Ministry of Justice Consultation

Supporting earlier resolution of private family law arrangements:
A consultation on resolving private family disputes earlier through family mediation

Family Mediation Council Response

14 June 2023

Executive Summary

1. **Encouraging Non-Court Dispute Resolution (NCDR)** We strongly support the policy objective of encouraging separating families to pursue mediation – including Child Inclusive Mediation - and other forms of NCDR, and to do so early in the process. This will lead to better outcomes for families and reduce the pressure on family courts.

2. **Parenting programmes to support families** We strongly support the aim of encouraging the use and availability of parenting programmes at an early stage and streamlining the referral and use of them as an adjunct to NCDR processes.

3. **Culture change to consensual solutions** We welcome the MoJ's intention to change the culture in the family justice system, strengthening expectations in favour of consensual solutions: this will require a concerted effort to educate, inform and enlist the support of all agencies and bodies across the family justice system and as well as to promote widespread understanding across society as a whole.

4. **Confidence in family mediation delivered by FMC Registered Mediators** We welcome the confidence shown in family mediation conducted by FMC Registered Mediators as a highly effective form of NCDR, and the desire to increase uptake: this is justified by data from the Legal Aid Agency and the Family Mediation Voucher Scheme on family mediation's effectiveness, international evidence, and the strength of FMC regulatory principles.

5. **Voluntary participation** The effectiveness of family mediation derives from it being undertaken and completed voluntarily by both participants: successful mediation builds on the commitment and readiness of separating partners. Voluntary participation is a central tenet of family mediation and is enshrined in both the FMC's Code of Practice and in its Standards Framework; any departure from this principle would fundamentally contradict the essence of mediation. The non-partisan approach mediators take promotes the capacity for self-determination and ownership of outcomes which are more sustainable in the long term. Compulsion to mediate:

    a. Would undermine the essence of mediation; and
    b. Is unlikely to be effective in achieving the underlying policy aims and delivering successful outcomes.

6. **Compulsory Mediation Information and Assessment Meetings (MIAMS)** MIAMs are distinct exploratory meetings. They are not mediation. A requirement of participation by both potential parties to a court application in a MIAM would not infringe the voluntary participation principle. If the parties cannot agree to proceed to mediation, or if mediation is not suitable there will be no mediation and the issue of voluntarism will not arise.

7. **Encouraging parties to adopt mediation** Changes in policy and practice can encourage the early uptake of mediation and improve its capability to help separating families, developing MIAMs further as the gateway to family mediation by:

    a. Requiring both individuals to attend a MIAM to explore options for NCDR;
    b. Stronger monitoring and enforcement of existing requirements on the courts to assure themselves that potential parties to a court application have tried NCDR in any form; and
    c. Tightening up the Family Procedures Rules (see the parallel consultation response from the FMC) to reduce MIAMs exemptions and encourage participation at any stage of the separation.

8. **Standards for MIAM delivery** Mediation is the only profession that has specific training and standards for MIAMs; only fully accredited mediators (FMCAs) are trained specifically to conduct MIAMs and permitted to do so. Their professional practice is bound by clear and rigorous FMC Standards that emphasise their role in sharing information, assessing readiness for resolution, and screening for any form of abuse. FMCAs are required to explore all forms of dispute resolution, not only mediation. The skills required to recognise domestic and child abuse are a key component in the training of mediators, and maintaining them is a required element in the continuing professional development of FMCAs, such that with a high level of awareness and suitable safeguards mediation can still be safe and successful.

9. **Confidentiality and impartiality** The Code of Practice and Standards Framework for FMC Registered Mediators require confidentiality and impartiality in MIAMs and any subsequent mediation: any breach of these principles is professionally unacceptable and subject to disciplinary action by the FMC. It is therefore inappropriate for mediators to be required to make judgements about participants' conduct, for example by advising a court whether there has been a 'reasonable' attempt to mediate. However, a purely factual statement would be appropriate (e.g., stating whether a person has or has not attended a MIAM or mediation session).

10. **Affordability of family mediation** Accessible and affordable family mediation is required to deliver the policy objectives. Funding systems need to complement each other. The voucher scheme has been significant in encouraging the considerable expansion of publicly funded family mediation. However, it is legal aid that enables mediation to be accessible to those on the lowest incomes, and higher rates of remuneration for this are essential to ensure that legally aided mediation is sustainable. Child Inclusive Mediation must be another priority area for funding, so that the voice of children can be heard irrespective of their parents' finances.

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Introduction

The Family Mediation Council (FMC) welcomes the government's drive to ensure that separated families have the best possible chance to resolve issues without the need to go to court, as well as the recognition of the role that mediation has to play in this.

Family mediation has proven benefits for families and children and yet tens of thousands of families end up in prolonged court proceedings when they do not need the protection of the court. Creating an environment where separating families know they have everything to gain and nothing to lose from attending mediation will benefit those children and families and therefore society as a whole.

Family mediation helps parents and separating couples resolve issues by providing a structured process which enables them reach their own decisions, reminding parents to focus on the needs of any children of the family, and facilitating better communication and fostering better understanding of each other's point of view. As well as helping participants reach agreement on the issues at hand, this has a positive benefit for their future relationships as parents or former partners, meaning that arrangements reached are more likely than court orders to be sustainable and families have a better chance of being able to resolve future issues without recourse to court.

For children in particular, high level parental conflict can cause significant harm, resulting in poor outcomes which research shows can last into adulthood. Mediation can help reduce parental conflict, by resolving issues and helping parents communicate better.

It is therefore right that parents and separating couples be required to consider mediation before they can apply to court, unless special circumstances apply. Mediation is not suitable in all cases, including in some instances where domestic abuse has taken place, and so carefully-defined automatic exemptions from the requirement to consider mediation as a way forward are necessary.

Good quality parenting programmes recognise different models of parenting, help parents focus on the needs of their children during the separation process and for the future, and explain the benefits of resolving disputes without adversarial court proceedings. The government's aim of significantly increasing the use of parenting programmes and mediation, thus preventing the need for protracted court proceedings, is therefore welcome.

This is a complex consultation which challenges us all to think carefully about the core principles of mediation, how it works in practice and how mediators interact with the court. With some changes, we believe the government's proposals to reduce the number of families needing to turn to the court can be made to work and its aim be achieved.

