Family Procedure Rule Committee:
Consultation on strengthening existing rules and practice directions to encourage earlier resolution and on private family law children and financial remedy arrangements

Family Mediation Council Response

25 May 2023

Preliminary points

A MIAM is an opportunity for potential participants in mediation to learn about it and other dispute resolution processes, so that they can make informed choices about how best to resolve issues arising from separation. FMC Registered Mediators also assess the suitability of mediation for the participants and, if appropriate signpost them to other services. Professional standards are in place ensure that MIAMs delivered by FMC Registered Mediators achieve these aims.

A MIAM is also a gateway to mediation, which has numerous benefits for separating families:

- Less stressful and far quicker than going to court
- Cheaper than legal representation, and
- Individuals keep more control of their family's future, allowing them to make decisions in the best interest of their children.

Mediation also has a high success rate, illustrated by data from the MOJ Voucher scheme.

Therefore, we recommend that:

a. The MIAMs structure should both encourage people to attend MIAMs and require attendance by *all* parties to a dispute, unless there is very good reason for them not to attend. The most significant change that can be made to the court rules to keep cases out of court is therefore to include a requirement for 'respondents' to court applications (as they are currently called) to attend a MIAM.

b. The language used when talking about MIAMs should set the right tone to reflect the fact that (at least) two people have an interest in and responsibility to resolve issues relating to separation or parenting; the language must not pit people against each other. We suggest that it would be best to call people "MIAM attendee(s)" or "prospective MIAM attendee(s)" on the form, rather than "applicant" and "respondent".

c. The name be changed from “Exemptions” to “Special Circumstances” as recommended by the Family Solutions Group [p.141 of “What About Me?”].

d. HMCTS reviews the mediator’s “sign off” section of Form A/C100. The FMC is often contacted by respondents to court applications who do not understand why mediators have ticked particular boxes or signed the form, and this can become another aspect of the dispute between parties. The form could helpfully be reviewed to be more specific about what a mediator is confirming, and to avoid being seen by respondents as apportioning blame.

Section 1 - MIAMs

Proposed Amendments to Rule 3.8 - Circumstances in which the MIAM requirement does not apply (MIAM exemptions and mediator’s exemptions)

Consultees are referred to Paragraphs 11-13 above in respect of MIAM exemptions, which set out the issues to which the questions relate below:

Question 1: Do you consider that there would be any specific issues that may arise as a result of the proposed amendments to Rule 3.8? Please answer “Yes” or “No” and give full reasons and examples to support your answer. If you are unable to answer this question, please state “Don’t know”.

No, in the current context.

The proposed changes to present system are all welcome: they are sensible and will help reduce the number of MIAM exemptions that are incorrectly claimed. We particularly welcome:

- the amendment to the current rule regarding urgency - as many people consider their application is urgent, and
- the changes to the proposals that take into account the fact the online working has made mediation more accessible.

However, the Ministry of Justice’s proposals to make mediation mandatory would lead to a different context, in which case the answer would be ‘yes’ as the landscape would change to include the would-be respondent to a court application also having to be assessed on similar criteria to an applicant.

We have previously commented that the exemptions under rules 3.8(2) were all redundant, as they relate to mediators providing exemptions on the basis of a respondent’s non-engagement with the MIAM process before seeing either potential party to a court application: to our knowledge, these exemptions are never used in practice. We stand by this position under current arrangements.

If the government removes the option for people to be able to choose to go to mediation, there will need to be a sign-off that is similar to the current mediator’s certification to show it is not appropriate for the MIAM participants to proceed to mediation (without the mediator giving details of what those circumstances might be).

Question 2: Do you consider there are further amendments which could be made to Rule 3.8 to increase attendance at MIAMs (in the appropriate cases)? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

Yes. Our concerns relate to two areas: domestic violence and non-court dispute resolution.

a) The Committee proposes to retain the exemption for domestic violence (FPR 3.8(1) (a)). We recommend amending the language to refer to domestic abuse throughout, rather than domestic violence. If within the Committee's remit, and to ensure clarity for the purpose of the MIAM rules, domestic violence should be re-defined as encompassing all forms of domestic abuse, including coercive control and financial abuse.

