Response to the Law Commission
Administrative Redress:
Public Bodies and the Citizen
1. Resolution, which was formerly known as the Solicitors Family Law Association (SFLA), is an organisation of 5000 lawyers who believe in a constructive, non-confrontational approach to family law matters. Resolution also campaigns for improvements to the family justice system.

2. Resolution supports the development of family lawyers through its national and regional training programmes, through publications and good practice guides and through its accreditation scheme. Resolution also trains and accredits mediators and is the only body providing training and support for collaborative lawyers in England and Wales.

3. The cornerstone of membership of Resolution is adherence to the Code of Practice, which sets out the principles of a non-confrontational approach to family law matters. The principles of the code are widely recognised and have been adopted by the Law Society as recommended good practice for all family lawyers.

4. The code requires lawyers to deal with each other in a civilised way and to encourage their clients to put their differences aside and reach fair agreements.

5. Resolution has extensive expertise in relation to Child Support matters – having been consulted by, and engaged with, the Government and the Civil Service in relation to the creation, and subsequent amendment, to the Child Support Scheme. The Law Commission has referred to the case of Rowley –v- Secretary of State for Work & Pensions in the consultation paper (footnote 190 – page 41 and footnote 5 page 101). Resolution intervened in that action – because of the significant public importance of the case. Resolution (and individual members) have submitted evidence to the House of Commons Work & Pensions Committee reporting to Child Support reform, the House of Lords, House of Commons Joint Committee on Human Rights, looking at the legislative scrutiny of the Child Maintenance & Other Payments Bill.

6. The Commission sets out points for consultation at page 132 – 133 of the consultation paper which are wide ranging and are recognised to be complex.
The response from Resolution is only intended to deal with the issues raised in so far as they relate to Child Support. The Child Support Agency is in the process of being replaced by the Child Maintenance and Enforcement Commission (CMEC). For the avoidance of doubt Resolution believes that the principles relating to either organisation should be the same.

7. Resolution is, of course, aware of the passing of the Child Maintenance & Other Payments Act 2008. In this submission references to the Child Support Agency will, where appropriate be deemed to include references to the successor organisation – CMEC. With reference to Public Bodies, Resolution has a particular concern, whilst at present, dissatisfied users of the CSA have the right to make an application to the Department of Work and Pension (DWP) for compensation under the Financial Redress for Maladministration Guide, Resolution is aware of no such arrangements if things “go wrong” under the CMEC scheme.

**Executive Summary**


9. Resolution condemns the lack of formalised procedure for compensation claims. The Independent Case Examiner (ICE) is on a non statutory footing and its parameters are vague and uncertain – in particular Resolution condemns the fact that there is only a “verbal agreement” between the CSA and ICE to the effect that ICE recommendations will be accepted by the CSA save in exceptional circumstances. Both the nature of the agreement and the exceptionality cases need clear definition.

10. Resolution agrees with the National Audit Office and the Parliamentary Ombudsman – that there should be an independent appeals mechanism in relation to ex gratia compensation payments.

11. Resolution supports the creation of a statutory right to compensation with a scheme similar to the Criminal Injuries Compensation Scheme – but based on
paragraphs 15, 29 and 68 of the existing Financial Redress Guide. An independent appeal mechanism would be an essential ingredient of the compensation scheme.

Background

12. The Child Support Agency was established in 1993 - having been created by the Child Support Act of 1991. It is important to appreciate that following creation of the Agency, in most circumstances the right to go to Court to obtain maintenance for children was removed. Parents with care (about 96 per cent of whom were female) had no choice other than to rely on the Child Support Agency to recover maintenance for any relevant children. The difficulties facing parents with care – and the inscrutable face of the agency can be adequately summarised by the Witness Statement of Mary Kehoe in the case of Kehoe –v- Secretary of State for Work & Pensions. This case will be referred to later, but her evidence was quoted by the Court of Appeal between Secretary of State for Work & Pensions –v- Kehoe [2004] EWCA Civ 225 when she said

“I have expended all of my energy attempting to get the CSA to obtain maintenance payments for me. I feel excluded from the process. I have been repeatedly told that the dispute is between the CSA and (my former husband) and does not involve me. I have repeatedly been refused information concerning (my former husband) on the grounds that I have no right to this information. I believe that I would not have received a fraction of the payments and compensation that has been made…. Had I not continually pressurised the CSA and complained of their inaction and ability to obtain maintenance for me. The combined effect of reduced income and stress involved in trying to obtain payments from the CSA has seriously affected my family life. I believe that if I had been allowed direct access to the Court to obtain maintenance I would have been successful. The Child Support Acts prohibition on me taking independent action through the Courts has left me powerless. My only remedy is to constantly pressurise the CSA which takes no real responsibility for insuring maintenance is paid and for whom I am just a nuisance”.