Encouraging the take-up of mediation

The route into mediation is through a Mediation Information and Assessment Meeting (MIAM). This is different from mediation – it is a meeting before mediation itself gets under way in which a mediator meets potential mediation participants separately and:

- provides information about mediation and other dispute resolution processes to enable them to make informed choices about how to resolve the issues they raise;
- obtains information from participants about their circumstances and issues arising from separation;
- assesses the safety and suitability of mediation for the participants; and
- discusses and, where possible, identifies with participants their next steps, including the value of seeking legal advice.

MIAM attendance

The proposals in the consultation paper would require parents and ex-partners to make a reasonable attempt to mediate, by attending a pre-mediation meeting (currently called a MIAM) and a mediation session before being able to make an application to court (unless exempt).

We strongly support the requirement for both parties to attend a MIAM. For mediation to work, both parties need to attend a MIAM. Treating potential participants differently from the very start (by not requiring both to attend a MIAM) fosters division, instead of encouraging people to work together to find solutions to issues they are both responsible for resolving.

A MIAM allows a mediator to make an assessment about whether mediation is suitable for a family and the appropriate format for that mediation, as well as providing a valuable opportunity for participants to learn about the value of resolving issues outside of court.

Participants attend MIAMs separately, hear about their options for resolving their dispute and explain their situation to the mediator. The mediator asks questions in order to be able to assess whether mediation will be safe and suitable, explores how mediation might be conducted (for example, in a series of meetings together, or on a ‘shuttle’ basis with each of the participants in separate rooms, either online or in person, and helps the participants determine their next steps. Requiring both parties to attend a MIAM does not contravene the principle of voluntariness, as mediation itself will not yet have started.

Voluntary participation, confidentiality and the impartiality of the mediator

In the experience of mediators, where both parties attend a MIAM the vast majority choose to go on to mediation - where they can afford to do so. If parents have also attended a parenting programme, the likelihood that they will choose an alternative to court is even greater. Providing information about separation, getting both participants to a MIAM and ensuring mediation is funded are therefore the most important factors in increasing the use of mediation and therefore ensuring families do not need to turn to the court. As a result, we do not think that requiring people who have attended a MIAM to attend a first mediation session is necessary to achieve the government's aims.

Recognising the public policy considerations that have led to this proposal, however, we have considered whether that requirement and the proposal for the court to assess whether participants have made a 'reasonable attempt to mediate' are compatible with the core mediation principles of voluntary participation, confidentiality and the impartiality of the mediator.

The use of the term "compulsory mediation" is considered by some to be an oxymoron, given that one of the core principles of mediation is voluntary participation. The FMC Code of Practice states at paragraph 6.1 that: '*Participation in Mediation is voluntary and must be the free choice of each Participant at all times. The Participants and the Mediator are always free to withdraw'.*

Voluntariness is important as it allows for self-determination of outcome, enabling participants to decide whether and on what terms they will reach an agreement. It is one of the factors that contributes to the creation of a safe space that mediation provides, and that allows participants to explore options without worrying that doing so will result in something they don't like being imposed upon them. The voluntary nature of mediation also encourages mediation participants to take responsibility for resolving issues themselves and empowers them to find solutions that work for their family by developing thinking to move away from the win/lose mindset.

Agreements in mediation have been found through research to be more sustainable and long lasting as the participants have freely entered into these agreements. When participants can genuinely commit to the process it allows the long-term benefits of mediation, such as improved communication and collaborative parenting, to come into operation increasing the sustainability of agreements and avoiding repeated returns to court. As well as the voluntary nature of mediation increasing the likelihood of reaching an agreement on issues immediately at hand, it also ensures that participants are less likely to go to court in the future.

Furthermore, voluntariness allows participants to withdraw if they feel unsafe at any point during the process, without fear of consequences.

Attendance at a first mediation meeting

Requiring participants to attend a first mediation meeting is a much bigger challenge to the principle of voluntary participation than requiring both parties to attend a MIAM.

There are a number of different aspects to the 'participation' when mediation takes place prior to potential court proceedings. To understand where the challenge to voluntary participation lies, these aspects can be considered in turn:

A. The mediation process which at present is determined by the mediator, with input from the participants. Participants have the choice of remaining as part of the process or not, but they alone do not determine the process to be followed.
B. Active participation in the mediation session which at present is determined by the participants themselves.
C. Outcome of the mediation which at present is determined by the participants themselves.

A. The mediation process

With regards to the mediation process, the fact that a participant can withdraw at any time means that the process is driven by their consent. The mediator has to earn and to preserve the trust of the participants for the process to continue. It is also a process which requires and generates trust between participants: mediators find saying 'the other person is here because they want to find a solution' a very useful intervention to help participants resolve difficult issues. If court rules were to require attendance at a first mediation session, and therefore the parties have to turn up, in order to preserve voluntariness, there would have to be a unilateral opt-out for each of the participants and the mediator at any time after turning up to that session.

B. Active participation

To preserve voluntariness on active participation, courts must not be required to judge whether parties to a court application have made a reasonable attempt to mediate by considering how parties have behaved in a mediation and penalties relating to behaviour must not be imposed.

In order for the court to make a determination about how participants have behaved in mediation, either the mediator or the mediation participants would be required to tell the court their view on whether a person's behaviour constitutes a 'reasonable attempt' to mediate. This requires a judgment to be made: mediators cannot do this, as it would compromise the facilitative nature and impartiality which is fundamental to their role. It would also jeopardise the key principle of mediation that discussions are confidential.

The alternative of asking one party to a subsequent court application whether they or the other party have made a reasonable attempt to mediate risks is likely to create another dispute which a judge would have to decide upon, and take up more court time.

C. *Outcomes*

Voluntary participation is also challenged by the idea that a person who does not make a 'reasonable attempt to mediate' would face sanctions in court. The notion of the court deciding whether somebody has made a 'reasonable attempt' to mediate risks coercing prospective participants into making decisions in mediation they would not otherwise make, threatening the sustainability of mediated agreements.

It is common in mediation for one participant to say to another 'you're not being reasonable'. If there were sanctions for not making a 'reasonable attempt to mediate', a participant who may be perfectly reasonable in the view of the mediator or the judge, could worry that their position may be considered unreasonable and that this could be held against them; this could create pressure to reach an agreement that they don't think is right for their family.

As well as being contrary to the fundamental tenets of mediation, it would be impractical and unrealistic to ask a mediator to make an evaluative judgment and communicate that to the court, particularly if a first mediation meeting was terminated early in the session. Family situations are always complex and nuanced.

