Family Mediation Association Conference

John Cornwell Lecture 2022

'Relaunching Family Mediation'

Sir Andrew McFarlane: President of the Family Division

Introduction

It is 50 years this year since John Cornwell founded the solicitors firm, Dawson Cornwell, that bears his name. Ten years later he founded the Solicitors Family Law Association, now Resolution, which pioneered a more collaborative model of working. Six years later, in 1986, he co-founded that National Family Mediation Association, having himself been one of the first Family lawyers to train as a mediator. To have been inspirational in the launch of just one of these bodies, would have been a stellar achievement of great benefit to families and professionals alike; to have been the catalyst behind all three is an awesome contribution to have made. John was a giant, benevolent and dynamic figure, who died in 2013 and whose memory is kept alive in a number of ways, not least by the delivery of the John Cornwell Lecture. It is a genuine honour to have been invited to be this year's lecturer.

I am, also, very grateful for the invitation to address this year's Family Mediation Association Conference as it provides an opportunity for me to review progress in the reform of our approach to the resolution of private Family law disputes one year after I used a speech given in Jersey to state that the achievement of such reform is the Number One priority during the remainder of my term as President.

Those attending this conference will all know of the comprehensive blueprint for change that was set out by the Family Solutions Group, a spin-off from the President's Private Law Working Group, in their excellent report 'What About Me?' (published in October 2020)[1]. I am, therefore, not going to take time now in describing the broad menu of recommendations made by the FSG, which, together with the earlier history

[1] https://www.judiciary.uk/guidance-and-resources/what-about-me-reframing-support-for-families-following-parental-separation/

of attempts at reform, was the subject of my October 2021 Jersey address: 'Supporting Families in Conflict: There is a better way'[2].

In Jersey I said:

> 'I began this address by explaining that my principal priority [is now] to press for and achieve real change in the field of Private Family Law. If asked to crystalise that priority into one sentence I can easily do so. My aim is to use the FSG report 'What About Me?' as the blueprint for radical change and to do all that I can to press for its recommendations to be implemented.'

It is widely acknowledged that real harm can be visited upon a child who is the subject of inter-parental dispute, and particularly if that involves sustained court proceedings.

The overall approach that is needed is to provide information and support for parents so that they may move away from a 'justice' based response to parental fallout towards cooperative separated parenting, where child welfare (rather than playing out parental conflict) is the central and overriding factor.

The occasion of addressing this conference today, some 12 months on, provides the opportunity to ask 'what progress has been achieved?' in bringing about change.

Well, a casual observer would be entitled to say 'not much', but I believe that a closer look reveals that there are clear signs that some of the tectonic plates are shifting, or at least signs that the pressure is building so that a shift may soon take place.

I propose to use this address to identify some of those signs and to look at the possible direction of travel that any shift may take Family Mediation. I also wish to question whether the Family Mediation community is ready for this likely journey, and what might be done to optimise your/our ability to be ready for the changes that are likely to come.

Signs of change:

The first indicator of a need for change, and there being substantial pressure for it to occur, is, unfortunately, a negative one. Over recent years, the volume of private law

[2] https://www.judiciary.uk/speech-by-the-president-of-the-family-division-supporting-families-in-conflict-there-is-a-better-way/

children applications being made to the Family Court has significantly increased. In 2015, the year before the removal of Legal Aid for most parties, the number of private law children cases was 43,298. In 2019 it was 54,909 and in 2021 it was 54,649. These figures are for all non-public law children cases, including money claims under CA 1989, Sch 1, but not including financial relief on divorce/dissolution of civil partnership.

This increase was matched by an increase of some 25% in the number of public law, child protection, applications. Dealing expeditiously with this much larger volume of cases has stretched the capacity of the court system. The need to understand the various drivers behind these changes, and develop strategies to address them was behind my decision to set up both the Public Law and the Private Law Working Groups in 2018. As those groups were progressing, COVID 19 struck and, whilst heroic and sustained efforts were made to list and hear as many cases as possible in the restricted environment within which we had to operate, further backlogs inevitably developed.

