



## **Overview of Consultation Responses: Family Mediators Drafting Consent Orders**

This paper gives an overview of the responses received to the FMC's Consultation 'Family Mediators Drafting Consent Orders' (see Appendix 1). All responses have been thoroughly considered and will continue to influence discussions but not every argument made has been included in this document. Instead, this document gives an indication of the views of respondents.

Some extracts from responses have been included; at other points, arguments have been paraphrased. Only quotes from FMC member organisations have been attributed (because there is a public interest in knowing what those organisations have said to the FMC). The remainder of the quotes have been anonymised. The FMC would like to thank everybody who submitted a response to the consultation.

### **The consultation and responses received**

The FMC consultation concerning mediators drafting consent orders was open throughout December 2016 and January 2017.

53 responses were received from individuals, small groups, or firms of mediators. Most were written by accredited mediators. In addition responses were received from FMA, the Law Society, NFM and Resolution.

The consultation asked three questions, and the table below shows the responses to those questions. Understandably given the complex nature of the issue, many

answers were not as black and white as ‘yes’ and ‘no’. These terms below therefore include answers that can be characterised as ‘probably’ or ‘probably not’. However, this table should not be read in isolation from the rest of this document, which provides the context in which, and some of the reasons for, these answers to have been given.

The consultation asked respondents to distinguish between matters involving children and those involving finances. A small number did so, but others did not make this distinction. A significant proportion of respondents only answered in respect of financial matters. The table below should therefore be read with this in mind.

	Yes	No	Not answered
1. Would the role of a mediator as an impartial third party in mediation be jeopardised by that mediator drafting a consent order, once a mediated agreement has been reached?	30	18	5
2. Is it possible to draft a consent order without giving advice on its terms?	20	26	7
3. Is it appropriate to draft a consent order without giving parties advice on its terms?	22	24	7

Comments specifically made in relation to matters involving children have been summarised separately below.

## **Matters relating to children**

The majority of mediators who discussed matters relating to children:

- highlighted the fact that the mediator has a professional duty to safeguard children;
- identified that the court has a duty to put the welfare of children first;
- pointed to the 'no order' principle and the fact that, if orders are made, they are not final (unlike financial orders); and
- emphasised the need for mediators to listen to children.

FMA also expressed concern that:

*'the holistic approach of mediators to issues relating to children, in which the precise child arrangements (and the "legal dispute") are usually a very small part of a comprehensive focus on the needs, cooperation, communication and responsibilities of the adult participants. The danger is that, just as in finance cases, the trajectory and core of mediation may be lost if the perfection of child arrangements in mediation summaries becomes the norm'*

However, a significant number of the respondents who directly addressed matters relating to children felt that it could be appropriate for participants to waive the confidentiality of a Statement of Outcome relating to child arrangements, and for this to be registered with a court:

*'Child-only Statements of Outcome have been presented by mediators working in court and used without modification by judges. This practice – with clients agreeing to waive confidentiality - could become the norm and would not affect the mediator's impartiality. The impact on mediators' practice might be minimal'*

One respondent argued this would reduce the need for consent orders and could:

*'increase confidence and commitment to mediation even though, if the agreement broke down and court proceedings ensued, the court would review the situation and not necessarily enforce the previous agreement.'*

Drafting consent orders for matters relating to children was generally thought to be less complex than doing so in financial matters. This, and that fact that orders made about arrangements for a child are not final, appeared to make mediators more willing to consider drafting consent orders in children rather than financial matters.

However, other respondents said their views about impartiality being jeopardised (see below) applied equally to financial and children matters.

## **Financial matters**

### **Question 1: Would the role of a mediator as an impartial third party in mediation be jeopardised by that mediator drafting a consent order, once a mediated agreement has been reached?**

Many responses were very passionate and expressed an absolute view, though at the opposite ends of the spectrum.