Participants may also ask the mediator to make a call during the mediation process about whether one or both of them are being reasonable: this compromises the impartiality of the mediator.

The most that can be asked of mediators by the court is to give answers to factual questions, and those should be limited to asking whether parties have attended a MIAM and/or a mediation session. Limiting the court's assessment of whether people have made a reasonable attempt to mediate to these questions would not result in the frustration of the government's aims; it would increase the chances of achieving them, since we are confident that the requirement for both parties to attend a MIAM and parenting programme will help a significant majority of parties resolve their issues without recourse to the court.

In addition to this change to the proposals, it is important to clarify that should a mediator decide that a case is not safe or not suitable for mediation at the MIAM stage or once mediation has started, the case should then proceed to court or, if appropriate, another form of non-court dispute resolution. In these circumstances, courts must not ask the mediator to explain their decision, as it would breach both the confidentiality of the mediation process and the impartiality of the mediator – both core principles of

mediation practice. To protect against this, the government should introduce legislation similar to that which exists in Scotland[1] which prevents any evidence as to what occurred during family mediation from being admissible in any proceedings.

The value of a change in language

We also strongly advocate a change in language. The paper refers to *'compulsory mediation'*. Using this term risks being counterproductive, as people who feel they are being compelled to do something may be less inclined to participate fully. It is also a term that doesn't accurately describe the proposals in the consultation paper, which require people to consider mediation and, where appropriate, to give it a go.

Instead, we believe mediation should be described and acknowledged as a normal part of the court process: just as completing a court form, paying a court fee, exchanging statements and financial disclosure are not described as compulsory, but must be undertaken as part of the court process.

In so far as this must be expressed as a requirement, a court rule requiring parents and separating couples to attend a MIAM (in the absence of an exemption) would preserve the self-determination of participants and avoid the potentially damaging effects of participants feeling they are being forced down a particular path. A court rule requiring attendance at a first mediation session would require other safeguards to be put in place, including:

- an opt out once a person has started the first session; and
- a guarantee through legislation that mediators will not be required to share any information other than the fact of attendance with the court.

Child-Inclusive Mediation (CIM)

The government's proposals would be strengthened - and its aims more likely to be achieved - by supporting CIM.

Evidence from the family mediation voucher scheme shows that mediation is more successful when children are consulted[2].

[1] Civil Evidence (Family Mediation) (Scotland) Act 1995, Section 1

[2] Overall success rate 69%, Child Inclusive Mediation success rate 74% - *Family Mediation Voucher Scheme Analysis*, Ministry of Justice (March 2023)

Research findings from numerous reports and projects over the last 25 years to show that many children need and want to have a voice in decisions affecting their lives[3] when their parents separate. Mediation offers the opportunity for children's voices to be appropriately heard and understood without placing undue weight and responsibility upon them. The most recent research in this area comes from the University of Exeter, where Barlow and Ewing (2022)[4] spoke specifically to children and young people who had met with a mediator as part of the process that their parents were engaged with. Their findings demonstrate the value of participating for the young people involved. These were some of their comments:

> 'It gives [young people] a chance to talk about their feelings and… a sense that somebody is there for them, that they have somebody to… talk to.' (Ellie)
>
> 'With mum or dad I want to make them both happy…so I change my own opinions but… if I wasn't personally telling them then I could actually say what I meant.' (Jonny)
>
> ''It opened me a lot more and made me a lot more confident to speak to my [parents] about things, which just made a lot of stuff much, much easier and took a lot of stress off my chest.' (Alfie)
>
> 'I think it helps [young people] in that…they have got a voice and they are being respected … somebody has heard them… I also feel like it's actually quite cathartic for children to be able to kind of explain what's going on to someone and someone to listen to them.' (Anna)

A commitment to child-inclusive mediation

The government's commitment to hearing the voice of the child within the family justice system was clearly established within the Children and Families Act 2014. Following on from this, the Voice of the Child Dispute Resolution Advisory Group made its recommendations in 2015 and these were carefully considered by the Family Mediation Council. Mediators undertaking CIM are required to attend additional specialist training and practice standards specific to child-inclusive practise are embodied within the FMC Standards Framework and we continue to take note and act on the recommendations of forums such as the Family Solutions Group.

The FMC Code of Practice includes a presumption that children over the age of 10 should be offered the opportunity to be consulted as part of the family mediation process, yet this happens rarely. The reasons for this include:

- a lack of access to funding;

[3] See particularly *Taking a longer view of contact: The perspectives of young adults who experienced parental separation in their youth*, J Fortin et al. (2012), University of Sussex.
[4] *Transforming relationships and relationship transitions with and for the next generation: The Healthy Relationship Education (HeaRE) and Healthy Relationship Transitions (HeaRT) Project*, A Barlow et al (2022), University of Exeter

- parents often not being aware of the importance to their child's mental health and wellbeing of having their child having their voice heard;
- other family justice professionals not being aware of the possibility and the importance of offering children and young people the chance to speak to a mediator; and
- because there is not yet a culture in which adults feel children's voices should be heard as part of discussions about separation.

Funding for child-inclusive mediation

A government commitment to CIM would require some further financial backing both to fund the mediation and to fund resources to help parents understand the value of CIM. We believe that this would be a relatively small investment which would bring a significant return, and would make a positive contribution to the government's levelling-up agenda by ensuring that all children can have their voices heard when their parents separate, regardless of their parents' income.

At present CIM receives very little government funding. It is not viable to fund CIM currently through legal aid: the number of sessions needed when children are consulted well exceeds the average of three sessions that legal aid will cover. Therefore, only children whose parents can afford to pay for them to be consulted as part of the mediation process are able to have their voice heard. That inequality needs to be addressed.

The voucher scheme has helped to fund a small number of CIM cases since its inception. This has provided us with very valuable information about the success of CIM, but is based on a small sample. We urge the government to trial an extension of the voucher scheme specifically for CIM funding for all children over the age of 10, including those whose parents receive legal aid.

DBS checks

We also urge the government to amend legislation, to include family mediators on the list of professionals for whom enhanced DBS checks can be obtained. At present, it is not possible for family mediation services to obtain these checks[5] for family mediators, even though child-inclusive mediators regularly meet vulnerable children, sometimes without other adults present, as part of a confidential mediation process. Enabling services to obtain enhanced DBS checks for family mediators who work with children would encourage more families to have confidence in mediators, and encourage more mediators to train in child-inclusive practice.

