Covid-19 and the Family Justice System – Meeting the Challenge: Potential Contributions by the Family Mediation Profession

Members of the family mediation profession have been considering how to support the Family Justice System in meeting the challenges caused by the Covid-19 pandemic and the expected major inflow of work during and immediately following the associated lock-down.

The proposals set out below follow the clear recommendations regarding MIAMs made in Sir David Norgrove's Family Justice Review in 2011[1].

The objective of our proposals is to free families in conflict and their children from burdening, and being trapped in, the Family Justice System during the pandemic and beyond, save for those cases which need access to the Family Court. Those who actually require the Family Court need access to a system which is working well and is not over-burdened with cases which could and should be resolved elsewhere.

The key to achieving that objective is the diversion of potential litigants away from the Court system to Family ADR options – ideally before an application is made, but otherwise at the earliest stages of any Child Arrangement or Financial Relief Application.

Given that there was already a crisis in Family Justice, significantly preceding the COVID-19 crisis, the need to tackle this problem creates an opportunity to establish whether such measures could relieve the burden on the Courts in the longer term.

We believe the objective of supporting potential litigants to arrive at their own sustainable outcomes can be achieved by three fundamental steps:

A. Making Mediation Information and Assessment Meetings (MIAMs) free to all Applicants and Respondents at the point of delivery, so that the resistance on the part of Respondents to having to pay for a meeting (to deal with an issue that they might prefer not to have to face) is avoided.

Extract from
Family Proceedings Rules:

3.1.(1) This Part contains the court's powers to encourage the parties to use alternative dispute resolution and to facilitate its use.

(2) The powers in this Part are subject to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.

Court's duty to consider alternative dispute resolution

3.2. The court must consider, at every stage in proceedings, whether alternative dispute resolution is appropriate.

When the court will adjourn proceedings or a hearing in proceedings

3.3. (1) If the court considers that alternative dispute resolution is appropriate, the court may direct that the proceedings, or a hearing in the proceedings, be adjourned for such specified period as it considers appropriate—

(a)to enable the parties to obtain information and advice about alternative dispute resolution; and

(b)where the parties agree, to enable alternative dispute resolution to take place.

(2) The court may give directions under this rule on an application or of its own initiative.

(3) Where the court directs an adjournment under this rule, it will give directions about the timing and method by which the parties must tell the court if any of the issues in the proceedings have been resolved.

(4) If the parties do not tell the court if any of the issues have been resolved as directed under paragraph (3), the court will give such directions as to the management of the case as it considers appropriate.

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/217344/fjr-exec-summary.pdf, see paras 115,116

B. **Maintaining vigilance within the gate-keeping process** and robustly enforcing the statutory requirement that Applicants attend a MIAM before making an application, unless exempt[2].

C. **The provision of a remotely accessed Duty Family Mediator Scheme** which would facilitate the immediate provision of information about family mediation or other DR options before parties become too entrenched in the litigation process.

This submission deals with those three measures in turn.

The submission should be read alongside the reports of the Private Law Working Group (June 2019[3] and March 2020[4]) and also the Creating Paths to Family Justice recommendations (briefing paper here). Together, these reports explain the context for and the research and thinking behind many of the statements in this paper.

Making Mediation Information and Assessment Meetings (MIAMs) free to all Applicants and Respondents

Following on from the recommendations in the Family Justice Review, in 2014 the Family Mediation Task Force[5] recommended that MoJ should consider paying for all MIAMs for a period of twelve months.

FMC research suggests that when family mediators see ***both*** clients for a MIAM they have a high conversion rate of 73% to mediation[6]. The issue has been that, very often, one person (usually the potential Respondent, who is not going to pay a court application fee) refuses to attend a MIAM at an early stage, or refuses mediation, often on the basis of perceived 'cost'[7]. The research also suggests that, where mediation is undertaken, it is successful in nearly three quarters of cases.