   Longer term, it is hoped that this exemption would not be required. Domestic abuse does not preclude a person from benefitting from a MIAM and does not necessarily mean that they would not want to pursue mediation. A MIAM provides a valuable triage service to help people identify the most suitable course of action in relation to child or financial arrangements, and victims of domestic abuse will learn about alternative support services. Safety can be ensured by an FMC Registered Mediator, through adherence to the FMC MIAM standards, which require separate MIAMs for each participant. As part of the MIAM, a mediator will assess whether and how mediation can proceed safely, including consideration of shuttle and online models to protect victims of domestic abuse from any risk of direct personal involvement between participants. Many victims of domestic abuse welcome this way of working to resolve their issues, rather than going to court.

b) In addition, rule 3.8(1)(d)(ii) allows for people to claim an exemption from attending a MIAM if they have attempted another form of NCDR. We welcome the proposal to define carefully the forms of NCDR that can be attempted, and the proposal that evidence must be presented to say these forms of NCDR have been attempted. However, we believe there ought to be re-consideration to whether using other forms of NCDR should exempt families from the MIAM requirement at all.

   We recognise that there are different forms of dispute resolution that can help families resolve issues, and that not all will choose to go to mediation. However, the only cases which the proposed rule concerns are those where a court application is being contemplated. If families wish to use another form of dispute resolution, they are not prevented from doing so. For example, if a family chooses to use arbitration, they wouldn't need to attend a MIAM or mediation session at all, as they would go to arbitration, and a final outcome would be decided. Alternatively, if families wish to try and resolve matters through solicitors, perhaps using a collaborative approach or solicitor negotiation, they can do so. If successful, they will not need to apply to court (except perhaps for a consent order).

   If other forms of dispute resolution have been completed successfully, families will not need to apply to court. However, if they have not been successful, and families wish to apply to court, there should not be an exemption from the requirement to consider or attempt mediation.

   Mediation is entirely different from other forms of dispute resolution, and there is no reason to suppose it will not work just because other methods have failed.

Question 3: Do you consider that there are benefits to applicants attending a pre-application standalone MIAM (in instances where the respondent doesn't engage or is not contactable, for example), as opposed to both parties attending post-application when ordered by the court? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

Yes.

Whilst it is critical that both parties attend a MIAM if a matter is to proceed to mediation, MIAMs have value independently of this. They provide a person with information about the benefits of resolving their dispute in a non-confrontational manner, as well as other forms of non-court dispute resolution, and signpost a participant to other available support. An exemption for one person does not therefore exclude the need for the attendance of the other. If mediation is also a gateway to a funded parenting programme, a standalone MIAM would have even more value.

Conduct of MIAMs r3.9

Consultees are referred to Paragraphs 20-22 above in respect of the conduct of MIAMs (r3.9), which set out the issues to which the questions relate below:

Question 4: Do you consider that there would be any specific issues that may arise as a result of the proposals relating to Rule 3.9? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

Yes.

At paragraph 22 of the FPRC consultation, it states

'*The Committee proposes that the Rules be amended to ensure the person conducting the MIAM is required to assess the suitability of all forms of NCDR and suggest to the participants which form(s) of NCDR could be the most suitable and why. As part of this, the Committee proposes that the person conducting the MIAM provides the participants with information on how to proceed with the different types of NCDR, should they be suitable and of interest to the parties.*'

We do not agree that the person conducting the MIAM should be required to assess the suitability of all forms of NCDR, for two reasons:

1. The best person to assess whether a case is suitable for NCDR is a professional trained in that form of NCDR. Assessment for suitability requires an in-depth understanding of the form of the features of NCDR, and the factors which make it suitable/unsuitable. No professionals are trained to assess suitability of all forms of NCDR; and
2. Assessing the suitability of all forms of NCDR would take substantially longer than the current MIAM, which is which is currently expected to take an hour or more.