[5] Some family mediators do have enhanced DBS check certificates, which are obtained because they also have another professional role

Question 1

Are you in favour of a mandatory requirement for separating parents (and others such as grandparents) to a attend a shared parenting programme, if they and their circumstances are considered suitable and subject to the same exemptions as for the mediation requirement (see chapter 3), before they can make an application to the court for a child arrangement or other children's order?

We are in favour of parents having to attend a parenting programme before making an application to court but believe different exemptions to MIAM/mediation should apply. It should be clear that parents do not need to attend together.

Parents' attendance at parenting programmes gives children a better chance of avoiding conflict and therefore a chance of a better life. It is therefore in the best interests of children for parents to attend parenting programmes. It is also in the best interests of parents, as the programmes share information that it is important for parents to know before making an application to court.

Under current arrangements, access to parenting programmes prior to making a court application is possible at a cost to parents, whereas it is free after the application is made. This creates a perverse incentive for parents to apply to court. These arrangements also mean the parenting programme - which may be effective pre-court in preventing an application to court from ever being made - is most often accessed after a court application has been made. Making attendance a pre-requisite to issuing a court application would mean the timing of the programme is more appropriate and the beneficial impact is likely to be bigger.

The proposal in the consultation paper is that parents should have to attend a parenting programme before making an application to court. This requirement would only apply to one parent, the court applicant. We believe that serious consideration should be given to requiring both parties to complete a parenting programme unless they are exempt. They should not be required to attend the programme together. Parents should not be treated differently by the court because they are applicants or respondents. Both parents are responsible for their children's welfare which is better served if both attend the programme, and both are entitled to receive the same information and support. If only one parent has attended the programme this is likely to be half as effective for the child. Whilst it is easier to make it a requirement for an applicant to attend a programme, there are options available to the court to make it a requirement for the other parent(s)/guardian(s) and prospective respondent(s) to attend.

We do not believe that the same exemptions that apply to MIAMs/mediation should apply to attendance at a parenting programme.

We believe the only exemptions that should apply to the requirement to attend a parenting programme are that:

- the court application is urgent;
- a parenting programme is not available/accessible with a certain time frame; or
- a person would be harmed by attendance at a parenting programme.

All of the above would need to be carefully defined.

One of the most widely used exemptions from a MIAM at present is FPR 3.8 (a): there is evidence of domestic violence. This isn't an appropriate exemption from attendance at a parenting programme, which are information-sharing programmes rather than dispute resolution options and do not require both parents to attend together. Therefore, we do not see that victims of domestic violence for instance should be put at risk by attendance at a programme as long as the programme was suitably delivered so as not to risk traumatisation.

Parenting programmes help parents focus on the needs of children whilst considering arrangements for children: the children of people who have experienced domestic abuse need their parents to focus on this as much as children of people who have not experienced domestic abuse, albeit often in a different way.

There should be clear standards in place for parenting programmes that must be attended before a court application can be made.

The compulsory element of the programme should relate to:

- educating parents about the value of focussing on a child's needs;
- the benefits that come from communicating in a non-confrontational way; and
- the options available to resolve issues.

Programmes should be formulated and delivered in a way that takes in to account that each of the course delegates will have different circumstances and experiences, in particular recognising that parents may have been victims or perpetrators of domestic abuse whether or not this has been reported or identified.

Question 2

If yes, are you in favour of this being required before mediation can start?

No, although this should happen in most cases.

Whereas for many parents attending a parenting programme before mediation starts can be very helpful, requiring attendance at a parenting programme could cause an undue delay in starting mediation.

A significant benefit of family mediation is that it is flexible and can be arranged very quickly, to respond to a family's needs. Mediators frequently offer families in crisis appointments within days and help them reach to agreements about the way forward, whether on an interim or long-term basis.

For some parents it may be more appropriate for them to complete a parenting programme once mediation has started. The timing of the attendance of the parenting programme can be discussed by the mediator with each parent at a MIAM.

We are also concerned about whether a mediator might be expected to police the requirement for parents to attend a parenting programme if it became a requirement to attend before mediation starts. This would again compromise the impartial role of the mediator.

Question 3

Should information on the court process (non-tailored legal information) be provided to those with a private family law dispute:

- **at the mediation and information assessment meeting (MIAM)**
- **at the parenting programme**
- **via an online resource**
- **by any other means (please specify)**

Please provide reasons for your answer.

Information about the court process and other legal information should be provided to families at every opportunity.

Family separation is a stressful time and legal information can appear complex. Family members may not understand information when it is first presented: repeating information at several points can be helpful to reinforce the message. Under current rules, FMC Registered Mediators are required to provide MIAM

participants with information about the court process and information about law relating to their case. This does not extend to providing legal advice, but does include providing non-tailored legal information. If such information could also be provided as part of parenting programs and as part of online resources which are readily available to families, that would be beneficial for all.

The vast array of different online information available that makes it difficult for participants to access appropriate information. One maintained government 'go-to' online resource with links to information on other appropriate websites such as the FMC, the FMC Member Organisations and CAFCASS, would be valuable and could be referenced as part of every interaction with a family justice professional.

It would be particularly helpful if as part of this online resource the court's expectations of what parents should do before making an application could be made clear to parents by HMCTS as an authoritative source. The 'Midlands Expectation Document'[6] published by the Midland Region Family Judges and Magistrates some time ago is an excellent example of the kind of information which helps parents understand their responsibilities and explains that the court will focus on the needs of the child and not the wishes of the parents.

Question 4

Based on current online resources, what are your views on an online tool being provided by the government to help parents, carers and possibly children involved in child arrangement cases? What information and resources should any such tool prioritise to support families to resolve their issues earlier?

A government resource which clearly sets out information for parents would help parents obtain reliable and accurate information as referred to in the response to question 3 above.

We suggest the resource includes information about:

- The rights of the child and importance of focussing on their needs;
- The Court:
    - Expectations before issuing proceedings & afterwards (see Appendix 1)
    - Timescales
    - Process – e.g., safeguarding checks, Cafcass involvement, referral to mediation, cost orders
    - Costs of going to court (represented)
    - Range of available outcomes from court
    - When the protection of the court is needed

[6] See Appendix 1

- Research into harm to children of ongoing disputes
- What young people say about being consulted
- Experiences of people who are now adults whose parents separated when they were children
- Resources for parents
- Resources for children
- Links to other available and authoritative and reliable online resources.

