

21 May 2021

Registered Charity No. 1077230

FAO Helen Anthony, FMC
Please forward to FMSB MIAMs Working Group

Scottish Enterprise Technology Park
Nasmyth Building
2nd Floor
60 Nasmyth Avenue
East Kilbride
G75 0QR

Tel: 01355 244 594

Fax: 01355 249 959

E-mail: info@thefma.co.uk

Web: www.thefma.co.uk

FMA RESPONSE TO THE MIAMS DOCUMENTS

A. General

FMA welcomes the three documents and the division into Standards, Expectations and Guidance. We have consulted as widely as possible in the limited time available. FMA members have taken part in the FMSB online meetings with members of the drafting committee; 100 members responded to an FMA poll on the consultation, the results of which have informed this response; they demonstrate the range of views and the thoughtfulness with which the consultation proposals have been received. Many others have attended other supervision and discussion groups, tasked with a hasty consideration of the documents. Those of us involved in this response document had variously met online with over 40 colleagues to discuss the papers in more detail. These meetings gave general support for the clarification they provide, both for mediators and clients, and also for other professionals; they are seen as “an excellent and timely contribution to the further professionalising and development of mediation.” One FMA PPC commented she was “delighted to read the documents as they reflect real practice; they are very clearly and crisply written and user-friendly.” There is a general sense, indeed, that the documents do indeed reflect what FMA mediators already do. The mixed response to the poll however demonstrates real concern that we may have to spend more time proving this; there was a real split between mediators who welcomed the proposals and others who felt really quite overwhelmed and cross about what was perceived to be an onerous and further set of obligations.

On the basis of our survey, there is strong support for the emphasis on standards, alongside a belief that in most areas of the profession, that rigour and assurance is already embedded. 94% answered “yes” to the question “do you believe MIAM standards are required?” and 65% “yes” to the question “do you believe the MIAM standards should be rigorously monitored and consistently maintained?”

We are very grateful for the creativity, time and energy which has been expended on our behalves. Our message is that the ethical management of options development for non-Court pathways is safe in the hands of accredited mediators.

We recognise that the aims may have been to:

1. Reflect the unique quality of these initial meetings and the necessity for them to be conducted by professional accredited mediators;
2. Place these meetings clearly within both the court process and the wider Family Solutions Network;

FMA response to MIAMs Consultation 21.05.21

3. Emphasise the need for professional assurance without imposing unrealistic expectations on the profession.

We recognise there is an opportunity, or perhaps risk, that these standards may become normative. For that reason we make some detailed comments about the content of the documents, particularly those relating to standards and expectations and guidance. Whilst we recognise that the document has been created by an experienced group of mediators and that we all would approach it differently, we think there are some fundamental matters that could be improved relatively easily.

Language: We recognise that the ugly acronym MIAM is a useful shorthand and relates to the interface between these meetings and the court process. As mediators, our responsibility is to provide an effective, safe and robust assessment, whether or not there is an interface with the Court. We have therefore suggested changes where the word “meeting” might be substituted.

B. Comments on the two general approaches adopted being

- a) The three-layered format of the new standards – that of Standards, Expectations and Guidance; and
- b) The principle of reliance on the rigorous establishment and demonstration of the professionalism of mediators, to underpin assurance processes.

We support this general approach, subject to our concerns about overly onerous assurance processes. It is clear however that members had varying levels of approval of the approach; whilst some, pointing to concerns about the practices of others in their area, welcomed a restatement of “consistency,” providing “professional rigour and credibility,” another commented: “I agree with there being best practice standards but strongly oppose making MIAMs too prescriptive and removing experienced mediators’ ability to exercise judgement and proportionality. “

C. Comments on the content of the MIAMs Standards and Expectations (landscape) document.

For clarity’s sake, we have supplied a track-changed version of this document as Appendix 2. This is by no means to try to improve on the excellent drafting, but rather to illustrate the points we make below more effectively.

Introduction – this is a most helpful scene-setting; we have no comments, save changes to reflect our general point above about terminology.

Scope of Standards/ Terminology – this section is critical, and might benefit from a slight reorganisation particularly to deal with the same point above – see tracked document.