Those who thought that a mediator's impartiality would be compromised argued:

*'The impartiality of a mediator is sacrosanct... A memorandum of agreement reflects the consensus reached between the parties on a wide range of issues which themselves are acceptable to the parties. In circumstances where a mediator attempts to distil those issues into a legal framework this could seriously affect the dynamic of the mediator in the relationship with the parties.'*

*'I do not think that the mediator's neutral position can be maintained if there is an expectation that we somehow 'morph' into an advisory role.'*

*‘To be able to conclude the process (to draft the order), the mediator must have been mindful of the requirements for an equitable order from the very outset and so there must be an obligation to provide legal advice to both parties throughout the process. It is not possible to sever the relationship between conducting the mediation and drafting an order and so there cannot be impartiality.’*

*‘Knowing that he/she is likely to be drafting the consent order at the end of the process must be in the mind of the mediator during the mediation process hence influencing how the mediation is conducted. The fact cannot be simply ignored by the mediator.’*

*‘Drafting a consent order ... will impact on the quality of the process of mediation. The quality is maintained by the mediator taking no responsibility for the outcome and by their perceived and actual impartiality. The decision rests with the parties. If mediators drafted consent orders, their role in the eyes of their clients would change. They would attribute them with more power than mediators should have, enabling mediators to have more influence than they should have.’*

*‘In parallel with his relationship with the participants, the Mediator has a duty, unlike the solicitor, not to the Court but to his professional process. In this sense he is not answerable to participants in the way that solicitors are to their clients: they can never exclusively own his loyalty, though they can expect that he will faithfully deploy his art and skills in their service. To permit a family mediator to draft a consent order would undermine those distinctive features of his role. He cannot have a relationship with participants at one minute and a relationship with clients the next – the two roles are so fundamentally different that one would fatally undermine the other.’*

FMA said concerns like these were *‘about the impact of the issue on “the heart and soul of mediation.” Mediation is a dispute resolving process; it is not aimed at producing a Court Order.’*

Some mediators reflected on the practical problems of drafting consent orders:

*'If, as a mediator I could draft orders, I am sure that, before doing so, I would feel obliged to have a session with my clients where I spelt out in a great deal more detail than I do when simply giving legal information the particular implications of each clause for each person. I fail to see how I could do that without losing impartiality.'*

*'I do think impartiality could be compromised albeit inadvertently. Drawing up a consent order is not just about reflecting the agreement. Issues such as practicality of implementation, future liabilities, fallback options, enforceability, child support options, duration of spousal support, possible future variation, need for and enforceability of undertakings - are just some of the things to consider on behalf of each person.'*

*'A mediator must remain impartial at all stages. Drafting an order must damage that duty of impartiality. What is the mediator to do if he/she recognises an obvious problem in the final draft terms? Eg such that there is an obvious advantage to one party and disadvantage to another?'*

*'Financial consent orders can contain clauses setting out possible consequences if certain actions agreed by the parties are not put in place within specified time schedules and I wonder how impartial this may then appear to clients. A lawyer will look at a draft order from the point of view of enforceability, which is essentially "partial" rather than impartial.'*

NFM noted that:

*'Clients may have reached agreement in mediation but when the terms need to be incorporated into a consent order, far more detailed legal questions need to be asked. How the Order is worded can have severe ramifications for either party and it is difficult to see how a mediator could address that impartially and avoid giving advice. Inevitably this will also lengthen the*

*process for the clients and could result in the mediator having to have a detailed exchange of emails or further meetings with the clients to ensure that the legal documentation corresponds with the clients' agreement.'*

Respondents who thought a mediator's impartiality would not be breached viewed drafting a consent order as a neutral process:

*'the role of the mediator will be clearly defined [so] that they are not advising on the consent order, nor are they representing one parties interests, simply that they are putting into legal effect what has been agreed'*

Some described the drafting of a consent order, on a without prejudice basis, and on which participants are urged to get legal advice, as having no different status to that as Memorandum of Understanding. They argued the client then has a choice as to whether to take advice on the consent order or lodge it with the court as drafted. Resolution encapsulates this point as follows:

*'The mediator's role, i.e. limited to that of a neutral draftsman, and the status of the draft consent order, must be clear to both participants in the mediation. This would follow existing arrangements for the drafting of a Memorandum of Understanding that:*

