FAMILY MEDIATION, FAMILY RELATIONSHIPS
AND ACCESS TO JUSTICE

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Family mediation is different. It is like no other form of alternative dispute resolution (ADR). The parties will, if there are children, continue to have some kind of relationship with each other even if only parental and even if at extreme arms’ length. A secondary difference is that all parties usually come to family mediation in an emotional state, if not in open hostility or anger then always in fear – fear of the future, how matters will turn out, and whether they will be able to cope. The issues of family relationships, access to family courts and the role of mediation were examined by a Parliamentary House of Commons Select Committee early in 2005. Its report, which followed a 5 month inquiry into whether the family court system was being run effectively, reported in March. 2

Having taken written and oral evidence from over sixty witnesses including the President of the Family Division, judges of all levels of seniority, specialist solicitors and barristers, and many other professional and private groups including ardent campaigners for fathers’ interests, the report’s overriding message to the UK Government was that there must be a clear and unequivocal commitment to remove as many child contact and residency cases as possible from the family court system with more disputes dealt with through mediation. It recommended wide-reaching changes, including amendments to legislation, in order to alter the way that family courts dealt with child residence and contact cases. It concluded that the courts were not the best place to resolve complex family disputes and should only be used as a last resort. It stated that that in appropriate cases, where safety was not an issue, making most parents attend a compulsory preliminary session with a mediator would help steer people away from the court system. Nonetheless, it still seems that the UK Government will not make referral to family mediation compulsory. The aim of this paper is to ask, in the light of that report:

- Should referral to mediation be compulsory
- Is there bias against either gender from mediation or the family courts

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2 House of Commons Constitutional Affairs Committee, Family Justice: the operation of the family courts, HC116-1.
• How does the availability of legal aid impact on mediation
• What is the effect of domestic abuse on court orders and mediation.
• What are the politics of family law reform

Background
In 1996 the Government set up the Lord Chancellor’s Advisory Board on Family Law in preparation for the implementation of the Family Law Act 1996, an Act which would have radically changed the process of divorce and separation in the UK and an Act in which mediation would have played a pivotal role. The 1996 Act was dropped by the subsequent present Government in 1999. The Advisory Board in turn set up a Children Act Sub-Committee which produced in 2001 a consultation paper entitled *Making Contact Work* which dealt with the facilitation and enforcement of contact. A report was subsequently made to the Lord Chancellor’s Department (LCD, as it then was) and a response was issued by the LCD in August 2002. Amongst the recommendations were that:

• The LCD should fund additional facilities for resolving contact disputes by negotiation, conciliation and mediation. Whilst there was plainly a role for the court in resolving contact

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• that the institution of marriage was to be supported;
• that the parties to a marriage which may have broken down are to be encouraged to take all practicable steps, whether by marriage counselling or otherwise, to save the marriage;
• that a marriage that has irretrievably broken down and is being brought to an end should be brought to an end:
  • with minimum distress to the parties and to the children affected;
  • with questions dealt with in a manner designed to promote as good a continuing relationship between the parties and any children affected as is possible in the circumstances; and
  • without costs being unreasonably incurred in connection with the procedures to be followed in bringing the marriage to an end; and
• that any risk to one of the parties to a marriage, and to any children, of violence from the other party should, so far as is reasonably practicable, be removed or diminished.

During the passage of the Family Law Bill, it became clear that implementation of the provisions relating to divorce and mediation would be a difficult and lengthy process. The Lord Chancellor announced his intention to establish a body which would provide him with independent advice on the implementation and operation of the Act. The intention was that the Advisory Board on Family Law would be able to take a broad, strategic view of all aspects of the new law, considering the application of the principles set out in Part I (above). The aim was also to promote a multi-disciplinary approach to the implementation of the Act and its subsequent operation.
disputes, there was a widespread perception that such disputes were better addressed outside the court system. There was also a widespread feeling that an application to the court should be the last resort;

• The judiciary and the court service needed to promote a culture of judicial continuity avoiding time-wasting and inconsistency, by a more proactive management of judges’ calendars and itineraries;
• Legislation must provide the powers the courts need to enforce orders;
• A recommendation that judges and magistrates should be given the power to refer parties to mediation.