Components of the meeting – general comments

If this document is used in Foundation and advanced training, it will need to reflect the advances in mediation practice in recent years. We respectfully suggest that these components miss out, or give insufficient prominence, to the following areas. This could be rectified by the relatively simple changes to the Standards and Expectations columns, or to the Guidance document, which we have suggested:

- a. **Child Inclusive Mediation** –the expectation that CIM will be actively promoted wherever appropriate, in accordance with the CoP, should be firmed up – for example – “the expectation that children of appropriate age will be invited to participate in meetings with the mediator, with parental consent.” A little more emphasis on CIM at all three levels of the documents would be helpful.
- b. **“Other” or “remaining” mediation principles:** This begs the question, “what are they?” Traditionally, and supported by the FMC Code and Standards documents, it is taught that there are four core principles, being Voluntariness, Impartiality, Confidentiality, Client Responsibility. It goes beyond the scope of this consultation to add further principles of Child-Inclusion and Safety, but to embed these in this document might give greater assurance, especially in the case of the concern over screening.
- c. **Screening** – to reflect emerging practice, there should be some mention of gaining permissions where appropriate to liaise with other support agencies such as Women’s Aid, recognising the significance of the Family Solutions proposals for these initial meetings. Whilst we appreciate these documents are overviews, their treatment of abuse is inadequate for both mediators and for those keen to be assured of mediators’ trustworthiness in this respect
- d. **Providing a Safe Space:** As described by one PPC, building rapport is the “gold standard” of mediation, and the provision of an emotionally safe space needs to be contained in the formal standards and expectations. (It is discussed at the start of the Guidance document but we submit that is not enough.) This is one primary reason why the assessment *must* be conducted by an accredited mediator who will either then continue with the case or at least have knowledge of and communication with those colleagues who will. It may also impact on choices as to next steps. We have added an extra expectation in this respect. (It is notable that 60% responding to our survey felt that mediations should be conducted by those conducting the MIAMs wherever possible.)
- e. The document includes no explicit reference to **diversity** and **accessibility**, which are again core elements of mediation. This can be easily rectified, as we have attempted in the attachment and under 8 below. There should also be a reference to mental health and other vulnerabilities, which we have inserted.

Comments by reference to the 8 components:

We have made detailed comments and suggested amendments in the accompanying tracked documents, and raise some specific issues below.

6. Separate Meetings

On the issue of entirely separate meetings, we are firmly in favour of an absolute embargo on “joint MIAMs,” primarily for the reasons of effective screening discussed. 66% survey respondents felt they should be “absolutely ruled out.” They were also asked about whether it was “acceptable for a mediation to follow a MIAM”. We were surprised that 44% thought this might be acceptable, and we know that there are those who believe this is generally acceptable practice. We do not agree, but do agree there may be exceptional circumstances, which we hope are covered in the general definition of “expectations” in the S&E document. It may be that something more can be said about the possibility of exceptions to this standard.

7. Format of the meeting

Signposting: the implications of the FSG report are that signposting and referral needs to be more dynamic and multilateral than previously imagined, building on existing relationships rather than simply relying on the provision of web addresses or telephone numbers; all this takes time

Length: It is abundantly clear that the various tasks, properly expected of a mediator to be accomplished within this initial meeting, must take a significant length of time if they are to include the creation of a safe space and trusting relationship, where a participant may feel empowered to share their experience of control or abuse, perhaps for the very first time. 80% of survey respondents felt there should be an expected (non-mandatory) minimum time, and 77% a compulsory minimum, no doubt reflecting their experience of poor practice elsewhere. A small majority felt that time should be 45-60 minutes or 60+ minutes. Those of us writing this response generally felt “a minimum of 45-60 minutes” was a reasonable expectation. It follows that any model of assessment or funding mechanism such as that by the Legal Aid Agency which expects, or pays for, less than that time is inherently unsafe. 69% of respondents felt that implementing and assuring the standards would require an increase in time and in fees.

8. Inviting other potential participants

We broadly support the standard and expectation that both potential participants in mediation should be invited to meetings, whilst recognising that it is not always possible. If mediation is impartial, an equal opportunity needs to be offered. We were surprised by the almost equal split of respondents to the FMA survey on this point, which may reflect the binary nature of the question, or the lack of clarity inherent in the current process. The supporting comments are again thoughtful, and cover a wide range of views. The failure of the Court system to reform the forms and processes relating to the expectation on the “second” participant continues to undermine that aim. FMA has produced countless papers promoting change in this respect.