- the document is private and confidential and provided on an evidentially privileged and 'without prejudice' basis;*
- the document does not record or create a binding agreement between participants; and*
- it is intended to set out the participants' proposals so that they have an opportunity to reflect and obtain independent legal advice on the proposals which they are recommended to do before taking any steps to enter into a binding agreement, whether through solicitors or between themselves.'*

The following was a typical argument advanced support of mediators being able to draft consent orders:

*'It is important to note that the legal status of a MoU with a draft order attached is no different to the legal status of MoU without a draft order attached, which is likely to be in more general and potentially less detailed terms. A more general MoU leaves scope for those in mediation to find it more difficult to take legal advice on the terms of it, and more scope for future dispute especially if those in mediation do not have the resources or the inclination to take legal advice. It is not providing the best possible service to clients to leave them with potential issues that have not been considered and could have been resolved if they had been considered...'*

Most of the respondents who did not believe that a mediator's impartiality is jeopardised by drafting a consent order said that safeguards should never the less be put in place.

The Law Society said that:

*'It is possible for a mediator to provide legal information that will allow the parties to judge whether the information in the consent order is legally compliant, and if there is a risk that the court may reject it. A mediator, if they feel knowledgeable enough to do so, may tell the parties how applicable principles of law tend to be applied in the court. If the parties want to receive advice as to how this relates to their consent order then the mediator must explain that they will each need to instruct an independent legal adviser to help them.'*

Resolution looked to situations where the mediator has concerns about outcomes:

*We suggest that circumstances where the mediator has a concern about the intention of either individual to use mediation as a means to gain an unfair, unbalanced or inappropriate outcome would be identified long before any*



*proposals or arrangements were to be recorded in any proposed consent order. But, alongside any proposed changes to the Code, the FMC should consider:*

- *identifying and giving guidance on where a mediator should decline to draft a consent order and where it will not be possible to be a neutral draftsman, with the participants recommended to consider one instructing a solicitor to prepare the consent order with both taking their own legal advice;*
- *giving guidance to mediators on issues and risks to consider before agreeing to prepare a consent order before, during or at the end of a mediation; and*
- *training needs around preparing consent orders and other mediation outcome documents.*

One respondent argued that when a model of directive mediation is used, drafting consent orders is a logical step and that discussions about the terms of the consent order can form part of the ongoing mediation process. This respondent said that in these circumstances a mediator is reinforcing neutrality by dealing with the consent order, and the issues arising from it which may not have been in the discussions leading to the mediation outcome document, which he argued was in the classic tradition of independent neutral mediators.

**Question 2: Is it possible to draft a consent order without giving advice on its terms?**

One respondent reflected the views of many by saying:

*‘At the heart of this question is the never ending debate about what is advice and what is information and where the lines blur.’*

This was borne out by responses which illustrated the contrasting views on this issue.

Reflecting a typical view from among those who thought advice was necessary, one respondent said:

*I firmly believe that it is not possible to draft a Consent Order without giving advice on its terms. Lay clients do not understand the implications of eg. an extendable or non-extendable term order in maintenance. They often don't understand the dismissal of claims, and whether for example, if there was a maintenance order they may be able to make a claim under the Inheritance Act. ... Some of the language we use is in legal jargon and the clients need to understand the clauses, the provisions and what they are signing up to.*

Similarly, NFM argued:

*'There are many clauses in a Consent order that can be drafted pro one or other party. The mediator would not be able to address this without giving advice on the advantages and disadvantages of a particular clause. This would not be simply "information giving" as is permissible in the mediation process itself because of the implications for either party of the wording on the Consent Order. There would also be serious risks of potential liability for the mediator in the event of error.*

*The vast majority of MOU's on financial matters do cover all aspects that need to be taken into account by a court before final orders are made. They are not however written in the arcane language used by courts and solicitors.'*

The complexity and nuances of consent orders were cited by a large number of respondents to the consultation as being reasons why it was not possible to draft such orders without giving advice. Many examples of complexity were given. FMA said '*drafting is not a simple task*' and pointed to a recent case [*Minkin v Lesley Landsberg (Practising As Barnet Family Law)* [2015] EWCA Civ 1152]) in which the courts recognised this.