Instead, the rules should reflect the FMC MIAM standards for mediators. These require mediators to:

- provide information during the MIAM about the suitability of mediation and other out-of-court ways of resolving issues arising from separation;
- ensure each MIAM participant leaves the meeting with a clear idea of their next steps, having been signposted to other NCDR services, legal advice, interventions or support (whether or not mediation is proceeding) and mentioning significant time-scales, when appropriate.

Question 5: Do you agree that the person conducting the MIAM should "assess" the suitability of different forms of NCDR at the MIAM? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

No. The person conducting the MIAM should not assess suitability of forms of NCDR apart than mediation.

Please see answer to question 4 above.

When MIAM Evidence Should be Provided to the Court

Consultees are referred to Paragraphs 23-27 above in respect of when MIAM evidence should be provided to the court, which set out the issues to which the questions relate below:

Question 6: Do you consider that there would be any specific issues that may arise as a result of the proposal that any required evidence of a MIAM exemption should be provided with the application to court? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

No.

We do not think any specific issues may arise and we support the proposal that any required evidence of MIAM exemption should be provided with the application to the court.

We believe the proposed change would ensure that the rules of MIAMs exemptions are more closely adhered to, and close a current loophole that allows people to claim an exemption without supporting evidence and to proceed to court.

It is also important for the gatekeeping process to be as robust as possible, to ensure that the evidence supplied with exemptions as well as any certificates signed by mediators are genuine. We are aware of reports of people falsifying mediators' signatures on MIAM forms to avoid having to go to a MIAM, and of courts accepting applications from people whose MIAM form has not been signed by an authorised family mediator as required, but has instead been signed by other dispute resolution practitioners.

The Timing of When the Court Reviews MIAM Exemption Evidence (private family law children proceedings only)

Consultees are referred to Paragraphs 28-30 above in respect of the timing of when the court reviews MIAM exemption evidence (in private family law children proceedings only), which set out the issues to which the questions relate below:

Question 7: Do you consider that there would be any specific issues that may arise as a result of the proposed amendments to bring forward the point at which the court must review the MIAM exemption and any supporting evidence to the gatekeeping stage for private family law children cases? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

No.

We do not think any specific issues may arise and we support the proposal that the court must review the MIAM exemption and any supporting evidence at the gatekeeping stage for private family law children cases.

If a MIAM exemption is claimed, it makes sense to check its validity at the earliest possible stage. If it is not valid, there is the shortest possible delay in confirming a MIAM exemption has not been correctly claimed and a MIAM would therefore have to be attended.

Question 8: Do you consider that there would be any specific issues that may arise as a result of the proposal that where a claimed exemption is no longer relevant, the court has the power to order both parties to attend a MIAM, where appropriate? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

No.

We do not think any specific issues may arise and we support the proposal that, where a claimed exemption is no longer relevant, the court should have the power to order both parties to attend a MIAM, where appropriate. Empowering the court to be able to order both parties to attend a MIAM at any stage in proceedings would provide courts with another tool to encourage parties to resolve disputes outside of court, and is therefore welcome.

Section 2 – Dispute Resolution

Encouraging Engagement with NCDR

Consultees are referred to Paragraphs 31-34 above in respect of when adjournments in proceedings may be ordered by the court where the court believes that parties could benefit from attempting to engage with NCDR, which set out the issues to which the questions relate below:

Question 9: Do you agree with the proposal to give the court the power to adjourn private family law children proceedings and/or financial remedy proceedings, when the court believes that NCDR would be beneficial for the parties, to allow them to attempt to resolve their issues outside of court? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

Yes, we agree with the proposal to give the court the power to adjourn private family law children proceedings and/or financial remedy proceedings, when the court believes that NCDR would be beneficial for the parties, to allow them to attempt to resolve their issues outside of court.