Given this, if both parties to a dispute were to attend MIAMs, the potential to divert cases away from the courts would be substantial. The PLWG has been discussing extending the obligation to attend a MIAM to Respondents, and mediators have argued for this for some time, but there is considerable resistance to this idea because of perceived issues relating to access to justice. In our view an even better way to improve take up of MIAMs, and thereby the take-up of family mediation, is for MIAMs to be provided to both parties free.

Mediators typically charge a significantly discounted fee for MIAMs of around £120 per person; this is a rate which most mediators would recognise as economically viable (it is about half what most family lawyers would charge for

Extract from Practice Direction 3A

8. The adversarial court process is not always best suited to the resolution of family disputes. Such disputes are often best resolved through discussion and agreement, where that can be managed safely and appropriately.

9. Family mediation is one way of settling disagreements. A trained mediator can help the parties to reach an agreement. A mediator who conducts a MIAM is a qualified independent facilitator who can also discuss other forms of dispute resolution if mediation is not appropriate.

10. Attendance at a MIAM provides an opportunity for the parties to a dispute to receive information about the process of mediation and to understand the benefits it can offer as a way to resolve disputes. At that meeting, a trained mediator will discuss with the parties the nature of their dispute and will explore with them whether mediation would be a suitable way to resolve the issues on which there is disagreement.

[2] We are unclear why, given that this is a legal requirement, so many court applications have no mediator signature or exemption noted on the court application (we have been given figures by MOJ ranging from 60% to 30% of applications with no mediator signature or exemption noted)

[3] https://www.judiciary.uk/wp-content/uploads/2019/07/Private-Law-Working-Group-Review-of-the-CAP-June-2019.pdf

[4] https://www.judiciary.uk/wp-content/uploads/2020/04/PRIVATE-LAW-WORKING-GROUP-REPORT.pdf

[5] http://www.justice.gov.uk/downloads/family-mediation-task-force-report.pdf

[6] https://www.familymediationcouncil.org.uk/wp-content/uploads/2020/01/Family-Mediation-Survey-Autumn-2019-Results.pdf

[7] The perceived cost of mediation and even of assessment will often seem very high to those who are planning to act as litigants in person, without any experience of the indirect costs of doing so.

similar work); below such a figure the proposal would not work, since many family mediation services, inevitably already struggling as a result of the current crisis, might need to close if charging at a lower rate for MIAMs. As set out in the PLWG report, considerable work as well as skill is involved in delivering a MIAM in a way that gives the client and the mediator all the information needed to make an informed decision about mediation as a way forward, so it is vital that this work is done by an accredited mediator. The Legal Aid Agency pays a fee of £87 plus VAT, based upon the assumption that MIAMs require 45 minutes of mediator time. The first report of the Private Law Working Group indicated that this is unrealistic and that an hour is required. Annex 8 of the report sets out the key elements of a MIAM, which cannot reliably be covered in less than an hour. Scaling up the Legal Aid fee to cover one hour of a mediator's time would take the figure to £116 plus VAT which is broadly what mediators charge for privately funded MIAMs.

There would plainly be a cost to government if they offered free MIAMs to couples considering litigation. However, when compared with the enormous public costs of dealing with family litigation at current levels, the expense of providing free MIAMs would not be significant; and, given the high conversion rate to mediation when both parties attend MIAMs and the success rate of mediation, our perception is that it would be more than matched by the saving of costs within the Family Justice System. The costs would be offset against those already spent by the legal aid agency on MIAMs, and the savings would include not only those for HMCTS but also CAFCASS. There would also be significant benefits and wider savings for the health and social care sector.

We expect that the numbers of MIAMs will increase following PLWG recommendations and further training recommended for court staff and the judiciary, as both applicants and respondents are expected to attend MIAMs in the absence of legitimate exemptions. However, if the net cost to the MoJ of a private court application is any higher than £240 (plus VAT if relevant), as it surely must be[8], then that would lead to increased savings for the Ministry of Justice as opposed to increased costs.

We have endeavoured to work out both the costs and the savings to the MoJ of this proposal, but we do not have all the necessary information to do this at present as it is not easily found among information in the public domain. We would be very happy to work out the details of the costs and savings if the necessary information was available.