In absolute contrast, other respondents argued:

*'it is possible to explain each aspect in neutral terms, explaining its meaning, and how it will operate, without saying that any option would be better or worse for someone.'*

Similarly, Resolution said:

*'It is not the mediator's role to give advice, nor should it be. However, with understanding of the mediator's role as a neutral draftsman and the caveats in relation to seeking independent legal advice and the precise status of the document in place... it is our view that it is possible to draft a consent order without giving advice.'*

Others explained how this could work in practice:

*'The terms of the consent order could be part of the negotiation between clients, so that in effect it would form part of the mediation agenda to be covered during the final session once an agreement in principle had been negotiated. In this way the precise legal terms and effect (i.e enforceability) can be considered and explained as part of information giving, as well as being evaluated by both parties during the mediation process.'*

Most respondents who thought that consent orders could be drafted without providing advice said that parties would be encouraged to seek legal advice on the draft (which would remain confidential unless the parties waived this confidentiality), but would be free to take the draft to court without advice if they chose to. They point to the fact that Statement of Information for a Consent Order in Relation to a Financial Remedy (Form D81) requires the parties to state how the attached proposed consent order was reached, and the fact the parties should disclose that it was reached through mediation and the order drafted by the mediator.

Other respondents felt that it was possible to draft a Consent Order without giving advice in theory, but would feel uncomfortable about this in practice. Some of these respondents indicated that this was because they might believe that the outcome of mediation was excessively in one party's favour. One such respondent said:

*'Whilst such circumstances are not common, nor are they entirely uncommon, you can have a party who feels incredibly guilty for calling time on a long marriage... I would feel very uncomfortable being asked in such circumstances to draft such a consent order.'*

Similarly others felt that to draft consent orders without giving advice would mean that mediators would fail to protect vulnerable clients, and would be unprofessional.

In contrast, other respondents felt that if mediators had done a good job in mediation, they would have helped participants to consider in enough detail what the agreement will mean, with the draft consent order providing no surprises for any participant. The mediator would then explain the meaning of each part of the consent order, with participants again encouraged to take legal advice if this raises an issue for either of them.

### **Question 3: Is it appropriate to draft a consent order without giving parties advice on its terms?**

Responses to this question broadly fell in to two categories: no, it is not appropriate and it would be a dereliction of duty to do this; or yes, clients want this and safeguards could be put in place.

Those who fell in to the former category were concerned about the final nature of financial orders and were concerned that parties would not take or have the opportunity to take legal advice on the draft:

*'The drafting of a Consent Order is a legal procedure that should be carried out by a lawyer. It involves the parties entering into a legally binding*

*relationship with one another which, because of the inherent risk of a conflict of interest, requires each party to have had the benefit of separate legal advice from an independent legal advisor.'*

*'It is wholly unsafe to drive the parties into a binding and enforceable court order without firstly giving them the opportunity to seek independent and partial legal advice. Whether they choose to do so is a matter for them, but this should not in my view be a decisive factor in handing the responsibility to the mediator. Far better for mediators and local solicitors to work together in providing a user-friendly and good-value service, whereby the mediator mediates and the solicitor advises.*

*'It is not appropriate for anyone drafting a consent order to not have a view on the certainty, clarity and enforceability of its terms, even if that advice is that the terms are solid.'*

Those who answered it was appropriate to draft a consent order without giving advice highlighted client choice:

*'Yes – clients want it. They are frustrated to be told they have to ask someone else to draft the key document that reflects the agreed outcome.'*

*'Parties should always be encouraged to obtain independent advice either before or after the order is drafted, but before they sign it and submit it to court. If they do not want to take independent advice that is their choice, but should not prevent the mediator drafting the order.'*

Others who thought it was appropriate pointed to safeguards that could be put in place, including telling participants they should seek legal advice, and introducing a cooling off period before the order could be made. One respondent also said:

*'The mediator should also make clear that whilst drafting the consent order, they will not be taking any further steps. There is a temptation, especially for*

