

LASPO Post-Implementation Review

Submission by National Family Mediation

September 2018

A. Introduction

This submission to the LASPO Post Implementation Review (PIR) is made on behalf of National Family Mediation (NFM), the largest provider of family mediation in England and Wales. Established over 30 years ago, NFM was the original provider of family mediation and its network of accredited services now delivers in over 500 locations.

NFM has provided input to the PIR through its membership of the Family Mediation Council (FMC). However, as the sole non-profit mediation provider in the FMC, a number of LASPO related issues pertain to NFM members and affiliates, which do not necessarily impact as strongly on other members.

NFM therefore considers it important to provide its own submission to the PIR, and this response follows consultation with our members and affiliates.

The stated aim of the PIR is to assess the impact of LASPO against the following objectives:

- a) To discourage unnecessary and adversarial litigation at public expense
- b) To target legal aid at those who need it most
- c) To make significant savings to the cost of the scheme; and
- d) To deliver better overall value for money for the taxpayer.

This submission does not rehearse the arguments in favour of increasing the numbers of people attending family mediation to resolve family disputes, rather than taking a confrontational court-first route. However, in view of the way an increase in the take-up of family mediation can help achieve objectives a), c) and d) above, it is written with the assumption that – in line with legislative change and numerous Ministerial statements in recent years - government policy remains firmly in favour of encouraging family mediation.

B. Observations on the impact of LASPO

A key paragraph of the [post-legislative memorandum](#) which established the PIR admits the government has failed in its stated aim of increasing take-up of family mediation:

The implementation of LASPO did not lead to increased take-up of either MIAMs or family mediation sessions, as anticipated. Instead, the opposite occurred, with the number of people attending publicly funded MIAMs and mediation falling (see Figure 1 below). In 2012–13, the year prior to LASPO, there were 31,000 MIAMs and 14,000 mediation starts. By 2016–17, these figures had fallen to 13,000 MIAMs and 7,700 mediation starts, reductions of 61% and 44% respectively. (Para 161, page 39)

In the period immediately after the implementation of LASPO, court applications dropped. However, they have now returned to pre-LASPO numbers and the majority of cases now being considered in court feature litigants in person, and the burden to the tax payer has increased as a result.

NFM remains very concerned about future access for separating families to non-confrontational settlements as well as, of course, the future of our profession.

When the LASPO changes were being introduced, NFM warned government of the expected impact and sadly we have been proved right.

Amongst LASPO's effects was an exponential rise in 'litigants in person', leading to severe delays and blockages in courts, combined with legally aided solicitor referrals to mediators drying up. Yet it was over a year before legislative efforts to increase family mediation take-up were implemented. This gap had a devastating impact upon voluntary sector mediation providers, resulting in the closure of a number of service providers due to declining numbers of referrals. Even now the knock-on effect is still felt with more provider organisations crumbling.

Evidence shows that lawyers are treating the current situation as they did pre-LASPO: Families are spending their money on solicitors, then being sent by those solicitors to a MIAM simply in order to tick the box that 'frees' them of any obligation to make settlements through full family mediation – which would save the families money, time and stress, whilst delivering better outcomes for their family. They then head back to the solicitor to spend still more money and still end up in court. Pre-LASPO, solicitors had legal aid for representation, they referred people to mediation to box tick then back again to spend more money. In effect, nothing has changed.

Mediators used to be able to claim government funding to carry out the so-called 'willingness test', where the ex-partner of the mediation client is contacted to determine if they are prepared to engage in mediation. However, the axing of the funding has provided a double-whammy – again as we predicted. Not only are mediation services' finances hit by the funding withdrawal, but their ability to properly engage with the 'second party' to help them understand the benefits of mediation is hugely diminished, leading to a lower take-up all round.

The coalition government introduced the provision of the first mediation session for free. It was a laudable idea but appeared to have come from nowhere, since it was not part of the discussions of the Mediation Task Force established by then-Minister Simon Hughes MP. Its impact dealt a further blow to mediation providers – cutting their earnings because rates paid to providers by the government had not been reviewed since 2004.

Greater compliance with the compulsory MIAM process would mean more couples coming through mediators' doors, which in turn significantly increases the chances we then have of working with them to conduct successful family mediation processes, saving them and the taxpayer money and time and, crucially, providing better outcomes for everyone involved, especially the children.

We want the government to deliver access to justice, a part of which in the realm of family law is, promotion of and access to family mediation is an essential part.

One of the objectives of LASPO was to cut the cost of legal services to the public purse. In private family law matters it is difficult to argue that the taxpayer should pay for someone else's legal advice on divorce. Great strides were made to provide alternative services that would help families experiencing family breakdown keep control of their destiny after separation by using mediation. However the culture of divorce in England and Wales remains focused on legal solutions that are fundamentally adversarial and not conducive to encouraging personal problem solving behaviours. As long as this remains the case the taxpayer will forever foot the bill for relationship breakdown.