This shift to free assessment meetings for all would be the single most transformational change that could be undertaken to relieve the Courts and families currently locked in conflict. Even if it were adopted only as a short-term measure, as part of the national response to Covid 19, the experiment would enable government to assess the effectiveness of such a step in the longer term. (This measure would be even more effective if it were extended to payment for an initial joint mediation session, as is the case under the Legal Aid mediation scheme.)

A note of caution: for such a scheme to work, it would be essential that the administration of payments to family mediators operated through the MOJ rather than the Legal Aid Agency contracting structure. There are two fundamental reasons for this:

First, the base of mediation services with contracts has diminished significantly since LASPO. The recent FMC survey found that fewer than half the mediators responding to the survey worked in a service with a LAA contract. Therefore, the only way to ensure that the family mediation profession has the capacity to undertake the additional work, and thereby actually provide the support required by the family court system, is to ensure that all family mediators accredited by the Family Mediation Council are able to offer the free MIAM and be paid – regardless of whether they hold a Legal Aid contract. Secondly, if the scheme were to be limited only to those Accredited Family Mediators with Legal Aid contracts, an inevitable consequence would be that family mediators without contracts would not conduct

[8] Analysis by The Law Society from 2018 estimates that a 'Cost of a day in Court' is £2,692

any MIAMs. This would limit the choice of mediator for ALL parties to those with LAA contracts, regardless of their personal circumstances. It would distort the spread of work across the profession and diminish the important contribution for the Family Mediation Profession as a whole to make to support the Family Justice System and families in need of their help.

The scheme must of course be efficiently administered and involve a level of quality assurance, given that it will involve the spending of public funds. We believe that this can be achieved through a straightforward administrative process.

As clear evidence of the impact of this proposal, an experienced New Zealand ("NZ") mediator who has recently relocated to England states of the NZ experience as follows:

When the NZ Family Dispute Resolution Act 2013 was brought in, the Assessment (NZ equivalent of a MIAM) was only free for those who qualified for state funding on a means-tested basis. This resulted in a much lower than expected uptake, particularly by respondent parties. Following negotiations in 2015, Assessments were made free for all (there has been no assessment for funding eligibility since then). So now everyone finds out about mediation and is able to engage in an Assessment (MIAM) without any cost. The result has been significantly increased uptake of mediation year on year since then. There was a major review of the system in 2019 and general satisfaction was expressed; the system of funding therefore continues.

Maintaining vigilance within the gate-keeping process and robustly enforcing the existing statutory requirement that Applicants must attend a MIAM before making an application, unless exempt[9]

We believe that all Family Courts ought to be able to demonstrate that they understand and value mediation and other forms of ADR and that they are robustly enforcing the MIAM requirement. In our view, most courts will be unable to demonstrate this, without both a shift in their mechanical processes and a shift in their culture. Without these shifts, the expectation in the rules that the court will encourage and facilitate the use of mediation is essentially meaningless. Building on existing knowledge of the availability and benefits of family mediation amongst court staff as well as the public would help ensure this culture shift. This proposal requires no additional expenditure by the MoJ. But - as we note below - it would be very likely to lead to greater use of mediation (and hence less use of court resources).

We have already noted that enforcement of the statutory requirement is patchy and, even at its best, inadequate. If our first recommendation is implemented and MIAMs are free to clients, the removal of the cost objection for both Applicants and Respondents would have the effect of significantly reducing the number of non-compliant applications. Resolute attention to the remaining non-compliant applications would also contribute towards the easing of current and anticipated pressures upon the Family Justice System.