*family lawyer mediators, to be 'helpful' and try to see the matter through to a concluded order, like they do in their non-mediation work. However it has to be the role either of the parties or the solicitors they instruct to take the steps from beyond the draft to the filling in of form D81 and the application to court.'*

The Law Society argued that a competent mediator would be able to protect clients:

*'Yes, as long as the parties are fully aware that they will not receive advice; have the advantages of instructing an independent lawyer explained to them; and the mediation has been completed to the satisfaction of the mediator'*

*'Before a mediator agrees to draft a consent order for both parties at the end of a mediation they must be confident that the parties understand the limits of the retainer - in particular that the mediator will not be providing legal advice and that the parties understand the difference between being given information and advice. The consent order will be the product of the agreement reached at the end of a successful mediation, plus any other relevant information provided and other agreements reached in finalising the consent order. Any mediator who fails to do this will have failed in their duties.'*

### **Other relevant issues**

The consultation document was deliberately narrowly focussed on three issues of principle, but many respondents set their views in a wider context.

Some respondents thought that the questions asked were inappropriate. These respondents had absolute views – at both ends of the spectrum - on the substance of the consultation. On the one hand, some people felt that to even ask these questions was a threat to the model of mediation where proposals are reached, and on the other some felt that to ask the same questions was antiquated to the point of irrelevance given it was so obvious that mediators should draft consent orders.

### **The status of documents**

A number of respondents reflected on the nature of documents produced at the end of mediation. The same view was often expressed by those who thought mediators should be allowed to draft consent orders and those who thought they shouldn't. This view was that, whatever final documents are called, they should be confidential, without prejudice as to legal proceedings and non-binding unless the parties agreed otherwise.

### **Need/demand and how this can or should be met**

There was a broad consensus that mediation either accompanied by or followed by legal advice was an 'ideal' combination with clearly defined roles for mediators and lawyers who both contribute to the process:

*'In the ideal model where a successful mediation is supported by independent legal advice, it is easy to see how the roles of mediator and lawyer are quite distinct and separate. The mediator helps the parties reach agreement, and the lawyer – one for each party – advises on the law and advances their individual client's interests.'*

There was however a general recognition that this model was beyond the reach of many people because of the cost of this:

*'We do not live in a perfect world and it is not always possible to work with a "perfect" system. Whilst we should strive to achieve this there may be occasions where we have to look at a system that is simply "good enough" to enable clients to resolve conflict (which must ultimately, as mediators, be our priority).'*

Respondents also recognised that some people choose to take mediated proposals to court without turning these in to orders, attempt to draft orders themselves, or turn to the market of unregulated people such as McKenzie friends, all of which carry risks. For some, 'mediators need to be at the forefront of assisting those in need of support and resolution facing family breakdown' but for others, this is an

inappropriate step in to the legal arena, which risks blurring the lines between the role of mediator and lawyer to the ultimate detriment of those same people.

One respondent said:

*'We need to respond to what clients need and want. I cannot recall a case, at least with married couples where property is involved, where their desired end point is not to have a consent order. This is the only pathway to a legally watertight outcome and, where appropriate, a clean break.'*

Others took a different approach, saying that clients are looking for a conclusion (rather than specifically a consent order) and that mediators must work on that basis that:

*'our MOU, and the guidance we give our clients as to the pathway beyond mediation, is as future-proofed as it can be from becoming stuck or unravelled. We cannot just get our costs paid, close our file and not care.'*

Many mediators suggested that the family mediation community ought to look again at the documents that are produced at the end of the mediation, with several suggesting that much more detailed Memoranda of Understanding - with the level of detail akin to that of consent orders – are required.