13. Ward LJ said in his Judgment that “her position may be unjustly affected and there is nothing she can do about it”. It has to be said that the comments made by Mary Kehoe reflect the substantial experience of practitioner members of
Resolution. These comments must go to the core of the issues currently being considered by the Commission, to the extent that an individual should be able to obtain redress from a public body that has acted in a substandard manner.

14. It has since been recognised that the Child Support Agency is a failing organisation (House of Commons Work & Pensions Select Committee Report 2006/2007). Resolution accept that since this report was published, very substantial improvements in standards have been made by the CSA and welcomes the efforts made by Government and individual employees within the CSA, but the issues raised are regarded by Resolution as essential since:

- Many parents with care have not been properly compensated for the failings of the past and
- Resolution does not believe that there are adequate preventative measures in place in case the failings of the past are repeated in future.

15. The National Audit Office prepared a report into the Child Support Agency in June 2006. This report revealed some very important statistics including

- In March 2006 the CSA had around 1.5 million live maintenance cases
- Since inception in 1993, 5 billion pounds of maintenance have been collected but 3.5 billion remained outstanding.
- One in four new applications received since March 2003 were waiting to be “cleared” (an assessment carried out).
- Under the “New” system (introduced by the Child Support Act of 1999), it was expected that a calculation would have been made and payment arrangements would have been put in place for the majority of cases within 6 weeks of an application having been received. Only 20 per cent of the new scheme cases cleared to 2006 have done so within that time.
- During 2004/2005 over half of the full maintenance assessments reviewed as part of the National Audit Office annual assessment of accuracy throughout the lifetime of the case were found to have errors made on them for sometime.
- For 11 consecutive years the Comptroller and Auditor General had qualified his audited opinion on the agencies client account funds due to errors in the accounts.
• The CSA had not made full use of the enforcement powers it had available. In 2006 there were 19,000 cases with enforcement teams, but this represented only a small percentage of the 127,000 where the non resident parent (NRP) had paid nothing. In addition a further 120,000.00 NRP’s had only partially paid. The statistics relating to enforcement were equally woeful. See page 66 of the audit office report, for example, only 5 driving licences were seized, 15 committals and 8,000 referrals to Bailiffs.

16. One of the major problems that arose, did so by virtue of the Child Support Collection and Enforcement Regulations 1992. This provided an application for a Liability Order may not have been instituted more than 6 years after the day on which payment of the amount in payment became due, effectively meaning that maintenance (when an NRP was not in regular employment (being self employed or changing employment regularly)), became “statute barred”. In July 2006 there were approximately £760 million pounds that had become “statute barred”. The CSA had apparently had no effective policy in place to prevent debts becoming “statute barred”. Although this regulation has subsequently been amended, the historic problem remains.

17. Resolution endorses the comments made by Lord Walker of Gestingthorpe and Baroness Hale of Richmond made in the case of Smith –v- Secretary of State for Work & Pensions & Another [2006] UKHL 35 to the effect that “I see considerable force in the argument that a state which prevents a parent with care from claiming child support through the ordinary Court system has a positive obligation to provide an effective alternative system. The state has a positive obligation under Article 8 of the European Convention to take steps which permit the child’s integration into his own family... the child can scarcely benefit from family life if there is not enough to live on” – Baroness Hale.

The Availability of Compensation

& 12). It is noted that the definition of Maladministration is wider than the definition of Maladministration which was given to the House of Commons by Richard Crossman in 1966.

19. Resolution welcomes the “Seven basic principles” set out within paragraph 15 of the said Guide. This essentially sets out that where Maladministration has occurred, “redress” (which presumably equates to compensation) is fair and reasonable and restores the customer to the position that he or she would have been in “BUT FOR” (our emphasis) the official error. Resolution supports the principles that compensation is to be determined on the balance of probabilities – not beyond reasonable doubt. See paragraph 29 of the Guide.

20. Resolution endorses paragraph 68 which reflects that “the emphasis should be on trying to restore the customer to the position that he or she would have been had the official error not occurred”. (the “but for” test again).

21. Unfortunately Resolution does not believe that the compensation scheme is adequate and it causes real problems in practice. Resolution recognises that the CSA does indeed pay several millions of pounds compensation as ex gratia payments each year (see annual accounts), but Resolution believes that compensation paid out represents only the tip of the iceberg in relation to cases made.

22. Resolution is grateful to Ms Bovey for allowing the facts of her case to be brought to the attention of the Law Commission, since the facts of her case demonstrate the ill thought out and fragmented complaints process and highlight the fact that the CSA is a “judge in its own cause”.