Many of those recommendations were accepted in whole or in part by the LCD at the time. Lord Justice Wall, chair of the sub-committee pointed out in January 2005’s *Family Law* that many of those themes had found their way into the government Green Paper *Parental Separation* published in July 2004. That paper stated clearly that the current ways in which the courts intervened in contact disputes did not work well and provided evidence to demonstrate that resident and non-resident parents were satisfied or very satisfied with informal arrangements in over 80% of cases, but that when the court becomes involved the picture was very different. The select committee report listed the key concerns:

• The current law, or its interpretation in practice, did not give non-resident parents the relationship with their child that they should have;
• The process for identifying and verifying safety issues was ineffective and slow;
• The legal aid structure rewarded litigation rather than settlement;
• Adversarial court proceedings exacerbated acrimony between separating couples;
• Delay in court proceedings could be so protracted that it undermined the relationship with the non-resident parent to the extent that, by the time a decision was made, the court might take the view that it was no longer in the child's interests to grant contact;
• Relatives in the wider family context, particularly grandparents, lost contact following

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4 These were, essentially, the power to refer a parent who disobeyed an order for contact to a variety of resources including information meetings or meetings with a counsellor or parenting programmes; the power to refer to a psychiatrist or psychologist (funded in the first instance); the power to refer a non-resident parent to an education or perpetrator programme; the power to place on probation with a condition of treatment or attendance at a given class; the power to award financial compensation from one parent to the other; and the power to impose a community service order.
6 *Parental Separation: Children’s Needs and Parents’ Responsibilities*, Cm 6273
7 Ibid, para 9.
• Some resident parents felt that the courts allowed contact in a way that put their, or their children’s, safety at risk;
• Court-ordered contact was poorly enforced and in some instances the courts were unable to resolve that problem;
• The effect of those features is to create, in the words of some witnesses, a ‘bias against fathers’ (or non-resident parents).

The Green Paper gave a general nod in favour of mediation as being a good thing which should be encouraged but gave little indication of how more couples could or should be directed to it. On the same day that the Green Paper was published the Legal Services Commission (LSC) which is responsible for the provision of legal aid in the UK and is sponsored by the government’s Department of Constitutional Affairs (DCA – the new name for the LCD) published its own consultation paper. The two being published together was no coincidence – in the UK reform of family law goes hand in hand with keeping costs to the public purse at a minimum. The theme of the legal aid consultation was to prioritise funding towards early resolution of disputes and away from contested litigation where appropriate and proposed introducing stricter controls over multiple and repeat applications in private law family cases and to limit its funding to one certificate per client at any time.

While the Government was producing papers, the judiciary were attempting to do what they could to streamline case management and reduce delay and the newly formed CAFCASS (the Children and Family Court Advisory and Support Service) was trying to get its act together, aggrieved fathers were taking matters into their own hands. Self help pressure groups such as Fathers 4 Justice were campaigning vociferously against the perceived injustices wrought by the family justice system in relation to contact with their children. In 2004 Acts of civil disobedience culminating in a condom filled with purple flour thrown at the Prime Minister on his feet in Parliament and the scaling of Buckingham Palace balcony by a father dressed as Batman all grabbed media attention. There is no doubt that without such pressures the House of Commons select committee report would never have been contemplated and the report was robust in its criticism of the Government for not following up the recommendations of the Children Act sub committee sooner: ‘One consequence of the Government’s delay is that the clamour for change and

8 A New Focus for Civil Legal Aid, Legal Services Commission, July 2004
9 Private Law Programme - guidance for courts on parental separation and children’s needs, DCA, January 2005
reform has greatly increased in the intervening four years’. As Mr Justice Ryder said in his evidence to the committee’s Members of Parliament about the lack of implementation: ‘This has been a constant theme of the judiciary for a number of years. The commitment is welcomed but concern remains as to the timescale and the commitment of Parliamentary time (i.e. the priority of that commitment, the lack of engagement of the NHS… and the funding of the options which should be made available).’

The House of Commons select committee report was clear that, while there was disagreement amongst those giving evidence as to whether all the criticisms of the family justice system were justified, it was widely agreed that reform was needed. The MPs concluded that there was some divergence of opinion about whether the proposals contained in the Government’s Green Paper were an evolution of previous policy rather than a major change. The report welcomed the Government’s acceptance of the general need to remove as many cases as possible from the court system but it was not clear that the Green Paper proposals would by themselves achieve that. A coherent statement of the Government’s overall strategy was needed combining established initiatives, such as mediation, with experimental approaches.