Application forms allow court staff to identify where a respondent has not attended a MIAM. Though it is an expectation and not a requirement that a respondent attends a MIAM, the court has nothing to lose – and everything to gain – from directing that the respondent attends a MIAM (where they have not already done so and no MIAM exemption has been claimed). Even though court staff are required to progress applications as soon as possible, the influx of applications which the court can expect following the Covid-19 crisis will surely allow enough time between application before the First Appointment (in Financial Relief cases) or FHDRA (in Child Arrangement cases), for the

[9] There is manifest evidence of the failure of the current diversion scheme; see the PLWG reports and, for example, Mending the Miams process: July [2018] Family Law 909-912. Anecdotal evidence is that there is very significant non-compliance and a limited willingness from some judiciary and court staff to robustly enforce the requirements.

respondent to attend a MIAM. for proper exploration of the possibility of mediation being used for a dispute that might be best resolved through discussion and agreement, where that can be managed safely and appropriately. If MIAMS are free for all, the take up by respondents and willingness of courts to order this would both be higher. However, we believe that should happen in any event and court staff should be reminded that respondents who are either eligible for legal aid, or whose partners are eligible for legal aid, will be able to access a free MIAM in any event.

We strongly believe that a significant contributor to the failure within the Family Justice System to divert litigants to family mediation has been that, although diversion to Family ADR has always been a Key Performance Indicator (KPI) for Court Centres, it has been generally neglected (largely because it is not currently measurable). The expectation upon the court to encourage parties to use what has been known as 'alternative dispute resolution (ADR)' and to facilitate its use does not (cannot be expected) to take priority over clearly set targets – for example average times to dispose of applications – against which the individual court will be judged. Self-evidently, and in our view perversely, the pressure to meet that particular KPI (to dispose of applications as promptly as possible) undermines the proposition (FPR 3.3(1)) that a court should adjourn a hearing to allow parties to try ADR options. It would be helpful if that specific KPI were to become more nuanced with, in particular, time being deemed to be suspended during any adjournment to try mediation or another family ADR process. It would be even more helpful if some new KPI were to be created that measured and acknowledged genuine court efforts to promote mediation and other forms of ADR.

We believe that a mediator presence should be embedded in some form in all family courts as part of the overall service to families. In courts as in most aspects of life, personal experiences and relationships drive real change in ways that rules and expectations cannot. Co-working partnerships require communication and understanding at a strategic and personal level. We address the idea of a 'duty mediator' in more detail in our third proposal, but there are potential benefits to a 'mediator presence' of any kind. Any form of regular collaboration between family courts and local mediators would improve awareness of the benefits, the process and the range of family mediation, leading to greater diversion of cases from court to mediation and other forms of ADR. We strongly believe that the necessary cultural shift will happen only when strong working partnerships are built between judges/CAFCASS/HMCTS staff and mediators.

The provision of a remotely accessed Duty Family Mediator Scheme which would facilitate the immediate provision of information about family mediation before parties become too entrenched in the litigation process

Remote working – hitherto seen as a way to overcome obstacles to access to justice and the administration of the courts – has been brought centre stage by the need to continue to provide a service during a period of national lock-down. Gradually, but assuredly, the use of video-conferencing platforms has become part of the new normal. Individuals and services who previously might have seen remote communications as second best are now finding them second nature[10]. It seems likely that the landscape will have been changed – and possibly enduringly so – by Covid-19 and that there are ways in which the use of video-conferencing platforms both during and after the crisis could make the delivery of family justice – and family dispute resolution generally – more accessible and less costly to deliver, whilst offering opportunities to achieve policy objectives that have previously proved elusive.

Before outlining how we propose that a new 'online' Duty Family Mediator Scheme might work, we make two general observations

[10] The FMC has already created an online register of family mediators who offer online mediation and have established that the majority of accredited mediators now do so.

Cost-saving

In relation to cost, one of the most expensive elements of any service delivery is the cost of time, and especially professional time. Anyone who practices or has practised as a court-attending lawyer or other professional will know the frustration of time spent in journeys to court and in busy court waiting areas – alongside numerous lawyers, social workers, CAFCASS officers and other experts as well as litigants. Anything that could help to reduce the cost of that time without prejudicing service quality must be worth consideration. The focused adoption of remote video communication could assist. There might properly be a presumption, post Covid19, that physical attendance at court should be the exception and that remote working is the new normal. If the underpinning question is 'What benefit would accrue from physical attendance?' so that such attendance would require justification, significant savings could follow. Some situations would, of course, more readily justify physical attendance – for example, a fact-finding hearing would be more likely to warrant the attendance at court of parties and legal representatives than might a First Appointment in a Financial Relief case.