23. Ms Bovey is a parent with care (PWC). She applied to the CSA in 2002. The CSA prepared an assessment. The NRP failed to pay and substantial arrears arose in the region of £20,000.00. Ms Bovey asked the CSA to take enforcement action. She pointed out to the CSA that the NRP was the sole legal owner of a property. She asked them to obtain a Charging Order over his property (September 2005). The CSA wrote to her in January 2007 and told her that they were considering legal action. Ms Bovey contacted the CSA by telephone and
told them to take urgent enforcement action because the NRP was believed to be selling his own home. In February 2007 Ms Bovey made numerous telephone calls to the CSA begging them to take urgent enforcement action. She continued with such requests over a number of months.

24. When the CSA did not take the requisite enforcement action, Ms Bovey attempted to obtain a Charging Order against the NRP's property herself. Her claim was dismissed by the Court because she had no locus standii. The NRP sold his property on the 5 June 2007. The CSA had not obtained a Charging Order. The NRP thereafter dissipated his assets. Mrs Bovey made a claim for financial loss under the principles in the Financial Redress Guide.

25. The CSA wrote to Ms Bovey’s Solicitors on the 3 August 2007 and said “I can see from our records that Ms Bovey contacted the agency in August 2004 to advise that the (NRP) owned (his property, the address of which was specified). It is clear that the agency should have considered placing a Charge on this property...”. Notwithstanding these comments, the CSA declined to make a special payment to Ms Bovey either in respect of alleged maladministration or in respect of financial loss. Instead, Ms Bovey had to go through a complex and protracted complaints process. Eventually the CSA responded (by the Complaints Review Team) on the 5 August 2008. They have decided to make a consolatory payment of £250.00 “as acknowledgement of the gross inconvenience caused by your client by the agencies failure to take prompt enforcement action in her case”. The CSA has not agreed to make a payment pursuant to the principles set out in paragraphs 188 to 190 of the Financial Redress Guide. They say that the principles require that “these paragraphs apply as they are dependent not only on there being a reasonable expectation of collecting maintenance, but also on the NRP having undergone a change of circumstances and no longer being able to pay maintenance and/or arrears of maintenance”. Ms Bovey contends that this approach adopted by the CSA flies in the face of the basic principles set out in paragraphs 15 and 68 of the Financial Redress Guide, where it states “the emphasis should be on trying to restore the customer to the position that he or she would have been in had the error not occurred...”. In this case it is clear that maladministration has occurred and this has been accepted by the CSA. It is clear that because the NRP was the sole
legal owner of a property, the CSA would have recovered the entirety of arrears upon the sale of the property, had they registered a Charging Order. Ms Bovey plainly satisfies the overarching principles set out in paragraph 68 of the Guide. The facts of this case illustrate the restrictive circumstances in which the CSA will agree to pay compensation and show the dangers of the CSA being a “judge in their own cause”. This case also illustrates the ill thought out and fragmented complaints policy. Firstly it seems that the CSA internal guidelines require claims for advance payments of maintenance to be considered by an entirely separate department from the department that considers claims for compensation under paragraphs 188 – 190 of the Guide. This is a policy that seems to be astonishing, causing as it does, additional delay. Another illustration of the problem appears from the fact that the decision of 5 August 2008 was made by the Complaints Review Team in Durham House, but the decision letter goes on to state that “there is no process of appeal” however stating that if she is dissatisfied with the decision she can invoke the agencies complaints procedure, i.e. by asking the matter to be considered by the Complaints Resolution Team, which would thereafter involve the right to go back to the Complaints Review Team. It is again an astonishing proposition to suggest that a decision made by the Complaints Review Team should be reviewed in the first instance by the Complaints Resolution Team. This is being further evidence of the ill thought out and fragmented complaints policy.

26. Resolution is deeply concerned that there is no coherent structured policy in relation to compensation payments made and draws upon the following principles

**Negligence**

27. The case of *Rowley v Secretary of State for Work & Pensions* [2007] EWCA Civ 598 established that the CSA owes no “duty of care” to users. This is despite the comments of Lord Justice Dyson in paragraph 74 to the effect that “That is not to say that there will not be cases where the CSA has acted incompetently and loss will be suffered as a result of its incompetence which might be recoverable as damages for negligence and cannot be compensated under the existing scheme”. Examples were given during the course of argument, for example, a classic case
would cover the situation where the CSA had allowed arrears of maintenance to become “statute barred” or had failed to take enforcement action allowing an NRP to sell his house and dissipate the assets when the CSA could have obtained a Charging Order had it acted with expedition. It was said that the sums usually at stake where there would be complaints of incompetence on the part of the CSA would be small relative to the cost of litigating to recover them as damages for negligence. However, no evidence was before the Court in this regard. The £3.5 billion un-enforced arrears figure indicates that compensation claims could be substantial, rather than trivial. Many of the claims dealt with by members of Resolution are for very substantial sums, as much as £20,000.00, £30,000.00 or £50,000.00. Even if claims were regarded as more modest having a value of say, £3,000.00 this logic has never been used as an argument to prevent, say, victims of personal injury from claiming modest amounts of compensation. It beholds the state to devise a system of compensation that produces proportionate costs. See Resolution proposals below. Incidentally Resolution takes issue with the comments made by the commission in paragraph 3.145 of the Consultation paper, to the effect that the Act made provision for interest to be paid on arrears thereby providing some measure of “compensation” for delayed receipt of maintenance. Although the Act did indeed make provision for interest to be paid on arrears, the powers given by Parliament have never been implemented.