**Further Developments**

Early in 2005 there were two Government initiatives. The first, which was not be entirely unconnected, was the appointment of Lord Justice Potter as the new Head of the Family Division, stepping into the shoes of Dame Elizabeth Butler Sloss on her retirement in April 2005. Lord Justice Potter was a stranger to family law and had been put in post as part of a ‘new management team’ (in the words of the government press release). Of greater consequence perhaps was the publication of a draft Children (Contact and Adoption) Bill which provided for courts to impose ‘contact activity directions’ on adults or parents who were parties to contact proceedings and to impose ‘contact activity conditions ’ in contact orders if it was in the child’s best interest to do so. Contact activities included information sessions, counselling or other activities devised ‘to establish, maintain or improve’ child contact. Children and Family Court Advisory and Support Service (CAFCASS) officers could be ordered to facilitate or monitor and report on compliance with contact orders. Courts would have new powers to enforce contact by imposing unpaid work or curfews orders on those who breached them. As Professor Judith Masson pointed out in April’s *Family Law*:

‘Parents use the courts because they cannot make arrangements. Even before proceedings start, they (and their children) are highly distressed. Court users have more severe parenting
problems than separated parents generally.\textsuperscript{10} Violence is a major problem for many women. Given this distress and distrust, it is unsurprising that contact disputes are not easily resolved in court. About one in six court applications involve breach of orders and some parents become locked in contact litigation for years….Better enforcement may mean more applications to enforce and more enforcement – not necessarily better compliance. We now know a lot about the families who do not make contact work but we still lack information about whether and how they can be helped to have good relationships with their children after separation.\textsuperscript{11}

There was nothing in the Bill relating to referral to mediation.

In April 2005 a Parliamentary Joint Committee on the Bill published its report. It agreed with the House of Commons Constitutional Affairs Committee that the courts were usually not the best place to resolve complex family disputes and supported the general thrust of policy to utilise alternative resolution mechanisms, particularly mediation. The report recommended that the government include within the Bill a provision giving courts discretion to refer parties to a mediation service in order to explore whether that could be a viable option in their case. It said that exploring the prospects for mediation was not, and should not be confused with, compulsory mediation and that section 13(1) of the Family Law Act 1996(see below) should be brought into force so that it applied not only to divorce cases but to all private law child disputes. The government replied to the Joint Committee in June. It firmly rejected the notion of compulsory assessment for mediation stating that referral to information sessions about mediation could be one of the ‘contact activities’ provided for in the Bill and that resurrection of section 13 would be ‘inappropriate’. The newly named Children and Adoption Bill was introduced in the House of Lords the next day. It does indeed state that:

1. (2) The court may make a contact activity direction in connection with…contact. …. (5) The activities that may be so required include, in particular … (b) sessions in which information or advice is given as regards making or operating arrangements for contact with a child, including making arrangements by means of mediation.

It continues:

(6) No individual may be required by a contact activity direction:

\textsuperscript{10} L.Trinder et al, \textit{A Profile of Applicants and Respondents in Contact Cases in Essex} (DCA, 2005).
\textsuperscript{11} Professor Judith Masson, ‘Comment: Courts, Contact and Compliance’, [2005] Fam Law 269
… (b) to take part in mediation

Up to 1 July there has been no further debate. However, this Bill is solely concerned with the enforcement of orders already made. There is still no statutory obligation to attend a mediation assessment meeting before court proceedings are even initiated – unless one is poor and needs legal aid in which case it is compulsory (see below). Publicly funded parents are required to attend a mediation assessment meeting unless they can be exempted on the grounds, for example, of domestic violence.