Adding value

The idea of cost-saving should lead on to consideration of ways in which value could be added. A wide variety of resources that cannot economically be provided in person at court may more readily be made available remotely. In this context, the opportunity to more closely integrate family mediation (and other non-judicial process options) into the delivery of family justice might serve as an exemplar of what might be achieved more generally.

A Duty Family Mediator Scheme

In order to at least attempt to meet the expectations of Rule 3, the suggestion has often been put forward of a 'duty mediator' scheme, whereby a mediator attends at court and is available for parties who may be directed to speak to them. In the past (and before LASPO undermined the mediator resource base) this was tried in some courts but proved unsustainable[11]. These schemes were not funded, so that the duty mediator was expected to attend court without remuneration (unlike every other professional present) and without resources. Take up, at that time, was patchy, partly perhaps because family mediation was less widely known by the public. Critically, family mediators – under increasing commercial pressure following the fall in referrals after LASPO – concluded that they simply could not afford to spend time at court on the slim off-chance that some paying work might thereby be secured.
The wider adoption of remote working using video-conference platforms presents an opportunity to revisit the possibility of a duty mediator scheme. The culture shift discussed above would help an online duty mediation scheme succeed, and provide value for money.

Whilst the details of a scheme will need to be worked out, a proposed outline of a duty mediator scheme is as follows:

1. Why have a duty mediator scheme?

   One obvious and natural answer to this is that it might contribute to achievement of a key objective of the Family Justice System. If mediators were more readily accessible to judges and parties at court, then the prospect of enabling the Court 'to consider at every stage in proceedings, whether alternative dispute resolution is appropriate' would be greater. An even more obvious and natural answer is the goal that lies behind this key objective: that having access to a mediator at court could help more families to access mediation and keep them out of court, avoiding all the costs associated with litigation for both the families concerned and the state.

[11] Document here, created by mediator member of PLWG, Helen Adam, which summarises the problems which have arisen from many prior separate attempts to establish at-Court mediator schemes, and the key learning points.

2. What should the scheme offer?

    a. The provision of informed guidance about whether family mediation (or some other form of family ADR) is likely to be of benefit in a particular case – to a Judge, a Legal Advisor, or a CAFCASS Officer, lawyer or litigant in person, when requested.
    b. In appropriate cases, and subject to suitable accommodation being available for private video conversations, a mediator might conduct online part or all of a MIAM where, for whatever reason, a litigant needs one.
    c. It might even be possible to engage parties in mediation on the day of the referral, where they are willing, and the mediator considers that this is safe and suitable. Although it might be relatively unusual for all issues to be resolved in a single session, especially for families who have not yet arrived in court, experience nevertheless suggests that it is often possible to achieve some agreement in a single session, and to identify clearly the remaining areas of disagreement, which might assist the court as well as the parties.

3. Why make it remote rather than on-site?

    a. The cost of paying for a professional Family Mediator to spend a day at Court would be greater than the cost of paying a professional Family Mediator to be available online.
    b. The cost to family mediators of participation in a scheme will be lower if they are able to continue to undertake other work between enquiries under a duty mediator scheme. Family mediators should not be expected to attend on a voluntary basis as was the case in the past – they are, no less than solicitors, barristers, social workers and CAFCASS officers, professionals undertaking professional work for which they are entitled to be remunerated.
    c. It is likely that other professionals will increasingly work remotely rather than on-site and properly resourced remote working will become a normal means of delivering services in the Family Justice System.

4. Who should deliver the service?

    The service should be delivered by Accredited Family Mediators (FMCA) who are 'Authorised Family Mediators' for the purposes of the Family Procedure Rules. These mediators have completed the training and meet the rigorous requirements of the Family Mediation Standards Board. As explained above in relation to the proposal for free MIAMs, any system would need to include all family mediators, and not be limited to those who are willing to have[12] a contract with the Legal Aid Agency.

    Mediation in the shadow of court is challenging; the clients are stressed and often highly conflicted. This type of work requires a high level of mediator competence and would not be suitable for any mediator who has not acquired FMCA status.