Europe
28. Mary Kehoe took the case referred to above to the European Court of Human Rights. Judgment was handed down on the 16 June 2008 Kehoe –v- the United Kingdom 2010/06. She claimed that she had been deprived of the right to a fair trial because she had no right to have her issues resolved by a Court.

29. The Government submitted that the remedy for Judicial Review provided her with an effective means of vindicating her complaints of delay in the enforcement process (paragraph 40). The Judgment reflected that the Court was not “persuaded by the Applicants argument that it would have been onerous to expect her to bring applications to the Court every time that the CSA was dilatory…. If, over a certain lapse of time, this might require more than one application to Court, such right does not per se disclose any disproportionate burden or clog on the exercise of the right of access to the Court”.

10
30. It is respectfully submitted that this Judgment does not accord with reality. As it has been demonstrated in the case of Humphries & Others –v- Secretary of State for Work & Pensions (see below), that Judicial Review is not to be used except in an exceptional case, unless all of the other appeal rights have first been exhausted.

31. In reality, a dissatisfied complainant first has to comply with the CSA internal complaints procedure. He/She has to make a complaint to the Complaints Resolution Team. Although the CSA complaints procedure promises that complaints will be acknowledged within two working days and that a substantive reply should be provided within 15 working days, these time scales are rarely complied with. If no resolution is achieved then the matter has to be referred to the Complaints Review Team. In the practical experience of Resolution members it often takes up to a year (if not longer) for complaints to be resolved by the Complaints Review Team. The ICE Website states that complaints will not be entertained unless a final response has first been received from the Complaints Resolution Team at the CSA.

32. Once referred to ICE, it is not unusual for ICE complaints to take up to a year to resolve. Resolution notes with interest the 2008 annual report from ICE. Although percentage targets achieved are set out in paragraphs 7.3 of the said report, all these targets are given in respect of service standards but NOT in respect of “clear performance report”. Resolution finds this omission to be unusual.

33. It is the position of the Government that even if an ICE enquiry does not resolve a complaint then a complaint, must be made to the Ombudsman before Judicial Review proceedings can be commenced (Defendants Defence - Marshall –v- Secretary of State for Work & Pensions CO/5469/2006) “The Claimant had a convenient and much more appropriate alternative remedy in the form of the Parliamentary & Health Service Ombudsman. It is noted that the ICE report identified the PHSO as the appropriate body to contact for clients who wish to take their complaints further”. It is not unusual for complaints to the Ombudsman to take a year to resolve. Having exhausted these remedies, these fragmented
and ill thought out complaints procedures, a complainant is free to make an application to the Court for Judicial Review (following the representations made by the Government to the European Human Rights in Kehoe above). It is not unusual for Judicial Review proceedings to take a considerable period of time. As an illustration, see *Humphries & Others –v- Secretary of State for Work & Pensions* (proceedings issued 14 December 2005 - Judgment handed down 9 July 2008).

34. In summary therefore it appears to be the position that the remedy available to a dissatisfied complainant is as follows

- Apply to the Complaints Resolution Team (which may take six months to resolve).
- Apply to CSA Complaints Review Team (which may take six months to resolve if not longer).
- Apply to ICE (allow a year to complete resolution).
- Apply to Ombudsman (allow a year to eighteen months to resolve).
- Apply for Judicial Review (say 2 – 2 ½ years to resolve).
- Total – Up to 5 years

35. This is the process that the European Court of Human Rights believes can be completed by “more than one application to the Court”. Quite an astonishing proposition.

**Judicial Review**

36. Contrary to the position adopted by the Government in the European Court of Human Rights in *Kehoe –v- the United Kingdom* 2010/06 European Court of Human Rights, Judicial Review does not appear to be a remedy that is accessible or available to most citizens. Firstly the rules relating to costs are oppressive. In civil actions, the starting point is that if a case is successful costs will be paid to the “winner” by the “loser”. In Judicial Review cases, a Pre Action Protocol has specifically been approved to avoid the need for Court proceedings. If a Protocol fails to resolve a complaint, then even if legal proceedings need to be commenced, there is no principle that the “winner” will get costs from the “loser”.