Compulsory Referral to Mediation

Mediation professionals have always resisted compulsory mediation. The UK College of Family Mediators Code of Practice states:

4.1 Voluntary Participation

Participation in mediation is always voluntary. Any participant or mediator is free to withdraw at any time. If a mediator believes that any participant is unable or unwilling to participate freely and fully in the process, the mediator may raise the issue with the participants and may suspend or terminate mediation. The mediator may suggest that the participants obtain such other professional services as are appropriate.12

Compulsory referral to mediation is a quite different concept. The Green Paper stated at para 65:

‘The Government, in conjunction with the senior judiciary and rule committees, proposes to review relevant rules and Practice Directions so that the strongest possible encouragement is given to parties to agree to mediation or other forms of dispute resolution, in order to ensure that all alternative means of resolving family disputes, short of contested court hearings, are fully utilised. For those eligible for public funding, this mediation would be funded through legal aid.’13

It is impossible to make any sort of accurate estimate of the number of current privately funded mediations but probably rather less than one in twenty, or less than 5% of privately funded work is resolved via mediation, and possibly fewer than 2% are mediated. What is required is a mechanism within the family field similar to that within the Civil Procedure Rules requiring a consideration of

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12 Available at www.ukcfm.co.uk
13 Parental Separation: Children’s Needs and Parents’ Responsibilities, Cm 6273, para 65
ADR and/or family mediation. As Emma Harte, Chair of the Solicitors Family Law Association Mediation Committee and Helen Howard, a mediation trainer, wrote in *Family Law*:

‘The commercial litigation field has witnessed a revolution in recent years. No longer can a commercial litigant dismiss mediation – it is financial suicide casually to reject an offer to mediate without reason. Costs penalties arising out of a refusal or failure to attempt mediation have concentrated commercial lawyers’ minds on mediation referrals and created an explosion in cases for commercial mediators. Why are there not similar sanctions as far as family law is concerned, perhaps combined with incentives to consider mediation as a first, rather than last, resort? The time may have come to abandon the dearly held principle of voluntary mediation ‘Professor Hazel Genn, has noted\(^4\) that the success rate of court ordered ancillary dispute resolution (ADR) over the review period settled at around 50 per cent, but even where ADR was unsuccessful, the great majority of cases subsequently settled with only a tiny minority of cases proceeding to trial. *CEDRSolve* reported in 2004 that the Commercial Court of Appeal mediation scheme has been doing even better, with a settlement rate of about 77 per cent. Court-directed mediation can, and does, work. Moreover it provides an important positive message that the courts expect parties to behave responsibly and settle wherever possible.

‘Could the judiciary be more proactive in encouraging parents to resolve problems through mediation backed up by costs penalties commercial style if an offer to mediate is unreasonably refused? Anecdotally (there appears to be no case-law on the point), the provisions of the Family Law Protocol about promoting mediation have not been given teeth via costs orders against parties who refuse, without even giving reasons, to refer to mediation. The ancillary relief rules, as defined by the Family Proceedings Rules 1991 amended by the Family Proceedings Rules 1991, set out a procedural code ‘with the overriding objective of enabling the court to deal with cases justly’.

‘Rule 2.51B provides for the court to further the overriding objective by actively managing cases including “encouraging the parties to settle their disputes through mediation where appropriate”. Rule 2.61D, relating to the first appointment, provides for the court to, among other options, direct ‘that the case be adjourned for out-of-court mediation or

\(^{14}\) Genn, *Court-Based Initiatives for Non-Family Civil Disputes: The Commercial Court and the Court of Appeal*, Lord Chancellor’s Department, 2002
private negotiation’ where a referral to a financial dispute resolution appointment is not adequate. The latent powers appear to have been little used thus far.15

Who is to assess suitability for mediation? Mediators themselves are best suited to assessing whether mediation is suitable. The mediator makes the final decision – it is not left to the parties. Because the mediator meets and speaks with both parties individually (even at joint introductory sessions the mediator will see each party separately at some point) the mediator can most easily make that judgment. The call is for compulsory introductory meeting only. The parties would be free not to return. However, if mediators were to make clear to parties that if they did not return even though mediation was suitable the court would inevitably direct in-court mediation (see below), that would be an encouragement and even more so if there were a costs sanction. Many mediations do not proceed at the present time because the second party, who is not eligible for legal aid, will not come for an introductory meeting, despite encouragement from the mediation service and despite the legally aided party being willing to mediate. Hence the need for robust court direction. There is no reason why two types of ‘mediation’ should not be ‘enforced’. The first, out of court as outlined above, would give the parties more time to address all the issues (including, for example, new relationships, housing, finance, debt, see below), is less stressful than being on court premises, and gives parties time between session to come to terms with the challenges of mediation. The second type would be in-court and directional. Both have their value depending on the circumstances of the case. My memorandum to the House of Commons committee was that a new family court protocol for children cases (i.e. not requiring legislation) should include the following (it being immaterial whether the parties are private or publicly funded):

1. On receipt of a contact or residence application the court sends out a letter to both parties stating that unless both parties have attended an out of court introductory meeting with a mediator there will be no first hearing. The letter will include contact details of local mediation services. Safety issues will be addressed by the mediator or referring solicitor.