Question 5

Do you think it is appropriate for mediators to determine suitability for a co-parenting programme at an information meeting?

No, but mediators should be able to refer parents to government funded parenting programmes who should assess whether the individual would benefit from the programme.

At an information meeting, mediators gain an understanding of each participant's needs and the extent of their knowledge about parenting following separation. Mediators understand the value of parenting programmes and would widely welcome the ability to make a referral to a parenting programme at no cost to the participants.

It would be important to make clear to which parenting programme or programmes mediators can refer participants and the grounds on which they could do so. It is also important that participants should not be required to attend the same parenting programme as their ex-partner without a detailed domestic abuse screening process having first been undertaken.

Question 6

Can you share any experience or further evidence of pre-court compulsory mediation and other countries and the lessons learned from this?

The 'Learning from Other Countries' section of the consultation document references systems in Australia, New Zealand and Norway, and we are are aware of compulsory or court-referred mediation in other jurisdictions such as Florida and Maryland in the USA. However, we urge caution when relying on conclusions reached from research carried out in other countries, because there is no system which matches the proposals in this consultation paper; parallels cannot be drawn.

Question 7

How should the MIAM pre-mediation meeting under this proposed model differ from the current MIAM?

The FMC has confidence in the current model for MIAMs as the Family Mediation Standards Board has introduced carefully defined professional standards for these initial meetings[7]. The MIAM Standards are comprehensive and ensure that mediators prepare participants to take the next steps in resolving issues. However, they have been designed to work with the court rules currently in force.

If the framework for making a court application changes, the MIAM will need to change to reflect this. At present MIAM participants are told about their different options for resolving issues; if participants are not to have these options this part of the MIAM would obviously need to change. Instead, where mediation is safe and suitable, mediators would need to explain to participants the process that will happen and when they would be able to opt-out. Next and/or parallel steps, such as using solicitor negotiation, collaborative law, early neutral evaluation, or arbitration could instead be discussed and explored at a later stage. Referrals could be made if mediation is attempted and does not resolve the dispute or if additional support would assist with the chances of mediation being successful.

It is critical, however, that some parts of the existing MIAM be retained. Mediators must still assess the safety and suitability of the mediation process for participants. In order to do this, mediators must obtain information from participants about the circumstances and issues arising from separation. Under the FMC's Standards Framework, where mediation is not safe or not suitable, mediation must not proceed and mediators must explore next steps away from the mediation process.

The Family Mediation Standards Board will review MIAM standards for mediators once a draft legislative framework and draft new court rules have prepared and is of course willing to work closely with the MoJ to ensure any amended MIAM remains fit for purpose.

[7] FMC MIAM Standards https://www.familymediationcouncil.org.uk/wp-content/uploads/2022/08/FMC-MIAM-Standards-August-2022.pdf

Question 8

What should 'a reasonable attempt to mediate' look like? Should this focus on the number of mediation sessions, time taken, a person's approach to mediation or other possibilities?

As previously stated in the Introduction, we do not believe that a court should be trying to assess whether or not participants have made a reasonable attempt to mediate by considering the behaviour of the parties as:

- it is impossible to make such an assessment without undermining the mediation process;
- it is unnecessary if both parties are required to attend a MIAM and there is sufficient funding for mediation in place - these two key factors will significantly reduce the number of families applying to court; and
- this would risk increasing conflict between parties in court.

A better solution would be for an authorised family mediator to report only factual information to the court, as set out in our introduction above This factual report could be whether the parties to the court process have attended a MIAM and/or the number of mediation sessions attended.

We don't have an objection to mediators reporting on the time taken at a mediation, however we don't feel that this information would be useful to the court as no inferences could reliably be drawn from it. For example, somebody could attend a mediation session, not provide any financial disclosure, not say anything, and still be sitting there for an hour or more. Equally somebody could attend a mediation session for 15 minutes and, within that time, a disclosure could be made that makes it clear that mediation has become unsuitable meaning the mediator has had to bring the mediation to an end.

Question 9

a) Do you agree that urgent applications, child protection circumstances (as set out in the current MIAM exemption), and cases where there is specified evidence of domestic abuse, should be exempt from attempting mediation before going to court?

Yes.

Although domestic abuse does not automatically make mediation unsuitable, we agree that where there is specified evidence of domestic abuse, people should be able to choose not to mediate. It is important that those who have experienced domestic abuse can choose to attend a MIAM and - where it is safe and suitable, take part in mediation.

We also agree that there should be exemptions for child protection circumstances and urgent applications[8], although in the case of the latter there should remain an expectation that the parties attend a MIAM as soon as possible, since it may still be possible for matters to be resolved in mediation.

We repeat our introductory comments (page 8) for emphasis: where a mediator assesses a case as not safe or not suitable for mediation, court rules must exempt the family from any requirement to attend mediation which may be introduced as a result of this consultation.

b) What circumstances should constitute urgency, in your view?

Where there is a legal imperative for proceedings to be issued quickly.

Question 10

If you think other circumstances should be exempt, what are these, and why?

We do not think that there should be other exemptions before a court application can be made, except where the application is only for a consent order.

Question 11

How should exemptions to the compulsory mediation requirement be assessed and by whom (i.e., judges, justices' legal advisers or mediators)? Does your answer differ depending on what the exemption is?

Any exemptions to court rules should be determined by a suitably qualified person at court, whether this be an exemption to the requirement to attend a parenting programme or MIAM, or to a requirement which may be introduced as a result of this consultation to attend mediation.

There should be clear grounds on which an exemption can be granted and a clear and effective procedure for presenting evidence which shows that a person is entitled to that exemption. The court needs to have the knowledge and resources to be able assess whether the exemption is valid. At present, for example, we know that MIAM exemption forms that should be signed by an authorised family mediator are sometimes accepted by courts when they have been signed by unqualified individuals. This undermines the requirement for a MIAM at present: it is crucial that any new system is not subject to the same flaw.

[8] See Appendix 2 for the FMC's full response to the FPRC's consultation about MIAM exemptions

Question 12

What are your views on providing full funding for compulsory mediation pre-court for finance remedy applications?

We welcome the recognition that funding mediation for families offers value for money. We also welcome the government's commitment to part fund children cases beyond the end of the voucher scheme in 2025.

However, if people are to be encouraged to use mediation and mediation is to remain a viable profession it is important that the funding of family mediation is considered as a whole, with funding systems complementing each other.