Lisa Parkinson’s comments on the Guidance in this respect are particularly helpful in considering how the “second participant” is best engaged.

The likelihood of an appropriately aged child/ young person being invited to join the mediation is also an element to be addressed in the MIAM.

Offering an equal opportunity is also an issue of diversity, accessibility and disability. Whilst the detail of this may go beyond the scope of these documents, there needs to be some recognition that accessibility and diversity are principles of mediation, and an expectation that services have proportionate policies and strategies in place to ensure equal access.

D. Comments on the accompanying Guidance.

The availability of a subsidiary Guidance document is welcomed. All trainers/ mediators and PPCs will no doubt have different views as to how that Guidance should be expressed; this is an excellent start. If it is to become part of the reading materials provided to Foundation Trainees, it may benefit from further consideration (in which case it might be published as a “1st edition” alongside the other FMA response to MIAMs Consultation 21.05.21

documents.) It would benefit from some limited adaptation to reflect our suggested changes to the landscape document, and also from a reference to further reading and guidance, since much has been written about the mediator's role as assessor in recent years – for that reason, a tracked version has again been supplied.

The offering of a suggested order of events is, on the whole, appreciated. However, there should be a reference to Client Choice – perhaps “G. Conversation about client's informed choice as to how to proceed, along with mediator's determination of....”

The matter of the invitation to the second client is controversial – see our comments above.

E. Comments on the proposed MIAMs assurance processes

FMA members welcome the emphasis on assuring standards; insofar as this is a restatement of the various elements of assurance and regulation that already accompany mediators on their journey, it is a helpful document, especially for those on the outside. However, FMA members are concerned about any additional reporting responsibilities that may be laid on them or on PPCs. We recognise the need to respond positively to the PLWG and FSG recommendations; we think this can be achieved by building on the annual registration requirement, the assurances built into the process to accreditation, the additional requirements of lead bodies, and the PPC/ mediator relationship. FMA members have written and spoken at length about the ethical and robust practices undertaken by FMA and other mediators; this evidence is readily available for those who wish to read it. The responses to Qb on the survey demonstrate the range of concerns expressed by mediators about the prospect of additional “monitoring;” “there is already enough oversight.” There was a general feeling that some specific attention to MIAMs in PPC supervision might be sufficient.

In respect of the specific proposals:

- File sampling and data collection – some limited and non-onerous data sampling may be of assistance, but the suggestion of “spot checks” needs much more thought. Mediators' experience of file audits by the Legal Aid Agency would make them very wary of such a suggestion
- Feedback from participants after a MIAM – a simple standard feedback form may be valuable; many mediators will have experience of the success or otherwise of such forms, which are again required by the LAA. This is valuable information for supervision sessions; most (56%) survey respondents were in favour.
- Reporting data back to FMSB: If such information would be valuable, would not be wasted, and would be used in subsequent discussions with interested parties, there may be value in this. Survey respondents were equally divided about this (52%:48%), no doubt reflecting the lack of detail as to what might be entailed.
- An alternative to the creation of yet more documents and submissions may be a greater reliance and trust in the annual declaration, submitted by both mediator and PPC, with some additional questions to deal with some of the above.

F. Final Comments and Conclusion

Overall the FMA welcomes the proposed changes and would request to be consulted once any amendments are made to the documents following written and verbal feedback received.

The new standards and guidance demonstrate the importance and completeness of a properly conducted MIAM. For many mediators this new framework will serve as a cross-check and crystallise what they are already doing. For some mediators there will be additions to their current MIAM practice, and this is why

FMA welcomes clear overall guidance and expectations. Potential participants to mediation are entitled to expect the same standard of service wherever they engage.

The responsibilities and requirements set out are properly the remit of mediators, but the skill and time it takes to do this should be reflected in proper recognition of the importance of this meeting and paid for accordingly. This is an opportunity to elevate the MIAM and move away forever from the idea that it is just a hoop one must jump through before issuing court proceedings. All stakeholders have to take it seriously; mediators, mediation organisations, the legal profession and the court/judiciary (with the appropriate changes to the court forms, as supported by 73% of our respondents). Only then will this become embedded, and participants get the full benefit intended from safe and effective signposting and non-court resolution whenever possible.

Appendices:

1. Tracked version of Standards and Expectations document
2. Tracked version of Guidance document

FMA Board on behalf of FMA members 21 May 2021