2. If at the first hearing it is certified by the mediator that both parties have attended an introductory mediation meeting and that out of court mediation is suitable but that one or both of the parties has not returned to mediation or turned it down, the parties can be

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directed to the in-court conciliation service and informed of the potential wasted costs orders that could be made.

3. If at the first hearing the mediator certifies that mediation has broken down or is unsuitable, the parties can still be directed to the in-court conciliation service if the court deems it appropriate.

Or that section 13(1) of the Family Law Act 1996 should be implemented.\textsuperscript{16}

The House of Commons committee reported that in giving its evidence the government was not enthusiastic about promoting compulsion but that the government had not adequately distinguished between a compulsory meeting with a mediator and forcing people to mediate. Neither could the Government adequately explain its starkly different attitude to privately funded litigants and those who wished to apply for legal aid. The latter must have a meeting with a mediator before applying for legal aid from a solicitor (see below). The report supports the implementation of s 13(1), amended to apply not only to divorce cases but also to private law child disputes.\textsuperscript{17}

\textbf{Legal Aid and Access to Justice}

Family mediation relies heavily on the Legal Services Commission (LSC – the legal aid provider). The 1996 Family Law Act put the mechanism in place and it is the only aspect of that Act to

\textsuperscript{16} Section 13(1) After the court has received a statement, it may give a direction requiring each party to attend a meeting arranged in accordance with the direction for the purpose –
(a) of enabling an explanation to be given of the facilities available to the parties for mediation in relation to disputes between them; and
(b) of providing an opportunity for each party to agree to take advantage of those facilities.

(2) A direction may be given at any time, including in the course of proceedings connected with the breakdown of the marriage (as to which see section 25).

(3) A direction may be given on the application of either of the parties or on the initiative of the court.

(4) The parties are to be required to attend the same meeting unless –
(a) one of them asks, or both of them ask, for separate meetings; or
(b) the court considers separate meetings to be more appropriate.

(5) A direction shall –
(a) specify a person chosen by the court (with that person’s agreement) to arrange and conduct the meeting or meetings; and
(b) require such person as may be specified in the direction to produce to the court, at such time as the court may direct, a report stating –
(i) whether the parties have complied with the direction; and
(ii) if they have, whether they have agreed to take part in any mediation.

\textsuperscript{17} House of Commons Constitutional Affairs Committee, \textit{Family Justice: the operation of the family courts}, paras 90-94
survive. Under the LSC funding code persons applying for legal aid are compulsorily referred to an assessment for suitability for mediation. Annual mediation starts under LSC family mediation contracts were 18:

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There were, within the publicly funded sector, about 72,000 certificates issued in 2002/2003 to cases which might otherwise have been susceptible to mediation and there were 21,141 publicly funded mediation clients. This compulsory referral is the mechanism that has substantially raised awareness of mediation and is mainly responsible for the growth of family mediation work in both legally aided and private work. If mediation is not suitable or breaks down a person can then apply for publicly funded legal help from a solicitor. The Government believes, as stated in its Green Paper, 19 that on average parents who are eligible for public funding through legal aid from lawyers use courts more often and for longer periods than those parents who fund their own legal representation. The paper concludes that “the availability of legal aid should not provide an incentive to go to the courts or to defy court orders”. It has made a number of proposals to address this problem including:

- Introducing a system of accreditation for solicitors who provide advice on family matters concerning children;
- A review of relevant rules and Practice Directions so that the strongest possible encouragement is given to parties to agree to mediation or other forms of dispute resolution;
- Ensuring that publicly funded parents demonstrate that they have “at least explored the option of mediation” as an alternative before turning to litigation, in order to be able to access continued funding.