As with the proposal referred to in question 7 above, this proposal would give the court another tool to help it resolve cases as efficiently as possible. In addition, for private family law children proceedings, the court is required to act in the best interests of the child. Given the harm that can be caused by the increased and prolonged conflict which can arise out of court proceedings, giving courts the power to adjourn (where it believes that NCDR would be beneficial to the parties) would provide the court with another tool to help it act in a child's best interests.

Question 10: Do you have any views on the appropriate timing for the court to adjourn proceedings in private family law children cases and/or financial remedy cases, in response to the issues raised in Paragraph 34(e)(i) and (ii)? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

Yes.

The proposals for an adjournment to take place after the first hearing in private family law children cases appear sensible, for the reasons given.

For financial remedy cases, we believe it would also be appropriate for cases to be considered for an adjournment at the first hearing. Although parties would by that stage have started preparing for the court hearing, the work done on financial disclosure would be needed for NCDR in any event.

We also believe that the courts ought to have the ability to adjourn proceedings for NCDR at a later date, if it appears suitable. For example, if in financial proceedings the issues are narrowed at a Financial Dispute Resolution (FDR) hearing, the final matters may be capable of being settled in mediation.

An adjournment is normally for a set period of time and therefore needs to be sufficient for mediation to meaningfully take place while also not delaying justice. For child cases, a six-week adjournment would usually be sufficient for two clients to attend MIAMs and for two mediation sessions to be held. For financial cases, the length of the adjournment needed will vary depending on the stage in proceedings and the complexities of the assets involved.

If an adjournment is not considered appropriate as the court does not want to delay proceedings, we would encourage courts to use their existing powers to order parties to attend a MIAM as part of other directions given in a case, so that mediation can be tried alongside court proceedings without affecting the court timetable.

Section 3 – Costs Orders

Consultees are referred to Paragraphs 41-58 above in respect of costs orders in financial remedy proceedings, which set out the issues to which the questions relate below:

Question 11: Do you consider that there would be any specific issues which would arise from amending the Rules to include an express provision for the court in financial remedy proceedings to factor in as a matter of "conduct" any failure to undertake a MIAM, if parties are ordered to attend a MIAM post-application, when considering costs orders against a given party? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

No.

As long as the 'conduct' is limited to attendance or non-attendance at a MIAM, we do not consider that any specific issues would arise from this proposal.

It would be important however to make clear that both parties are expected to be pro-active in attending a MIAM, to avoid respondents saying they didn't receive an invitation from a mediator to attend a MIAM. To assist this, we believe it would be helpful for the letter from the court notifying the respondent of the court application to:

a. include a clear statement from the court that the respondent is expected to attend a MIAM,

b. detail the potential consequences of not attending, and

c. provide contact details for the mediator who has conducted the MIAM for the applicant and details of how to find other FMC Accredited Mediators.

Question 12: Do you consider that there would be any specific issues which would arise in respect of the proposal that where the court determines that a financial remedy case is suitable for NCDR and encourages the parties to attempt it, but it is clear that one party has not attempted to engage with NCDR (without good reason), that the court should factor this in as a matter of "conduct" when considering costs orders against that party? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

No.

As long as the 'conduct' is limited to attendance or non-attendance at a MIAM, we do not consider that any specific issues would arise from this proposal.

Question 13: Do you think that attendance at NCDR should be determined through factual questions asked of the NCDR provider, or should the provider be asked to give subjective views as to whether an individual 'engaged' with NCDR (noting the satellite litigation and subjective determination concerns noted by the Committee)? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

Yes - any information provided by mediators must be limited to facts.

To preserve voluntariness as to active participation, courts must not attempt to judge the conduct of parties to a court application by considering how parties have behaved in a mediation. In order for the court to make that judgment, it would require either the mediator or the mediation participants to tell the court their view of the mediation. Mediators cannot do this, as it would compromise the impartiality which is fundamental to their role. The alternative (of asking a party to a subsequent court application whether they or the other party have made a reasonable attempt to mediate) risks opening up another dispute as to whether either considers the other has made a reasonable attempt to mediate, which a judge would have to decide upon, thus taking up more court time.