NFM's approach would be to focus on documentation other than consent orders:

*'The changes to legal aid in 2014 and the general unwillingness of the public and clients to seek legal advice because they fear the costs, exposes a different problem for the courts and government who are now faced with an increased numbers of litigants in person. The solution to this problem does not lie in mediators providing drafting services.'*

*We would suggest that rather than mediators drafting consent orders that, where clients are self representing, the Courts consider using the clients MOU's*



*and OFS' as the basis for the consent order and that the MOJ and Judiciary look at ways in which mediated outcomes can be used more efficiently in the legal process.*

*Mediation by its nature provides clients with options to develop more flexible agreements and arrangements that suit them and their circumstances and providing that the outcome which has been agreed by the parties is not manifestly unfair to one or other party could be used as the basis for final settlement or Order. Fully accredited mediators are aware of the parameters that the courts use and provide information as appropriate to guide clients to fair settlement.*

*We completely appreciate the need to provide clients with a more holistic service and would wholeheartedly wish to achieve this but do not believe [allow mediators to draft consent orders] this is the best way to achieve it...'*

FMA argued that the 'focus should revert to how mediation can be supported by (cost) effective advice by lawyers'. This argument was reflected in a number of individual responses.

The Law Society took a different view, saying:

*'Our view is that it would not be in the interests of participants or in the public interest to introduce a prohibition [on mediators drafting consent orders]. Even if it were desirable, in practical terms, it may be too late to seek to turn back the clock: whatever the formal position of the FMC organisations, individual mediators are already writing consent orders. Mediators draft memorandums of understanding that are agreed to by both parties at the end of successful mediations. The practical question is how to regulate an activity which is already happening, and how to protect clients who after mediation may not go to a lawyer and go to court with a MoU which is insufficient for the purpose of securing a consent order.'*

Resolution indicated there was scope to work on mediation outcome documents, saying:

*'We believe that our solicitor members would value a clear national standard setting out the required drafting, content, and format (including suitable caveats) of mediation outcome documents that would make it possible for cost effective advice to be given on mediated proposals.'*

### **The use of precedents**

Several respondents pointed to the availability of precedents that could help mediators draft documents, whether these are draft consent orders or detailed MoUs. Others reflected that detailed MoUs drafted using such precedents could be de facto draft consent orders. One respondent thought 'If the FMC issues precedents, these could be used by mediators and this would reduce the subjective element of drafting [consent orders]'

### **The blurring of mediator/lawyer roles and the risk of discouraging participants from taking legal advice**

A number of respondents felt that drafting consent orders was a job solely for lawyers (despite recognition that this is not a reserved legal activity) because of the legal complexities involved, and expressed concerns about the dilution of the role of mediator or lawyer:

*'The mediation task and the drafting of consent orders are separate and distinct professional interventions with incompatible objectives and requiring different professional qualifications.'*

*'The two professions are distinct from each other. Lawyers should continue to provide a layer of scrutiny to the agreement parties have reached. It is for lawyers to draft, produce and advise on legal documents, not mediators.'*

*'Mediation is not a legal service, or legal skill. It is a distinct professional skill set with a distinct purpose from that of a lawyer. Undermining the legal role*

*potentially blurs boundaries, produces confused processes which in turn makes for an unsafe process for the public.'*

Another argument advanced by a number of mediators was that it was not appropriate for mediators to draft consent orders because that is not the purpose of mediation:

*'Mediation is not a replacement for legal advice or legal scrutiny. Mediation is just a process that people can use to flesh out what they and their changing family need, to work out what works for them and to fashion out a unique way forward. It does not use an objective set of criteria because the third party is not a decision maker - that is what the law does. Therefore a consent order that needs to satisfy an objective set of criteria should be drafted by a lawyer acting in their capacity of legal adviser.'*

A number of respondents were concerned that if mediators were allowed to draft consent orders, participants would choose not to take legal advice, preferring instead the convenience of a 'one stop shop':

*'Moreover, and critically, having a mediator draft an order by this approach would (a) inevitably discourage the participants from seeking independent legal advice; (b) increase the prospect of participants proceeding to submit applications for draft orders without taking advice; or (c) encourage participants to act upon the terms of draft orders without seeking judicial endorsement of their terms.'*

Others said drafting consent orders was entirely compatible with the role of the mediator and the philosophy that mediation should empower participants to make their own decisions:

*'To me, the purpose of mediation is to give couples autonomy over decisions they make when they separate. Part of the mediator's role is to empower and facilitate clients to make their own decisions about what will be best for their*