At the beginning of March 2005 the Government announced measures to give effect to the proposals for reform of civil legal aid which were set out in the July 2004 LSC consultation paper. 20

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19 Parental Separation: Children’s Needs and Parents’ Responsibilities, Cm 6273, para 58
20 A New Focus for Civil Legal Aid, Legal Services Commission, July 2004 (see above, p 4).
place emphasis on early resolution and the use of alternative dispute resolution measures such as negotiation or mediation and away from contested litigation. A pilot to test the new structure was scheduled to commence in June 2005. The Government will also remove cost protection in family cases to deter unreasonable conduct by publicly funded clients, and introduce stricter controls over multiple and repeat applications in private law family cases. These controls will be enforced through improvements to processing systems that provide a reliable means of identifying previous legal aid applicants.

There is a danger if referral to mediation remains solely within the remit of the LSC. In the run up to the Family Law Act 1996 the Government’s thinking was that by diverting couples to mediation through legal aid, greater awareness of mediation would filter through to the private sector. That happened to a certain extent. Awareness might have increased but referrals did not. Privately funded Children Act cases and litigants in person can and do still get through to the court stage without mediation being suggested at all. Privately funded ancillary relief cases probably nearly always do, and will do so increasingly with the further restrictions on legal aid funding outlined above.

**Gender Bias**

The UK College Code of Practice states:

4.3 **Impartiality**

4.3.1 Mediators must at all times remain impartial as between the participants. They must conduct the process in a fair and even-handed way.\(^{21}\)

The assertion that mediation can be unfair to one party – usually the woman – has often been made. The contention frequently arises in the context of domestic abuse, on which see below, but about which there is in fact no argument as such cases are deemed unsuitable for mediation from the beginning. As a practising mediator I am most familiar with a male bias in financial cases where, as an extreme example, the husband will enter the session with a briefcase bulging with spreadsheets and the wife will declare that she has never paid a household bill. I am also familiar with a female bias in residence, contact and parental responsibility cases where, generally, the power imbalance swings in favour of the mother, her greater child care experience and the status quo. It is an

\(^{21}\) Available at www.ukcfm.co.uk
important part of the training, supervision and continual assessment of a mediator that such biases are recognised and dealt with in a practical way. But do the lawyers and the courts fare any better?

The MPs reported that from the evidence they had heard there was a perception that non-resident parents were not fairly treated by the court system. However they did not believe that the court system was consciously biased against either fathers or non-resident parents. Significant problems remained in a minority of cases following parental separation, often exacerbated by delays in the court process. They recommended that first, there should be a clear and unequivocal commitment to move as many cases as possible from the court system altogether and secondly that parents who did apply to the court should be given every encouragement and opportunity to resolve their differences through negotiation; and thirdly, when there was no viable alternative to court resolution, the courts should be responsible for ensuring that the case was effectively managed and that delays were kept to a minimum.22

**Domestic Abuse**

Mediation does not take place if there has been serious or continuing domestic abuse and a victim would never, ever, be obliged to enter into mediation, or continue, once the abuse was revealed. The UK College has a specific domestic abuse screening policy reproduced in full below23 and

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22 Ibid, paras 48-54
23 UK College of Family Mediators Domestic Abuse Screening Policy, May 1999

Each participant must make a fully informed and voluntary decision to enter mediation. This requires that each participant is sufficiently informed and has sufficient time to make the decision to attempt mediation after all safety issues have been fully considered. Safety issues must include not only the participants in mediation but also any children and any other significant member of the family of either party. Assessment for domestic abuse and/or child protection is a continuing requirement which lasts throughout the whole of the mediation process.

**Definition of Domestic Abuse**

Domestic abuse is behaviour that seeks to secure power and control for the abuser and the impact of which is to undermine the safety, security self-esteem and autonomy of the abused person. Domestic violence contains elements of the use of any or all of physical, sexual, psychological, emotional, verbal or economic intimidation, oppression or coercion. The most important factors in domestic abuse are:

- The impact of the behaviour as experienced by each<any of the individuals involved.
- That it is viewed from the perspective of the recipient of the abuse/abused person.