5. How would the scheme work?

    A court (or courts) would agree with one or more mediators that they be available on specific days for questions from parties, or referrals from the court. The mediator(s) would be working remotely and may be

[12] Because remuneration rates for family mediators have been eroded by over 20 years' inflation and a 15% reduction at the start of 'austerity' there are few mediators willing to accept the terms of legal aid contracts – those that do take on these contracts subsidise their legal aid work by the fees taken in privately funded cases.

engaged in other non-client facing activities, and would be ready to receive calls from the court(s), who would contact the mediator(s) when required.

6. How should payment be structured?

   The closest comparison in terms of structure (though not remuneration rates) would be the criminal duty solicitor scheme, in which a set payment is made for being 'on duty' with supplements for actual engagements with prisoners.

   For the same reasons as with the payment structure for universal free MIAMs, payment would have to be administered independently of the Legal Aid contracting structure.

   There is a willingness among the family mediation community to work together, and with the Ministry of Justice and the courts, to work out all the necessary details of an online duty mediator scheme.

Cost of Funding an Online Duty Mediator Scheme

We suggest that the simplest way to pay for this scheme would be to pay a day rate £200 to the online mediator. This would cover the cost of the mediator being available throughout the day (excluding them from seeing other clients) and answering initial enquiries from and providing guidance about mediation to judges, or others at court, when requested. any MIAMs conducted would then be charged at a reduced rate.

The normal cost of a MIAM would be £120 but the cost of those provided under the duty scheme would need to be discounted to take account of the day rate being paid as well. We propose a discounted fee for each MIAM of £75. The overall remuneration to the mediator for the day would be:

No MIAMs - £200 1 MIAM - £275 2 MIAMs - £350 4 MIAMs - £425 5 MIAMs - £500

Any scheme would need to be monitored to gauge what the average take-up of MIAMs is when referred from the court. Costings could then be adjusted as needed to arrive at an overall rate which fairly represents the availability and MIAM-provision by the mediator.

A cautionary note: it is our firm view that all MIAMs should be offered for free. If an online duty mediator service including a MIAM were to be provided for free to clients attending at court, but MIAMs normally had to be paid for by clients, an anomaly would arise. Whatever may be done about funding an online duty mediator scheme, it will be crucial to ensure that the scheme does not include an incentive to apply to court to obtain a free MIAM. Self-evidently, any such incentive would be directly contrary to a key goal of this paper (and, we know, the main goal of the government), which is reducing court applications relating to private family matters that could be better dealt with by the families themselves.

Final observations

On-line assessment and mediation are not a panacea. Mediators are faced with many of the same difficulties discussed by the President in Re P (A Child: Remote Hearing) – to adapt his words: "Just because a (mediation) can be conducted remotely does not mean it should be." Whilst mediators are rising to the challenge of "working remotely," there will be many cases where attempting to engage as mediators online in family conflict will simply be unsafe. In the case of MIAMs, however, there is a real opportunity to assist the Courts if the proposals set out above are adopted.

Whilst we think these proposals will have a transformational impact on the crisis facing family justice, we agree with the findings from the Creating Paths research as supported by PLWG, and what we anticipate will be the outcome of research into "Mediation in Mind", that a more holistic Family Solutions approach is both required and achievable. The needs of the separating family are multi-dimensional and only such a holistic approach will address their real needs and create sustainable arrangements. We are ready to support in any way the development of such thorough-going interventions, particularly during this period of opportunity that this crisis provides.

The rise in reporting of domestic abuse during the crisis is of great concern to mediators. Whilst effective screening and appropriate, safe intervention by mediators in such cases is outside the scope of this paper, we welcome the attention being given by the PLWG to greater collaboration between mediation and domestic abuse support agencies such as Women's Aid and would be prepared to address this separately if needed.

We would welcome the opportunity to discuss any or all of these proposals with colleagues at the MoJ or in other agencies.

The Family Mediation Council
6th May 2020

Contact: Helen Anthony, executive@familymediationcouncil.org.uk