Please see the FMC response to the MoJ's parallel consultation for more detailed comments relating to this issue.

Question 14: Do you consider that there would be any specific issues which would arise from having a pro-forma provided to the court which asks the parties to: a) set out their position in relation to NCDR at the first hearing, and; b) set out their reasoning following any non-attendance at NCDR (where this has been recommended by the court) or at other later stages in proceedings? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

Yes.

The main concern is that a person might not be willing to attempt NCDR due to a history of domestic abuse, and may not have claimed a MIAM exemption based on that. Instead, they may have attended a MIAM, claimed another exemption, or be a respondent to an application. They may not want to raise the issue as part of proceedings for fear of reprisal. In addition, the allegations of abuse may be contested, and lead to counter-allegations.

However, we do not think that a pro-forma as proposed should be entirely dismissed as a result of this concern, as there may be ways in which this concern could be addressed, for example by using the same criteria/evidence requirements for MIAMs as part of the pro-forma. We would be happy to take part in discussions to explore options if that would be helpful.

Question 15: Do you consider that the pro-forma should be required by the court via an "Ungley-style" order, or should it be a request by the judge rather than a standard requirement? If a requirement, at what stage(s) in the proceedings should it be made? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

Any order should be a requirement, not a request. It would be useful for parties to a court application to give such a statement, or affirm the one previously given if a position is unchanged, at every hearing and at any appropriate gatekeeping stage.

Question 16: Do you have any suggestions for what the pro-forma should look like or should include? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

Yes.

Any pro-forma that gives a reason for not attempting NCDR that would have led to an exemption, if claimed, should be accompanied by the evidence required to claim the exemption.

Question 17: Do you consider that there is a way to ensure that this proforma is not requested from victims of domestic abuse? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

Yes.

Please see the answer to question 14.

Section 4 – Single Lawyer Models and Early Neutral Evaluation (ENE)

Consultees are referred to Paragraphs 59-61 above in respect to the discussion of single lawyer models and ENE for private family law child arrangement and financial remedy proceedings.

Question 18: Do you have any views on the advantages or the disadvantages of the single lawyer models and ENE in regards to private family law children proceedings and/or financial remedy proceedings? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know"

Yes.

The FMC believes single lawyer models are a largely untested form of dispute resolution and as a result their effectiveness is yet to be determined. The models have only emerged over the last few years and the numbers of cases involved are small, so no comprehensive picture of success rates or client satisfaction has been formed.

Early neutral evaluation in private family law disputes is also largely untested, used only in a small number cases primarily related to finances and only used when both participants also have their own lawyers to support them.

Whilst the FMC supports families to use the form of NCDR which is right for them (as reflected in the FMC MIAM standards which require mediators to discuss and explain NCDR options to MIAM participants) we do not believe that, at present, use of the single lawyer model or early neutral evaluation should replace the need to attend a MIAM or (if determined by the government as a result of its concurrent consultation) mediation. Please see the answer to question 2 above.

If court rules are to allow for the use of any alternative forms of NCDR, they must be shown to be effective, and there must be robust standards in place that set out both what should be covered as part of the NCDR process as well as standards for those who deliver the service.

About the Family Mediation Council

The Family Mediation Council (FMC) is a not-for-profit organisation dedicated to promoting best practice in family mediation. Our central aim is to ensure the public can confidently access family mediation services that offer high quality mediation provided by mediators who meet our standards.

The FMC has five Member Organisations (College of Mediators, Family Mediators Association, National Family Mediation, Resolution and The Law Society) and registers individual mediators who meet the required standards. There are approximately 1000 mediators on the FMC at any one time, with 700 of those accredited and 300 working towards accreditation. The Family Mediation Standards Board is a standing committee of the FMC and is responsible for advising the FMC Board on the content of the FMC Standards and Self-Regulation Framework and for its implementation.

For more information contact executive@familymediationcouncil.org.uk