**Principles of Screening for Domestic Abuse**

- Mediators must routinely screen for domestic abuse before a decision is taken to proceed mediation.
- Screening must take place separately with each participant. In reaching a decision about whether to proceed, priority should be given to the individual’s perception of abuse over any judgement about levels of severity or types of abuse. If in doubt about the appropriateness of mediation the mediator could consult with his/her supervisor and if doubt still remains, must not proceed.
- Separate screening for domestic abuse must be carried out in circumstances that allow free, frank and safe discussion of the issues of domestic abuse to take place and a fully informed choice to be made by the participants as to whether or not to proceed to mediation.
mediation services are experienced in dealing with such situations. As a matter of routine couples are asked if they wish to have a solo introductory session. If they choose a joint introductory session they are asked if they wish to arrive/depart/wait separately. Mediators are aware that although parties might behave themselves in the context of a mediation meeting, repercussions following from something said in that meeting can easily follow elsewhere. This is checked out at every introductory meeting. Where solicitors are involved they can exempt clients from an introductory meeting where there has been domestic violence and mediators, as a matter of course, report families to social services where there are child protection issues. Such reporting is not negotiable.

The House of Commons report raised the issue – as it would do having taken evidence from fathers’ groups – of false reporting, stating that the Government was unable to provide accurate statistics indicating how frequently abuse problems occurred in contact disputes. Witnesses had offered widely differing views. Groups representing victims of abuse, such as Women’s Aid, focused on the inappropriate grant of contact and the under-reporting of domestic violence. Groups representing non-resident parents stated that false accusations were frequently made to frustrate contact which was not adequately recognised by the courts. Witnesses also pointed out that many child abuse cases arose while the child was at the home of the resident parent. The Government acknowledged that it did not have any statistics about unfounded allegations because, as they were unfounded, they were not pursued. Anecdotal evidence based on case reports was produced by the judiciary demonstrating that unfounded accusations of domestic violence had occurred in some cases. The MPs concluded that it was vital that important safety issues such as domestic violence and other forms of abuse were effectively addressed. Enforcement action by the courts should not occur while there were unresolved safety concerns. Equally, false accusations raised by parents

- Mediators must adopt clear, written procedures to screen all clients and to record all decisions about the appropriateness of mediation and termination if domestic abuse or child protection issues have been identified. If mediation is appropriate, procedures to ensure client protection, child protection and mediator safety must be implemented and recorded in writing.
- Whether or not domestic abuse emerges as an issue at an initial screening, continued screening must take place throughout mediation and a written record made of all such screening.
- In cases where the abused person has made an informed choice to mediate, the mediator’s responsibility is to ensure that appropriate arrangements are agreed which so far as possible guarantee that relevant safety issues are addressed and reviewed. Such issues will include for example the exploration of safety matters, implications for children, safe termination, voluntariness and informed consent.
- If mediation does not proceed, mediation must be terminated safely, other alternatives to mediation explored, and appropriate advice and referral possibilities should be considered, if possible.
as a mechanism to frustrate contact should not succeed. Further research was urgently needed.

The Politics of Law Reform

The House of Commons report encapsulates the misplaced optimism of expecting Governments to address, let alone solve, family relationships in the context of court proceedings. Some would argue that family law itself, apart from issues of protection and safety, should withdraw entirely from the arena. In December 2004 Dr Stephen Cretney, the author of a book on the recent history of family law developments, addressed a conference in Utrecht on the ‘Europeanisation’ of family law. He was clear that the last few years provided an unhappy but salutary example both of the growing significance of pressure groups in the reform process and the difficulty of securing a rational approach to law reform in the area. The grievances seemed no longer to be about, say, divorce reform but rather complaints were made about the courts’ approach to questions of the upbringing of children and, specifically, on the courts’ supposed failure to recognise the contribution which a child’s father could make. The history of family law and its reform in 20th century England demonstrated the intensely political nature of the process: there remained many different perspectives and sometimes sharply conflicting interests: ‘Above all there are the injured feelings of those involved: what is presented as a complaint about contact with children may in reality be a complaint about the rupture of a relationship. But the complaints may prevent changes being made which informed opinion would regard as desirable. This is part of the price we pay for Parliamentary democracy.’

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24 House of Commons Constitutional Affairs Committee, Family Justice: the operation of the family courts, HC116-1, paras 123 - 129.


26 A full summary of Dr Cretney’s address is published in Issue 1, 2005 of International Family Law.