*particular family when they separate. If they have made a decision that it is not right for them to consult with lawyers then the system which exists should not remove their right to make that decision. If having been provided with information about the process for formalising matters and about the role of lawyers clients still choose not to involve lawyers, then again I believe mediators should be able to assist their clients in finalising matters by way of a Consent Order ... provided they do not provide advice as part of this role'.*

One respondent reflected on different models of mediation, and specifically looked to directive mediation:

*'There is no one model of mediation that is appropriate in all cases. For some mediators the traditional passive mediation is appropriate and this is what is wanted by a number of clients. But there are some clients who want a stronger steer and a more directive approach, and this is provided by suitably qualified mediators experienced in doing so. This directive element includes knowing what is likely to be in a consent order following agreements reached in mediation. There is no reason why the lawyer mediator should not then draw up that consent order, explaining to the couple in the safety of the mediation room and the security of the privilege of mediation what are the merits and disadvantages of the respective clauses and terms of the consent order.'*

### **The context of the consultation**

FMA cautioned that the consultation questions were asked in an '*unsatisfactory state of the wider jurisprudential debate*' about the roles of lawyers and mediators, including whether lawyers should be drafting without providing advice; whether a conflict of interest between the parties exists if they have reached mutually acceptable proposals; whether mediators do in fact give advice, albeit non-partisan advice; and whether mediators always deal with legal disputes. Its concern was reflected by a small number of other respondents.

The Law Society and others felt that the consultation was not wholly relevant, because in practice mediators do draft consent orders, a practice which is market led, and that any attempt to prevent such a practice would not be likely to succeed.

### **Next steps**

The outcome of the written consultation shows the wide range of views held by those in the family mediation profession about mediators drafting consent orders. The FMC is keen to understand the perspectives of other interested parties and so is endeavouring to consult with them. The FMC is conscious of the complex nature of the issue and the many potential consequences of taking any steps in relation to this. The FMSB is also aware that any steps may have consequences for the professional standards of family mediation. It is vital that the potential effect of any decisions are explored and considered in as much detail as possible before any final decision is made. The FMC, including the FMSB, will therefore continue its work on this issue before any final decisions are made.

## **Appendix 1 – Consultation: Family Mediators Drafting Consent Orders**

### **Introduction**

The Family Mediation Council recently updated its Code of Practice (the Code). As part of the discussions when updating the Code, the FMC Board considered the question of whether mediators should be able to draft consent orders at the conclusion of mediations that they have conducted. The old version of the Code was silent on the point, but there has been much discussion in the mediation community recently about whether or not the drafting of consent orders by mediators is currently, or should be, allowed. The FMC decided that, before making any changes to the Code in relation to this issue, it should first consult those with an interest in family mediation. The FMC is therefore asking family mediators and others with an interest in family mediation, from any perspective, whether family mediators should be drafting consent orders.

### **Background**

Under a traditional model of family mediation, participants reach mutually acceptable proposals over their dispute with the assistance of an impartial third party (the mediator) who informs them what the law says, but does not advise on how it might apply to any individual. At the end of a successful mediation, a confidential summary of proposals is prepared and participants are advised to obtain independent legal advice on the proposals. If satisfied, participants can then apply to the court for a consent order to be made – one which both participants have agreed to, based on the summary produced by the mediator. Participants will usually be advised to seek independent legal advice on the preparation of a consent order. Not all will do so.

For some time, there have been anecdotal reports of mediators preparing consent orders themselves. Some mediators draft consent orders as part of the process of producing the confidential summary, with clients then choosing to waive this confidentiality and applying to court for the draft to be made into a court order.

Others change the basis on which they are instructed from mediator to lawyer, and, as a lawyer, then draft a consent order which clients can take to court. However, there is no clear evidence of how widespread either practice is.

In August 2015, the Solicitors Regulation Authority (SRA) published guidance which says that a solicitor who is also a mediator may act to draft consent orders for clients at the conclusion of a mediation, on a limited retainer and in their role as a solicitor. The guidance also sets out the criteria to be met in such cases.<sup>1</sup> Crucially one such criterion is that the solicitor is solely reflecting the terms of the consensus reached in drafting the consent order, and not offering either participant advice on its terms.