The Family Mediation Voucher Scheme has proved a great success, and the fact that it has brought government spending on mediation back to its pre-LASPO[9] levels is very welcome. However, the voucher scheme should not be mistaken for full funding for the mediation process. It doesn't pay for MIAMs (an essential part of the process) or for the drafting of documents that are drawn up to record the outcome of mediation such as a parenting plan Memorandum of Understanding that may include a draft court order. Voucher funding is also limited to £500 which may not cover all necessary mediation sessions, and is only available on a one-off basis. Parents cannot return for a second or subsequent voucher if their child's circumstances change and arrangements need to be reviewed.

For many people, the fact that these aspects of mediation are excluded from voucher funding do not act as a barrier to mediation. However, for those on low incomes these unfunded aspects of the mediation are likely to make the process unaffordable and so access to legal aid is crucial.

It is worth noting that research[10] from the Nuffield Family Justice Observatory shows that people from deprived areas of the country are more likely to resort to court in relation to child arrangements. The research suggests that 30% of applications to court for a Child Arrangements Order are from the most deprived areas in the country, whereas only 13% of the population come from these areas.

Legal aid should be a great strength of the current family mediation system, both for mediation and legal support for mediation, but it is at risk of significant decline. The number of mediators choosing to offer legally aided family mediation has dropped by 33% in five years. Many more mediators have told us they are considering giving up legal aid contracts as a consequence of universal credit being dropped as a passporting benefit, as this will lead to a much more complicated and therefore time-consuming assessment process for eligibility making it even less cost-efficient to offer legal aid. Some mediators who

[9] Legal Aid, Sentencing and Punishment of Offenders Act 2012
[10] *Uncovering private family law: Who's coming to court in England?* Cusworth et al (2021)

have recently given up legal aid contracts have also commented that they feel more able to do so as they are able to offer funding to the public through the voucher scheme.

Mediators who have continued to offer legal aid have reported to the FMC that it is becoming increasingly unsustainable to continue to deliver the service, the requirements of the legal aid contract are not proportionate making the contract more expensive than necessary to maintain, and that privately funded cases are subsidising legal aid cases.

The consultation paper does not mention legal aid for child cases. Is it the government's intention that this will continue, or will it be replaced by alternative funding? If it is to be continued, rates which have remained unchanged for nearly twenty years, thus reducing significantly in real terms[11] must be reviewed in order for the scheme to become sustainable. If it is not to be continued, the average cost of the voucher-style funding would increase, as legal aid usage currently keeps the average voucher claim down to a value lower than it would be than if legal aid was not used. Furthermore, to protect those on very low incomes in the way that legal aid currently does, replacement funding must both be enshrined in legislation, and cover the cost of MIAMs (as well as the mediation) for both parties.

For those who do not qualify for legal aid, perhaps because they just miss the threshold, the fact that MIAMs are unfunded can make the £500 mediation voucher inaccessible.

For families who fall in to the 'gap' between the legal aid threshold and being able to afford mediation, a top-up voucher to cover the costs of a MIAM, sufficient mediation sessions to deal with the issues raised and the drafting of a final outcome statement would ensure they do not end up in court, thus resulting in better outcomes for children and saving the tax-payer more in the long run.

It is important for mediation participants to have access to legal advice alongside mediation, particularly in finance cases. We believe that the 'Help with Mediation' aspect of legal aid which is intended to provide some legal support alongside mediation needs to be reviewed. It is rarely used and mediators cannot find solicitors who offer this service. 'Help with Mediation' is not profitable and should be addressed along with a review of all legal aid rates for mediation.

The voucher scheme has been significant in encouraging the considerable expansion of publicly funded family mediation. However, it is legal aid that enables mediation to be accessible to those on the lowest incomes. Higher rates of remuneration will ensure that legally aided mediation is sustainable.

[11] Using the Bank of England's inflation calculator, a MIAM paid at £87 in 2004 would be worth £146.49 today. It is still paid at £87. In addition, the Legal Aid Agency no longer pays a £25 willingness test, which used to be paid to cover the administration costs of establishing whether a second participant was willing to attend a MIAM.

In relation to the specific issue of voucher funding for finance cases, we suggest that this is trialled, as it has been for children cases. Where parties have assets and funds that they need to split between them, they may well be able to afford the cost of paying for mediation themselves, and not require a contribution from the public purse to do so. However, separating families are often under financial strain due to suddenly having to fund two households instead of one. For most families, their biggest asset will be the family home rather than available cash, and so they may lack funds to pay for mediation. In addition, the small upfront cost of a voucher would save public money as it would result in families avoiding court.

There are other issues of funding that need to be addressed or clarified when considering the proposals in this paper:

- The consultation states (at page 7) that the government intends to fully fund mediation for appropriate children cases but also states (at page 30) that funding will be limited to £500 per case, as with the current family mediation voucher scheme. A significant number of cases cost more than £500 and would not be fully funded under this proposal.
- The consultation paper indicates each family will receive up to £500 in funding. That amount must be annually reviewed and keep pace with inflation, so that the benefit to families will be maintained.
- Families find that their circumstances change, and sometimes they need to come back to mediation to resolve issues that they had previously thought had been settled. It is possible under Legal Aid for clients to receive funding so long as four months has lapsed since they concluded the last mediation; this is not possible under the current voucher scheme, and these 'returners' would need to be considered under any funding scheme, so that repeat cases do not end up in court.
- The consultation paper does not state whether the voucher-style funding will be extended to include funding MIAMs for all. MIAMs are currently not funded as part of the voucher scheme.
- There is no provision for the funding of CIM. The voucher scheme has shown that cases where CIM has been used are more successful than where it has not been used. Without funding, the UK risks not complying with its obligations under the UN Convention on the Rights of the Child.
- At page 30, the consultation asks whether mediation fees should be regulated. We understand the need to protect public money, and therefore why this question has been asked. However, unless the government intends to fully fund mediation cases, there is no need for fees to be regulated. There is a ceiling for voucher payments and overall fees are determined by the market. Mediation services that currently offer legal aid tell us that this publicly-funded work is subsidised by their private work, as legal aid rates alone cannot sustain a mediation service; there is therefore understandable concern about government also regulating private fees, and setting an unsustainable rate.

Question 13

Does the current FMC accreditation scheme provide the necessary safeguards or is additional regulation required?