12
This is particularly the case if a claim is resolved before a final hearing. This prevents the effective operation of access to justice by a “no win, no fee” agreement. Only those individuals fortunate enough either to be eligible for Legal Aid or those of substantial means are able to embark on this particularly expensive form of litigation. Resolution does however also recognise the special position given to organisations with no financial interest in the outcome – re Corner House.

37. The position of Judicial Review has been resolved in the case of Humphries –v- Secretary of State for Work & Pensions [2008] EWHC 1585 (Admin). Mr Justice Goldring concluded that “….There are good reasons why a Claimant… should normally first go to ICE…. To apply first for Judicial Review with its substantial costs would not seem to me proportionate. I have no doubt that it will only be the exceptional case that Judicial Review should be sought as a first resort”. Resolution does not agree with this logic, particularly relying upon the Judicial Review Pre Action Protocol. It is recognised in the Humphries Judgement that ICE often take a substantial period of time to resolve complaints. The Judicial Review Pre Action Protocol provides a quick and slick means of challenging a decision. The CSA is given a period of 3 months to rectify the situation and if that fails why should not a Claimant be free to instigate legal proceedings? If he/she is right in the issue of proceedings then he/she should be entitled to costs. If he/she is wrong in the institution of proceedings then, quite rightly, he/she will be condemned in costs. If the cost position was simplified to reflect the usual Orders made in litigation (the winner gets costs) then a flourishing body of work could be run on a “no win, no fee” basis. This has substantial and profound implications for access to justice.

The Parliamentary Ombudsman

38. The Law Commission appears to reflect that in cases concerning alleged maladministration, a dissatisfied citizen should apply to the Ombudsman (see footnote 5 page 101 of the Consultation paper) “It must, therefore, have been within the contemplation of Parliament when the 1991 Act was enacted that complaints about Maladministration could be referred to the Ombudsman”. Unfortunately this is not what happens in practice. The Ombudsman is most likely
to refer complaints to ICE. More reference will be made to ICE below, but to
Resolution this appears to be evidence of an ill thought out and fragmented
complaints policy. ICE is not a statutory body. The Parliamentary Ombudsman
has said (in correspondence from the Ombudsman to Resolution member 29
February 2008) that “the Ombudsman is a last resort and could not possibly cope
with the numbers of complaints were ICE not in place to resolve at least some the
complaints that are made about the CSA. The Ombudsman believes that ICE
should normally consider complaints about the CSA before she will consider
them”. It is a profound error of Judgment to conclude that a dissatisfied user of
the CSA can make a complaint to an Ombudsman. Very substantial non statutory
hurdles are put in place before a citizen ever gets near a complaint to the
Ombudsman.

39. Even if a complainant has gone all the way through the ICE procedure, then there
is no guarantee that an MP will refer the matter to the Ombudsman. This is
apparently in the discretion of the MP personally. Even if an MP agrees to refer
the matter, then there can often be (for good reason) substantial delays before the
matter is referred on – e.g. due to an MP’s ill health, absence from Parliament on
business etc. There are currently unacceptable substantial backlogs with the
Ombudsman’s office. It takes approximately two months simply to acknowledge a
complaint and then five to six months simply to allocate a caseworker. An office
which is set up, in part, to investigate delay must operate a quicker slicker
process.

40. Resolution is concerned that although a complainant may apply to the
Ombudsman (through an MP) there is apparently no guarantee that the
Ombudsman’s office will accept a complaint for investigation. The Ombudsman
office has been asked what criteria they use when deciding whether or not to
undertake an investigation into a particular complaint and whether such criteria
are published. The Ombudsman has written to a Resolution Member (13 August
2008) and said “I should explain that we do not have a publication of criteria used
to determine whether or not to undertake an investigation of a complaint because
the procedures used are under constant review”. It is constitutionally
unacceptable for the Ombudsman to retain a decision about whether or not to
investigate a complaint based on criteria which are not publicised. Complainants
should have the right to have complaints considered by the Ombudsman and a conclusion reached. A case worker will initially, simply consider whether the complainant’s complaint is one that will be accepted by the Ombudsman.

**ICE**

41. Resolution has great concerns about the effectiveness and capability of ICE.

42. First and foremost it has to be recognised that ICE is a non statutory body. Its jurisdiction is, to Resolution, unclear. By way of illustration the ICE Website says “You must first receive a final response from the CSA before we can deal with your complaint”.