Although the SRA makes decisions about the regulation of solicitors, and how they may act in that capacity, family mediators who are members of the FMC's member organisations must follow FMC's Code of Practice when acting as mediators. The FMC must therefore make its own determination about whether it is appropriate for family mediators to draft consent applications for clients where a mediation has resulted in a consensus.

### **The issues we are consulting on**

This consultation concerns the model, or models, of mediation that family mediators use. The FMC is keen to learn the views of family mediators, members of the public, and anyone else with an interest in family mediation, about whether drafting a consent order after conducting a successful mediation is likely to affect the role of the mediator as an impartial third party in that mediation, and whether it is appropriate for the mediator to draft a consent order without giving the participants advice on its terms.

A fundamental principle of mediation is that mediators do not give advice to participants. Mediators can give information - including about the law - to the participants. They can tell them of the factors that they could consider. But mediators do not give advice on what is in a person's best interest. Instead, they use their skills in facilitation to assist participants in reaching an agreed solution, while remaining neutral as to the outcome throughout.

The traditional view has been that to draft a consent order for participants at the end of a mediation breaches this principle, as advice on the draft would have to be given,

---

<sup>1</sup> See 'A Question of Ethics' <https://www.sra.org.uk/solicitors/code-of-conduct/guidance/questionofethics/August-2015.page>

and a mediator would thus be obliged to tell each participant if the proposal reached was favourable or unfavourable to them, which would make it impossible for the mediator to remain an impartial third party. It is therefore argued that allowing mediators to draft consent orders would significantly change the role of the mediator, to one of a professional who has, or purports to have, the ability to provide legal advice or assistance. This is a fundamental issue for mediators, and one that mediators who are opposed to colleagues drafting consent orders believe has very wide implications for the future and unity of the profession.

Furthermore, the drafting of a consent order once a consensus has been reached might deny the participants the opportunity to reflect - before the consent order is drafted - on whether the proposals are right for them.

Four main arguments have been raised on the other hand. First, it is argued that, having been told all relevant information by the mediator, participants should be free not to get legal advice if they so choose. Second, a mediator is capable drafting a consent order without giving advice, because the consent order does no more or less than simply reflect the proposals that have already been freely reached. Third, if mediators are able to draft consent orders, this would increase the choices available to participants. They could still be encouraged to take independent legal advice (as now) but, if they chose not to, they could have their agreement turned into a draft consent order by a professional and regulated mediator, rather than drafting it themselves or relying on an unregulated McKenzie Friend. Finally, it is just as possible for a mediator to draft a consent order that participants reflect on before it being made into a court order as it is for participants to reflect on a summary, and for the terms of this to be turned into a consent order by somebody other than the mediator.

### **Limits to consultation**

This consultation is limited to the three questions set out below. It is not a consultation about competency - if it is agreed that, in principle, mediators can draft consent orders, there is no question that any individual mediator must be competent to do so in any specific case. The FMC must therefore ensure that there is in place a



framework that regulates this practice.

Neither is it a consultation about allowing mediators who are also lawyers to do something that mediators who are not also lawyers cannot do: the drafting of consent orders is not an activity reserved only to lawyers, and mediators who are not lawyers may train to draft such orders.

Finally, this is not a consultation about the effect of the potential changes on insurance premiums.

Issues of competence, insurance and practicalities will all have to be addressed should the FMC decide in due course that family mediators should be allowed to draft consent orders. Our focus at the moment, however, is to look at the issue of drafting consent orders in light of the role of the mediator as an impartial third party and whether drafting a consent order upon reaching a consensus changes that role.

### **Consultation questions**

These are the questions on which your views are sought. When answering, please indicate whether you think there are any different considerations in respect of drafting consent orders relating to financial matters and drafting consent orders relating to arrangements for children.

1. Would the role of a mediator as an impartial third party in mediation be jeopardised by that mediator drafting a consent order, once a mediated agreement has been reached?
2. Is it possible to draft a consent order without giving advice on its terms?
3. Is it appropriate to draft a consent order without giving parties advice on its terms?

Please explain the reasons for your answers.