• Yes

• No – additional regulation required

• Don't know

Yes – the FMC's current regulatory arrangements provide strong protection for the public and promote high quality in the delivery of the complex professional activity that constitutes family mediation. The Family Mediation Standards Board] (FMSB) is the right body to regulate family mediators; no other regulator is required. However, there are constraints on its reach, as it operates on the basis of voluntary professional self-regulation, without statutory back-up; there would be value in the government promoting practical measures to enhance its effectiveness and strengthen the position of accredited mediators in the family justice system.

The FMSB was established by the FMC in 2015 to advise on and implement the FMC's Standards Framework and its system of professional regulation is robust. FMC Registered Mediators are governed by the FMC's Standards Framework and have a good understanding of the standards needed to provide effective resolution services. They are trained to recognised industry standards, follow a Code of Practice, carry out continuing professional development, have support from a Professional Practice Consultant, are insured and have a complaints process which includes the option for an appeal outside the mediation provider. Once they have sufficient experience FMC Registered Mediators submit a portfolio of evidence to demonstrate their competence as mediators; if they pass this assessment, they gain Family Mediation Council Accreditation (FMCA).

Since its establishment, the FMSB has implemented a programme of continual review and improvements. This is important because the family mediation profession is relatively young, and because all professions need to respond to any changes in the environment in which they operate. When the outcomes of this consultation are known the FMSB will consider whether any elements of the FMC Standards Framework and regulatory regime need to be reviewed to respond to developments in government policy.

One of the FMSB's current areas of focus is improving its assurance processes for domestic abuse screening and assessment. There is a set of professional standards in place for mediators which concern domestic abuse as follows:

- Foundation training covers domestic abuse and assessing suitability for mediation.
- Mediators join the FMC Register as working towards accreditation are required to observe accredited mediators and gradually build up their skills and increase the amount of practise they undertake, with support from a Professional Practice Consultant (PPC).

- Mediators are required to submit their portfolio within three years of training[12] and this will demonstrate they can meet set competences, including screening for domestic abuse.
- Following accreditation, mediators must carry out continuing professional development (CPD) activities on a three-year cycle, which includes a requirement to carry out CPD on domestic and child abuse, and to have continuing support from a PPC. The FMSB checks each mediator has met these requirements.

As part of its commitment to continually review standards, the FMSB is currently considering whether the standards around domestic abuse need to be enhanced, or be more specific. It is therefore seeking the views of external stakeholders, including Women's Aid and the Domestic Abuse Commissioner's office as part of this process, and is happy to work with others in the family justice system as this area of work further develops.

It should be noted that people are not required to be registered with the FMC to call themselves family mediators. Those mediators who are not registered to the FMC are not regulated by other bodies in respect of the mediation work that they carry out, and cannot be held accountable for their work as mediators. No professional body would, for example, hear a complaint that they had breached the FMC's Code of Practice (which is accepted as the industry standard) whilst mediating. It is therefore important that the government should ensure that any legislation or court rules that recognises the role of family mediators specifically requires those family mediators to be registered with the FMC. The FMC and FMSB stand ready to work with the MoJ on measures designed to achieve this.

Question 14

If you consider additional regulation is required, why and for what purpose?

N/A

[12] This time period can be extended for reasons such as parental leave or illness, but mediators are always required to bring their skills are up to date to remain on the FMC Register.

Question 15

a) Should the requirement for pre-court mediation be expanded to include reasonable attempts at other forms of non-court dispute resolution (NCDR), or should it be limited only to mediation?

• Mediation only

• Other forms of non-court dispute resolution (NCDR)

• Don't know

Please explain your answer

Mediation only.

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. Requiring potential parties to court applications to consider or attempt mediation prior to court proceedings would not preclude the use of other forms of dispute resolution.

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 arbitrate and a final outcome would be decided. Alternatively, if families wish to try and resolve matters through solicitors, perhaps using a collaborative approach or simply solicitor negotiation, they can do so. If successful, they will not need to apply to court except perhaps for a consent order.

b) What are the advantages and disadvantages of expanding the requirement?

The disadvantage of expanding the requirement to include other forms of dispute resolution is that this would open up a substantial loophole through which people could circumvent the government's intention that non-court dispute resolution must be genuinely attempted before an application to court can be made. For example, solicitor negotiation is a form of non-court dispute resolution, but if this was included as a reason not to attempt mediation, it would be easy to point to an exchange of letters as an attempt to try to resolve matters, irrespective of the tone, content or number of letters.

c) If for 15a you answered 'other forms of non-court dispute resolution (NCDR)', to what other forms of NCDR should it be expanded?

N/A

d) If for 15a you answered 'other forms of non-court dispute resolution (NCDR)', what accreditation/regulatory frameworks do other forms of NCDR have that could assist people in settling their family disputes in a way that fits with the legislation that applies to private law children cases and financial remedy cases?

N/A

e) If the requirement is limited to mediation, should completion of another form of dispute resolution lead to an exemption from the requirement to attempt mediation?

If other forms of dispute resolution have been completed successfully, families will not need to apply to court. 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 16

What is the best means of guarding against parties abusing the pre-court dispute resolution process:
(i) should the court have power to require the parties to explain themselves
(ii) what powers should the court have in order to determine whether a party had made a reasonable attempt to mediate, for example when considering possible orders for costs?

(i) Courts should not have the power to require that parties explain what has happened in mediation.

(ii) We believe the government is most likely to achieve its aim of keeping families who do not need to be there away from court if there is robust enforcement by the courts of the need for both potential parties to the court application to attend a MIAM and if the courts effectively enforce the provisions of Part 3 (rule 3.3) of the Family Procedure Rules 2010, which require the court to consider whether non-court dispute resolution is appropriate at every stage of the proceedings. There is ample evidence that mediation can be effective even in the most conflictual of cases (for example *Al-Khatib* v *Masry*[13], the Court of Appeal mediation scheme).

This would require:

[13] *Al-Khatib* v *Masry & Ors* [2004] EWCA Civ 1353 (05 October 2004) available at https://www.bailii.org/ew/cases/EWCA/Civ/2004/1353.html

- careful checking of applications by court staff, to ensure that an FMC Accredited Mediator has confirmed MIAM attendance or that a valid exemption has been claimed;
- Judges staying proceedings and ordering attendance at MIAMs should circumstances have changed or it become apparent that exemptions do not apply (or no longer apply) later in the proceedings.

Some courts such as Watford are doing this at present and it is very effective, but there doesn't appear to be standard practice across the country.

