were also of the view that it is only through direct contact with mediation services that clients properly appreciate how mediation may be able to support them with their dispute.

Other respondents were of the view that although efforts should always be made to try and achieve mediated outcomes in appropriate cases, as long drawn out acrimonious litigation can adversely impact on the long term well being of children and diminish family assets, a balance has to be appropriately struck in terms of which cases get referred, as mediation is not appropriate in all cases and can prolong the dispute and raise tensions. These respondents were therefore of the view that the current exemptions are set at the right level to ensure that those cases that are suitable to mediation are referred and no changes should be made.

### *Disability, inability or restriction on the client*

It was felt by many respondents that the current exemptions that relate to the disability, inability, or restriction of a client should be referred to a mediator to determine if they can put in place appropriate facilities or arrangements to allow an assessment meeting to take place. If a mediator is unable to accommodate a client then they can exempt the client as appropriate, without undue delay to the process. Likewise, if a client has learning difficulties then the solicitor can apply to the LSC for an exemption. Alternatively, they can in certain circumstances attend the mediation

with the client to provide legal advice to support the process, if they have the agreement of the mediator and the other client.

A number of respondents considered that just because a client has a disability didn't mean they should not be referred to a mediator and it was considered that there would be no disadvantage caused to the client in permitting further exploration of the circumstances between the mediator and client/representative to establish what is possible before requiring the client to physically attend an assessment meeting.

However, concerns were expressed about forcing disabled clients into lengthy and costly travel arrangements where the mediation service is able to accommodate the needs of the client at the meeting. The precise circumstances of a disabled client's ability to travel would need to form part of the discussions between a mediator and the client in determining whether appropriate facilities and arrangements could be put in place to facilitate a client receiving information about mediation at an assessment meeting.

A respondent did raise some reservations about the ability of the LSC to make decisions quickly if cases are referred directly to them to authorise the exemption of the client from the need to consider mediation. However, the LSC currently has a 48 hour turn around of decisions in this area and it is already appreciated that adopting this proposal would lead to an increase in such requests that we would need to meet within this time frame.

#### *Access to mediation services*

Many respondents were of the view that the 45 minute journey time was too prohibitive and was no longer appropriate as clients are increasingly having to travel further to receive legal advice or access to the courts or indeed to have actual contact with a child as part of any contact arrangements. Even where parents live a significant distance apart, technology could be utilised in certain circumstances or alternative arrangements could be put in place so that clients attend more intensive mediation sessions rather than having a number of separate trips. Again, if having been to an assessment meeting, the client doesn't feel able to travel to mediation then they are entitled not to proceed.

One respondent raised concerns about whether there are sufficient competence assessed mediators to cover the potential increase in willingness tests and assessment meetings this proposal would create and believe consideration needs to be given to the geographical spread of mediators if changes are made to travel exemptions in order to meet this demand.

#### *Availability of mediators to conduct an assessment meeting*

The majority of respondents were broadly supportive of this proposal as most felt that mediation services had the capacity to honour these time commitments. However, concerns were raised about mediation services ability to continue to meet this requirement in light of an increase in referrals. It was suggested that the LSC should consider extending the period of time to 15 and 20 days respectively to avoid the need for solicitors to make referrals to the LSC. Reservations about the mechanism for solicitors to apply to the LSC to raise an issue about mediator availability locally were also expressed.

#### *The use of alternative technologies*

In addition to answering the questions the respondents also had comments on other issues.

Significant concerns were expressed by most respondents about the potential use of technology in conducting assessment meetings without face-to-face interaction with the clients. The Family Mediation Councils code of practice currently prevents the conducting of assessment meetings over the phone and concerns were expressed about the adoption of this practice, believing the nuances of non-verbal behaviour and communication would be lost as a result, which are essential for the effective screening of domestic abuse in family disputes, as well as any substance abuse and child protection issues. The practicalities of establishing the means of clients was also raised if clients were not physically required to attend the assessment meeting.

Additional concerns were raised about conversion rates to mediations if assessment meeting were permitted to be conducted over the phone or through other mediums, (except in limited clearly prescribed circumstances), as clients would not be able to establish the same relationship of trust and understanding with the mediator, diminishing the quality of the mediator/client relationship and possibly engendering a greater degree of mistrust in the process.

#### *Additional comments*

Respondents also considered the potential use of different technologies to facilitate actual mediation itself rather than just the initial assessment for suitability, which did not form part of the proposals put forward in this consultation. It was argued that although telephone mediation has proved successful in civil and commercial mediation, such sessions are conducted privately whereas in family mediation, sessions are jointly attended, and in often highly charged and emotional atmosphere. The Law Society went on to raise the issue that *'in family work, mediators need to gauge the immediate reaction of each of the parties'* and *'the loss of accessing and appreciating the nuances of non-verbal behaviours and communication would represent a compromise of the true potential that proper mediation offers'*.

One respondent also voiced concerns about using teleconferencing to facilitate mediation as it could limit the effectiveness of a mediator to support clients to work together more cooperatively through better communication and understanding of their ex partners position.

Further fears were raised about conducting mediation online as, in the view of some respondents, this medium would lose even the limited opportunities provided by the telephone to gauge tone, style and reaction from what is vocalized and sub vocalised. It was suggested that research needs to be commissioned to evaluate the effectiveness of online/video conferencing models of delivering family mediation before any widespread implementation.

However, one respondent was of the view that once eligibility and suitability has been established then methods such as video conferencing and Skype could be useful tools for the conduct of some or even all of the mediations themselves in appropriate cases.

These comments on models of delivering mediation through new technologies have been passed to the Ministry of Justice for further consider as part of their programme of work to increase and develop the use of mediation.