C. Proposals

a) Enforcement of existing court powers

- Family courts have a vital role to play in signposting people to mediation. So the government needs to ensure the stronger hands-on enforcement of current court powers. We believe that boosting mediation numbers would not be difficult since court powers already exist which would help meet this aim. For example courts should always properly check the respondent has been approached, rather than allowing a situation where forms have simply been signed to smooth the applicant's route to court.
- There needs to be a court focus on promoting and supporting mediation, and ensuring that all applicants and respondents to court have at the very least attended a MIAM before they have an appointment with court. The Family Court Procedure Rules and the Child Arrangements Programme (Practice Direction 12b) expressly states that (6.1) *"The judge is obliged to consider, at every stage of court proceedings, whether non-court dispute resolution is appropriate."*
- Our experience shows that magistrates, judges, and court officials are bypassing the necessary process of getting the C100 and Form A paperwork signed by a mediator at a MIAM and anecdotally we hear judges say: *"you are here now so let's get on with it."* And in the next breath they lament that courts are not the place to solve contact issues or determine whether children should be collected at 3 or 3.30pm. Stronger monitoring and a more proactive government approach to enforcement would, we believe,

transform the situation and avoid the embarrassment for Ministers of their current policy dying on its feet.

- There is no evidence that courts have altered their practice and embraced the revised procedure rules or child arrangements programme that would prove pivotal in transforming the culture of litigation in divorce in this country. Had this been the case legally aided mediation figures would have recovered substantially to at least the pre-LASPO numbers.
- Member feedback indicates that communication between court and mediation services is not currently working very well. One of our affiliated member services has cited that it works with only one family court and has well-established links with them. However, the member service finds the court seems reluctant to promote mediation directly, on the basis it might be seen to be giving preferential treatment to one mediation service above another. Consequently, they appear not to be promoting mediation at all, simply in order to avoid being seen as offering favouritism. This is not helpful to either the court or any mediation services. In fact, all that is required is for all court officials to have information on all mediation services in the court area and to pass them to court users who can then make an informed choice. Services across England and Wales continue to report a significant decrease in the number of legally aided clients attending their service, despite continuing profile-raising at libraries, CABS, job centres and other public places which have traditionally been ideal marketing outlets for mediators.
- Simplification of the C100 and Form A is urgently needed, so these key items of paperwork are understandable to the lay person.

b) Scrutiny of existing practice and pilots

- We also ask the government to scrutinise the results of the Cafcass pre-court pilot. It has only just stopped taking new cases and so statistics may not yet be available but a view has been expressed amongst NFM affiliates that two main findings may emerge: a) cases have been identified which can be mediated, and agreements reached, which should never have needed to be in court in the first place; and b) it is not sustainable on a large-scale as they are funding only one joint session at legally aided rates.

c) Legislative / funded measures

- Provide some financial incentive for solicitors to refer to mediation - at present the main incentive they have is to find evidence of domestic violence to fund an application to court.
- Review and increase Legal Aid rates for mediation providers, in order to avoid the supply of mediators drying up completely.
- There is support amongst our membership for C2 MIAMs to become compulsory, so both parties can make an informed decision about mediation.

- Introduce a system to register mediated agreements with the court so that if they don't work and clients want to go to court next rather than review in mediation the courts have a non-adversarial starting point. We understand this works well in other countries as clients are not motivated to go straight to court because they want something legally binding.
- Reinstate some form of funding to ascertain the willingness of the respondent.
- Fund MIAMS for all parties, as skilled triage which will save money further down the line in contested proceedings.
- Provide Separated Parents Information Programme (SPIP) for all applicants in children's matters including additional components about the range of help available before expensive court proceedings commence. SPIP is currently a court-ordered contact activity. Evidence from research shows that this intervention comes too late in proceedings, and feedback from participants tells us that the majority of people express concern that this programme becomes available to them at too late a stage. The same is said about mediation, so combining a meeting with a mediator with the opportunity to attend a SPIP programme before they are properly immersed in the court process would improve the outcomes for many more families, as well as saving the tax payer and government significant sums in the longer term.
- There is member support for a further national information campaign regarding different pathways following family breakdown – along the lines of the MOJ's 'Family Mediation First' campaign. There is also a view that more should be done to help people find accredited mediators in their area right from the start – for example better publicising the FMC database widely at court, putting a link on the same gov.uk page that people download their forms from, improving the central screening of applications, so that non-attendance at MIAM is rejected consistently.

d) Legal Aid

- The Government of the day did not anticipate the fall of legally-aided family mediation when LASPO came into effect, and the evidence is that four years later the numbers of legally aided family mediations are still at less than 50% that they were in 2014. We appreciate that one aim of LASPO was to reduce the cost of the legal aid bill to the tax payer - and that perhaps government is content with the amount of payment it makes for this service. However, the cost of relationship breakdown has now shifted from paying lawyer fees and into other areas, the courts in particular, and this is the most expensive resource.
- The promotion of the availability of legal aid for family mediation has been at best very poorly managed and, even today four years later, there is confusion and misinformation about precisely what legal aid is available for family cases. This is particularly noticeable in the advice sector such as CABs which often remain unaware of the scope and availability of legal aid for family mediation. Experience indicates they can often also remain steadfastly ignorant of what family mediation can and does achieve.

- If the government seriously wants to divert people from family court it needs to invest time and effort in making people aware that legal aid is available for family mediation, and that offering public funding for this service will hasten the transformation of the culture of divorce into a position where it would be commonly understood that people take responsibility for their personal divorce or separation, thus becoming less reliant on state intervention from what would otherwise be a very private family matter.

**National Family Mediation
September 2018**