Should the government decide to extend the requirement to also attend a first mediation session (which is not something we recommend) the court must also ensure this is strictly enforced.

Whether the court should make costs orders against those who do not attend a MIAM or first mediation session without claiming a valid exemption depends in part on whether the MIAM and mediation session will be funded (see our answer to Q12). If the answer is yes, we would support the making of a costs order against a person who does not attend a MIAM or mediation session as required.

We do not believe that the court should be determining whether parties have made a reasonable attempt to mediate (see above) by considering the behaviour of parties in mediation.

Question 17

How could a more robust costs order regime discourage parties in court from avoiding reasonable attempts at pre-court or post-application mediation and lengthening proceedings unnecessarily? Should judges continue to have discretion to decide when to make these orders and what specific costs to include?

The scenario where a person is able to frustrate progress would only arise if a judge has to assess a person's behaviour during the mediation process. It would not arise if a judge has to make an assessment on the basis of attendance/non-attendance at a MIAM/mediation session.

If an opt-out is maintained, as we believe it should be for people once they have first attended a MIAM or mediation session, then one participant would not be able to lengthen the pre-court process unnecessarily as the other participant would be able to apply to court as soon as the opt-out had taken place.

If a more robust costs order regime was to be introduced to discourage parties in court from avoiding reasonable attempts at pre-court or post-application mediation and thereby lengthening proceedings

unnecessarily, we believe there is merit in considering distinguishing between litigants in person against whom costs orders should not be made and those who have legal representation against whom costs orders could be made. This would ensure those who have not had the benefit of legal advice and therefore who may not understand the consequences of their actions are not penalised in costs, whereas those who have been fully advised and have chosen to take the risks of costs orders being made against them could be penalised if appropriate.

Question 18

Once a case is in the court system, should the court have the power to order parties to make a reasonable attempt at mediation e.g., if circumstances have changed and a previously claimed exemption is no longer relevant? Do you have views on the circumstances in which this should apply?

The courts already have an ongoing duty in rule 3.3 FPR to consider whether parties would benefit from mediation, and the ability to make a referral to a MIAM at any stage. There appears to be no evidence of compliance with this rule.

For all of the reasons expressed above, we do not consider that the parties should be required to attend mediation by the courts. However, the benefits of attending a mediation in parallel with ongoing court proceedings could and should be explained to the parties at every stage. Increasingly mediation is being used in conjunction with, for example, private FDRs in financial proceedings. As court proceedings progress, parties may become ‘battle weary’. Those who are legally represented become increasingly aware how expensive that is, and most importantly, parties may have a greater understanding of the uncertainty of eventual outcome, the time it takes, and be more appreciative of the potential benefit of reaching an agreed compromise in mediation to enable them to ‘get on with their lives’.

The court should have an ongoing duty, reflected by specific assessments at different stages of a case, to consider whether parties would benefit from mediation, and the ability to make a referral to a MIAM at any stage.

Question 19

What do consultees believe the role of court fees should be in supporting the overall objectives of the family justice system? Should parties be required to make a greater contribution to the costs of the court service they access?

Court fees shouldn't be a barrier to issuing an application, but equally shouldn't be so low as to provide perverse encouragement for people to circumvent the pre-court process. FMC Registered Mediators have told us that potential mediation participants choose court as it is cheaper than mediating and they can get free access to a parenting programme. This is particularly the case where individuals are eligible for a court fee exemption.

About the FMC

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-Regulatory Framework and for its implementation.

For more information contact executive@familymediationcouncil.org.uk

Appendix 1 – Midlands Expectation Document

JUDICIARY OF ENGLAND AND WALES

MIDLAND REGION FAMILY JUDGES AND MAGISTRATES

What the Family Courts expect from Parents

The courts consider that these guidelines apply to all children and all parents. Please don't think that your case is an exception.

Are you a parent thinking of asking for a court order?

The court wants you to think about these things first:

- As parents, you share responsibility for your children and have a duty to talk to each other and make every effort to agree about how you will bring them up;
- Even when you separate this duty continues.
- Try to agree the arrangements for your child. If talking to each other is difficult, ask for help. Trained mediators can help you talk to each other and find solutions, even when things are hard. The court staff can give you details.
- If you cannot agree you can ask the court to decide for you. The law says that the court must always put the welfare of your child first. What you want may not be the best thing for your child. The court has to put your child first, however hard that is for the adults.
- Experience suggests that court-imposed orders work less well than agreements made between you as parents.

The court therefore expects you to do what is best for your child:

- Encourage your child to have a good relationship with both of you.
- Try to have a good enough relationship with each other as parents, even though you are no longer together as a couple.
- Arrange for your child to spend time with each of you.

Remember, the court expects you to do what is best for your child even when you find that difficult:

- It is the law that a child has a right to regular personal contact with both parents unless there is a very good reason to the contrary. Denial of contact is very unusual and in most cases contact will be frequent and substantial.
- The court may deny contact if it is satisfied that your or your child's safety is at risk.
- Sometimes a parent stops contact because she/he feels that she/he is not getting enough money from the other parent to look after the child. This is not a reason to stop contact.

Your child needs to:

- Understand what is happening to their family. It is your job to explain.
- Have a loving, open relationship with both parents. It is your job to encourage this. You may be separating from each other, but your child needs to know that he/she is not being separated from either of you.
- Show love, affection and respect for both parents.

Your child should not be made to:

- Blame him/herself for the break up.
- Hear you running down the other parent (or anyone else involved).
- Turn against the other parent because they think that is what you want.

You can help your child:

- Think about how he or she feels about the break up.
- Listen to what your child has to say:
- About how he/she is feeling
- About what he/she thinks of any arrangements that have to be made.
- Try to agree arrangements for your child (including contact) with the other parent.
- Talk to the other parent openly, honestly and respectfully.
- Explain your point of view to the other parent so that you don't misunderstand each other.
- Draw up a plan as to how you will share responsibility for your child.
- When you have different ideas from the other parent, do not talk about it when the children are with you.

If you want to change agreed arrangements (such as where the child lives or goes to school):

- Make sure the other parent agrees.
- If you cannot agree, go to mediation.
- If you still cannot agree, apply to the court.

If there is a court order in place:

- You must do what the court order says, even if you don't agree with it. If you want to do something different you have to apply to the court to have the court order varied or discharged.

Appendix 2 – FMC Response to FPRC Consultation

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.