43. The CSA complaints procedure is published on its Website. This policy states that complaints to the CSA should be addressed to the Complaints Resolution Team. This promises that complaints will be acknowledged within 2 working days and attempts will be made to provide a substantive response in 15 working days. Problems arise in practice however on a frequent occasion when the CSA does neither. A complaint can be escalated to the Complaints Review Team. The Complaints Review Team makes similar promises to acknowledge complaints within 2 working days and to respond within 15 working days but in practice (and Resolution would be interested to see statistics to show the extent to which these promises are maintained), complaints are not resolved within these time frames. It is Resolution’s position that even if the CSA has been given the opportunity to respond to a complaint, but has not done so, ICE will not accept a complaint unless there is a final response from the CSA. This can provide a substantial lacuna into which citizens can fall, for example, even if the CSA has been given an opportunity to resolve a complaint, but has failed to make a final decision, then even after a year has elapsed, ICE will still not accept a complaint because a final decision has not been produced in response. In practice it seems that ICE has developed an informal arrangement that if notice is given to the Strategic Complaints Liaison office at the CSA, then after 8 weeks have elapsed, a complaint will be accepted by ICE. However, this procedure is neither documented nor known about. This lack of clear policy has caused and continues to cause substantial difficulty, delay and expense.
44. Resolution is particularly concerned to note the terms of the 2008 “Annual Report” from ICE which refers to “Bounce Backs” (see paragraph 4.3”). ICE have reflected that for several years they had an arrangement with the CSA whereby it accepted referrals from complainants who were unable to secure a final response from or on behalf of the Chief Executive within a specified period. This “specified period” does not appear to be part of the formal ICE constitution or the CSA complaints procedure. In any event, ICE have simply recognised that the CSA have not been able to comply with their own complaints procedure and have astonishingly agreed that they will not accept complaints about the CSA until the complainant has gone through the agencies internal complaints tiers AND the agency had offered a final response to the “issues of concern” (see paragraph 4.4. ICE report 2008). As we have seen in this Submission, Parliament has declined to give Claimants a right to take a complaint to Court on the basis that a complainant can apply to an Ombudsman. As we have also seen, there is no right to take a case to an Ombudsman until ICE has prepared a report. As we now see a dissatisfied Claimant does not even have the right to make a complaint to ICE, if the CSA chose not to produce a “final response” to a complaint. This is a situation that Resolution regards as quite shocking. The fact that ICE has apparently agreed to this CSA request without (apparently) consulting with major stakeholders (such as those who refer cases to it) shows that ICE is not an effective body to pursue complaints on behalf of dissatisfied CSA users.

45. It has already been reflected by the Commission that ICE has no power to make decisions and can only make recommendations.

46. Resolution has information obtained from ICE from the Freedom of Information Act (response 19 November 2007) in which ICE say “Where we identify short comings in the service provided to a client, ICE makes recommendations about what remedy the agency should offer. Although our recommendations are not legally binding we have a VERBAL (our emphasis) agreement that the relevant agent or business will implement them in all but exceptional circumstances”. We asked for information from ICE about the numbers of cases over the last 3 years where the agency had not implemented agency recommendations, but ICE say they do not hold formal records of this data. We find their lack of information astonishing.
47. Resolution has a letter written by John Hanlon dated 14 December 2007 (member reference OWE341-1) in which he says "I gave the Child Support Agency a final opportunity to complete these actions. It has failed to do so. I regret there is now no further action I can take in respect of the complaint you referred to this office accept to advise you of the right to approach the Parliamentary and Health Ombudsman..." The ICE 2008 annual report discloses that ICE had to "exit" from 51 cases. This shows how ineffective the verbal non legally binding agreement is. Resolution has great concerns about the constitutional significance of this arrangement. The Court of Appeal has declined to impose a duty of care on the Secretary of State and appears to have recognised that this is because a dissatisfied citizen had the right to complain to an Ombudsman. In practice (as we see above) the Ombudsman will not investigate a case unless it has been investigated by ICE. ICE has the power to make recommendations which are not legally binding and they have no more than a verbal agreement that the agency will implement them, in all but exceptional circumstances (which are not defined). Resolution does not regard this position as being in any way satisfactory. Any arrangement should be legally binding and any agreement should be confined to writing – rather than being between unnamed individuals shrouded in secrecy.

48. In practice ICE does not make recommendations to the effect that compensation should be paid. Resolution has evidence that ICE will make recommendations to the effect that “the CSA should reconsider its decision”. This means the CSA is perfectly free to reconsider a decision and reach precisely the same conclusion. This puts both the CSA and ICE in this self satisfied position of both being able to claim a “success”. ICE can say that their recommendation to reconsider a decision has been complied with and the CSA is able to maintain its own denial as to liability.