*Question 2: Are there any other exemption that you think should be removed?*

*Please provide reasons for your answers?*

*(7 responses – 5 in favour of further amendments – 2 in favour of no further amendments)*

One respondent felt that the changes to the exemptions didn't go far enough and cases such as injunctions, Inheritance act claims and existing proceedings should be referred to mediation services as mediators' will be able to determine in assessment the relevance of these issues in establishing the suitability of mediation. The respondent went further to suggest that the domestic violence exemption should be further restricted, so it could only be relied upon where criminal or civil proceedings are current in the courts and at least one party is unwilling to attend. However, other respondents recognized that if many of the existing exemptions were removed, the LSC would be funding a greater proportion of assessment meetings unnecessarily which couldn't ever proceed to mediation, duplicating funding for this decision and impacting on the value for money derived from the use of mediation. It was argued that an appropriate balance needs to be found to ensure that those cases that can benefit from mediation are referred and those which are not, don't, to avoid unnecessary delay and additional costs to the Legal Aid Fund.

Two respondents felt that the exemption reason '*where there has been a previous negative assessment by the mediator*' should be removed or limited. However, there are already limits in place so that a previous negative assessment of suitability by a mediator can only be relied upon if it is in respect of the same dispute, there has been no material change in circumstances and the assessment was made within the last 4 months.

One respondent considered that mediation only works with a mediator who speaks the same language and has the same understanding of cultural issues; practitioners report that the use of interpreters does not always overcome this issue and at present there is no exemption which specifically covers this. However, if there are issues which mean that mediation might not be suitable or appropriate they can exempt the clients and the LSC view is that the mediator should be given the opportunity and is best placed to make this decision.

Other respondents were of the view that the exemption referring to bankruptcy should be strengthened to make it clear that this exemption was only applicable in cases concerned solely with financial matters and if children issues were also involved the case should still be referred.

One respondent suggested some additional exemptions if compulsory consideration of mediation is introduced and these were as follows:

*Proposed Exemption 1: Where a collaborative participation agreement has been signed, the parties have attempted to resolve their dispute via this process but the process has broken down. Indeed this should apply when legal aid is introduced for collaborative law.*

*Proposed Exemption 2: Where the parties have already attempted to resolve their dispute through mediation and this has failed.*

*Proposed Exemption 3: In international cases where the forum for the divorce proceedings needs urgently to be established by issuing proceedings and any delay in the issue of proceedings might prejudice the position of the client.*

## Conclusion

In conclusion we received a broadly positive response on the principle and precise exemption changes proposed and most respondents were supportive of giving more clients an opportunity to find out about the benefits of mediation and whether it may be suitable to their dispute.

It was not the LSC intention by proposing to remove these exemptions that clients would now be forced to attend an assessment meeting in all the circumstances, as we recognise that cases will have issues captured within these existing exemptions that clearly make an assessment inappropriate. However, what we were proposing to remove is simply the ability to exempt clients on these broad grounds automatically and encourage greater flexibility in referral practices.

The LSC are of the view that a number of clients currently exempted on these grounds could and should benefit from considering mediation. However, in certain situations it will be appropriate for either the solicitor to approach the LSC with details of a specific case to determine whether the case should be exempt or for a referral to take place so that the mediation service are able to speak with the client to establish the circumstances of the dispute, practical or otherwise, before requiring them to attend an actual assessment meeting itself. If following this discussion the mediator either does not have appropriate facilities or for example believes the transport costs involved for the disabled client to attend mediation would be prohibitive for the client then the mediator can exempt them and return a completed CLSAPP7 to the solicitor.

In regards to a partner living abroad, concerns were expressed about the practicalities of the client returning to the UK to attend an assessment meeting. This would be established by the willingness test. Clearly if a client living abroad can't afford or is unwilling to return to the UK for the purposes of attending an assessment meeting the willingness test would establish this. However the other client may return frequently to the UK and may be willing to travel to see a mediator in order to attempt to resolve the family dispute.

Concerns were raised about the capacity of current provider base to meet the increase in demand that could be generated as a result of the implementation of these proposals. However, the volumes of these exemptions was 4,619 cases in 2009/10 across England and Wales and accounting for conversion rate trends between willingness tests and assessments we believe there is capacity to undertake these cases by the current provider base, particularly as willingness tests can be undertaken by appropriately trained and qualified support staff.

The use of technology to support these proposals and to facilitate assessment meetings more generally was a slightly separate issue, as we wanted to consider whether there are opportunities to utilise more flexible arrangements in certain situations to allow more clients to benefit from information on mediation, particularly if travel was an issue preventing initial engagement with the process. We do not consider that our proposals require the use of technology, as outlined above, to allow for them to be operationally workable if implemented. The proposals simple seeks to give mediators the opportunity to speak with the clients first to establish if the client can be supported in order to receive information on mediation rather than having mediation automatically discounted.

If attending an assessment meeting is impractical or inappropriate then the mediator can exempt the client from attending and if an assessment meeting does take place,

it remains the choice of the client whether to attempt mediation, but in making that decision they will be doing so from an informed position.

Further consideration will be needed to look at the suitability of allowing a greater use of technology for mediation in the future

It is for the reasons outlined above and our desire to ensure that the maximum number of clients can benefit from receiving information on mediation that we will remove the following exemptions from scope on the **15th November 2010**:

*Exemption – Due to any disability, inability, or restriction on client where they are unable to travel to a mediator.*

*Exemption – Where due to any relevant disability or inability of client there are no mediators available with appropriate facilities.*

*Exemption – The client, the client's (ex) partner or other party to the dispute to the case is living abroad.*

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