49. Resolution is grateful to Ms Kennedy for agreeing to provide evidence of her case to the Law Commission. Ms Kennedy applied to the CSA in 1996. There was substantial and prolonged CSA maladministration and substantial arrears arose. Eventually Ms Kennedy complained to ICE. ICE prepared a formal report (22 March 2007). Amongst other things, ICE identified each of the criteria for an advance payment of maintenance. In respect of each ICE concluded that all of
the criteria for an advanced payment had been met. ICE wrote to Ms Kennedy and said “my office has approached the agency on several occasions to explore the possibility of an advance payment being made for some of the outstanding arrears. The agency has refused to make such a payment on the basis that it does not consider that on the balance of probabilities (the NRP) would have complied with the maintenance liability… however, it is my belief… that he would have done so”. ICE did NOT recommend that the CSA should make an advance payment of maintenance but the best recommendation that they could make was that “I recommend that the agency give further consideration to making an advance payment...”. The CSA did indeed comply with this ICE recommendation. The CSA did indeed reconsider the decision but reached precisely the same conclusion, namely that an advance payment of maintenance would not be made. Resolution believe that the significance of this is profound. Firstly it shows the generally weak position of ICE, who is not prepared to recommend that a payment be made, only that the CSA reconsider a decision. Secondly this case showed that even though ICE concluded that all of the criteria for an advance payment of maintenance had been met, the CSA disagreed. This matter was only concluded when Ms Kennedy instituted Judicial Review proceedings against the Secretary of State for Work & Pensions (CO 11442/07). At this juncture, the matter was concluded when the CSA did, after the issue of proceedings, agree to pay all of the arrears of maintenance and pay her legal costs. The CSA should not be a judge in its own cause.

50. The case of Kennedy is not unique. The CSA did not comply with ICE recommendations in the case of Ms Marshall; Marshall –v- SSWP CO/5469/2006. These cases are examples of the wholly unsatisfactory nature of the failure to comply with ICE recommendations to offer independent adjudication in respect of appeals.

51. ICE wrote to a Resolution Member on 1 September 2008 and said “I am writing to advise you that we have not as yet received the case papers from the agency (in respect of a complaint that was made to ICE in May 2008)... although the agencies delay is unacceptable we are still not in a position to start the investigation of (this) complaint because an investigation officer is not available to commence work on the case”. This letter once again demonstrates the
weaknesses and ineffectiveness of the current ICE system. ICE has no power to require the CSA to produce papers, which often adds to the complainant’s sense of frustration. It is not (apparently) policy or practice to recommend that the CSA should pay a nominal sanction or consolatory payment, in circumstances where the CSA fails to produce case papers within agreed timescales. This again adds to a sense of frustration on behalf of clients. The fact that even if the papers were available ICE would not be able to commence work on a case is yet further evidence of the inadequate position of ICE.

Financial redress revisited

52. Resolution has profound reservations to the effect that the CSA is effectively a Judge in its own cause. Resolution takes note from the National Audit Office reports (2007) into the compensation schemes for former Icelandic Trawlermen and the Coal Health compensation Schemes. In both these reports the NAO set out “lessons for the future” and made recommendations for good practice. The NAO recommended that when dealing with ex gratia schemes, there should be “explicit plans for dealing with appeals, including independent adjudication where appropriate”. Resolution is critical of the fact that the State has not complied with NAO recommendations. Resolution condemns the lack of independent appeals in respect of compensation claims when those that are making the decisions have an interest in the outcome.

53. Resolution has noted the Parliamentary Ombudsman’s fourth report – Equitable Life, which was produced in July 2008. Resolution notes with interest the conclusions that say (paragraph 9.1) “my underlying principle is to seek to ensure that the relevant public body restores someone to the position he or she would have been in, had the maladministration not occurred. If that is not possible the relevant body should compensate them appropriately”. In paragraph 4.3 the Ombudsman states “I generally begin by comparing what actually happened with what should have happened”. Resolution endorses this approach, which is precisely the “but for” test referred to in paragraph 15 of the Financial Redress Guide. Resolution notes with interest the conclusion that “the Government should establish and fund a compensation scheme...” (Paragraph 9.27) and most importantly the Ombudsman concludes that the scheme “should be independent and constituted along the lines of a tribunal or adjudication panel” (paragraph
9.33). This is precisely the type of scheme that Resolution has been recommending. It is precisely the type of scheme that has been recommended by the National Audit Office. It seems that responsible bodies such as the NAO and Ombudsman recognise that where there has been State maladministration which causes individuals financial loss, compensation should be paid and that there should be an independent right of appeal. Resolution regards these as fundamental principles.

54. Resolution accepts the Commissioners fundamental conclusion that “in principle, Claimants should be entitled to obtain redress for loss caused by clearly substandard administrative action” (paragraph 2.2).

55. Resolution supports the principle of a statutory compensation scheme, similar to the Criminal Injuries Compensation referred to in paragraph 3.42 of the Consultation paper. Resolution recommends that (in essence) the principles already set out by the Government in the Financial Redress for Maladministration Guide should be placed on a statutory footing, coupled with a right of appeal to an independent tribunal if a Claimant is dissatisfied with a decision made by a decision maker. It appears to Resolution that putting compensation on a statutory footing would have many advantages including

- It would comply with principles of good governance.

- Judgments would be rational, logical and transparent (and could be appealed if they were not).

- If the matter were placed before a Tribunal then, in principle, there would be no provision as to the award of costs. However, Resolution does take note of Regulation 38 and 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 which gives Tribunals the general power to make Costs Orders, particularly if one party has acted unreasonably, or has taken a point where it was misconceived.

**Serious fault**
Resolution does not accept the principles in relation to the definitions of “serious fault” contained within paragraphs 4.143 – 4.167 in the Consultation Paper. Resolution believes that the principles enshrined in paragraph 15 of the Financial Redress Guide represent an appropriate standard for the basis in which compensation would be payable. Resolution recognises that this can, like most issues, cause difficult decisions, but these issues would be “ironed out” over time. Resolution notes that, for example, in the Financial Redress Guide the Government sets out various time scales in which various steps should be taken – e.g. in annex C 3 various “waiting periods” are referred to. Resolution recognises that it is for policy makers to define their own standards, but states that if standards are breached, it should not be necessary for an injured Claimant to prove whether the standard was breached because of the “fault” or even “serious fault”. Resolution rejects the serious fault proposals put forward by the Commission.

Consultation issues 7.3

Resolution did support the imposition of a “duty of care” in relation to the Child Support Agency (see the position adopted when Resolution intervened in Rowley –v- Secretary of State for Work & Pensions), but this point has now been determined and Resolution believes that it is important to “move on” and to establish a coherent properly structured compensation policy within an appropriate appeals process.

- 7.4 The operation of joint and several liability is not regarded as relevant within the Child Support Scheme. An NRP will always be liable to pay compensation to the CSA (or CMEC). A parent with care has no direct right of enforcement against the NRP (Kehoe –v- Secretary of State for Work & Pensions).
- 7.5 Resolution has no more data on the frequency of use of misfeeds in public office as a cause of action.
- 7.6 Resolution has no representations to make in relation to misfeeds in public office.
- 7.7 The definition of “truly public” activity is not regarded as relevant to Child Support activities. It is plain that both parents are affected by CSA/CMEC activity.
- 7.8 No applicable
• 7.9 Conferral of Benefit Test – Resolution does not regard this as a relevant issue in Child Support claims.
• Serious Fault – Resolution does not accept the requirement for “serious fault”.
• Causation – Resolution adopts the principles set out in the Financial Redress for Maladministration Guide – paragraphs 15 and 68 and seeks adherence to the “but for” test.
• 7.12 – If (and only if) there is an adequate compensation scheme available for CSA users, then Resolution endorses the discretionary nature of Judicial Review remedies to be preserved for damages in the public law context.
• 7.13 – Resolution has no comment to make about the distinction between public law scheme and private law scheme, but does believe that pure economic loss should be recoverable (non economic loss should remain recoverable pursuant to the principles set out in the Financial Redress for Maladministration Guide, see for example paragraph 141, gross embarrassment, humiliation or unnecessary personal intrusion.

Other points
58. Resolution has anecdotal evidence that the consolatory awards that are payable to dissatisfied CSA users (as distinct to compensation for financial loss) are “out of line” with consolatory payments made in other spheres of public life, for example, the disappointed users of the NHS. The extent of distress and family life experienced by dissatisfied CSA users cannot be underestimated, and consolatory payments made are generally too low.

59. Judicial Review is not confined simply for claims for compensation, or in respect of claims made by parents with care. Resolution is deeply concerned by the extensive use of arbitrary power given to low grade civil servants in relation to Deduction from Earnings Orders. Resolution has no concern in relation to Deduction from Earnings Orders (in appropriate cases) in relation to maintenance payments as they fall due. What causes substantial problems is where the CSA has allowed substantial arrears of maintenance to arise. In those circumstances the CSA can impose a Deduction from Earnings Order both in relation to the assessment, and also in respect of arrears. This principle is set out in Section 31 of the Child Support Act 1991. What concerns Resolution deeply however is the provision contained in paragraph 32 (5) of the Child Support Act 1991. In
particular, Parliament intended that a liable person may appeal to a Magistrate Court if he was aggrieved by the making of a Deduction from Earnings Order against him OR by the terms of any such Order (our emphasis). When Parliament passed the relevant Regulations referred to in Section 34 of the Child Support Act 1991, it did not give an NRP the rights envisaged by Parliament. An NRP has no right to appeal against the terms of the Order, but can only appeal in very limited circumstances – e.g. whether the payments in question constitute earnings or if the Order was defective. Resolution believes that in all matters concerning the CSA either side should have the right to an independent appeals process.