The first indicator of a need to change our approach to private law disputes, therefore, arises from the need to reduce pressure on the system by diverting all those who do not need to go to court and would be better served by not doing so.

A second, I hope more positive, development has been the spotlight that the Court of Appeal decision in *K v K* [2022] EWCA Civ 468 has thrown upon the apparent ease with which a party is able to avoid attending a MIAM. Whilst the primary focus of *K v K* was upon the task of judicial fact-finding, during the court's preliminary observations time was taken to record that the proceedings were commenced by an application for a defined contact regime (issued days before Christmas) which replicated the arrangement that had hitherto been in place, but had recently ceased due to practical difficulties over transport and work shifts. As the applicant, the father was, by Children and Families Act 2014, s 10, required to attend a MIAM unless the case came within one of the exceptions. The father claimed that delay in having to attend a MIAM would cause 'a risk of harm to the children' and cause him 'unreasonable hardship'. He also relied on the fact that he was applying for a without notice hearing. Whilst the factual background to these exceptions was not investigated during the appeal, the impression was of a father who was desperate to resolve matters in the short time before Christmas and who therefore ticked these exemption boxes on the form. Looked at objectively,

whilst respecting that from the father's subjective perspective things will have seemed different, it is not likely that the claimed exemptions were made out or that a without notice hearing was justified.

Be that as it may, by the time the case first came to a judge in the following February, there was no mention of the MIAM requirement and the case proceeded as contested court proceedings.

In the judgment of the court we said:

> 'It is a matter of concern that a party can avoid the statutory MIAM requirement by simply asserting that a case is urgent and that they need a without notice hearing. Such assertions must be checked at or before the FHDRA under rule 3.10(1). They were not in this case. Had they been, it would have been clear that the case was not being dealt with as urgent and that the MIAM exemption did not in fact apply. For the statutory MIAM requirement to be effective, it must be enforced. The father ought to have been required to engage with the MIAM process.'

I have not seen any data, but it is my firm understanding that the avoidance of the MIAM requirement in *K v K*, rather than being a one-off, is in fact typical of a large number of cases. I fear that a culture has developed in the Family Court which accepts that the MIAM requirement is honoured more in the breach than the observance. If this is so it requires addressing. The requirement for the applicant to attend a MIAM unless validly exempt is a statutory requirement. Exposure to advice about mediation before active engagement in the court process has a proven track-record of allowing a proportion of parties to resolve their disputes swiftly and by consent.

Further, there has always been a strong argument for extending the MIAM requirement to both parties. There is now a need for this area to be reconsidered and then relaunched alongside a commitment from the HMCTS and the Judiciary to hold parties to their statutory obligation to engage with a MIAM at an early stage.

A group of judges, solicitors, barristers and mediators has been meeting over this summer to produce a report on improvements that might be made to the MIAM process. The report will be considered by the Rules Committee in the coming weeks.

Another development which suggests that there is a burgeoning of interest in supporting parents to resolve disputes away from court, is the arrival of a range of 'new' varieties

of mediation or other forms of intervention. The columns of the Family Law journal have, in recent months, been taken up with debate about new models of mediation. For example the 'psychodynamic model' used in mediation by The Mediation Space LLP (a team of experienced Family lawyers who are also qualified as mediators and/or psychotherapists) in the February issue, and, in March, Lisa Parkinson put forward the idea of an 'Ecosystemic' approach to Family mediation. These and other developments were met with a call for caution and a re-connection with the core principles of mediation by Marian Roberts in a timely and valuable article 'What is happening to family mediation' in the August and September issues.

Moving on, the structure of the MIAM process itself continues to be kept under live consideration by the sustained campaign of Dr Hamish Cameron, Oliver Cyriax and others who favour the 'Early Interventions' model ['EI'][3]. Along with my distinguished and much respected forebears, Dame Margaret Booth and Dame Joyanne Bracewell, I have long been in favour of this approach. The central proposition of EI is that there should be a set of widely available and judicially endorsed guidelines or templates for the pattern of child arrangements that are likely to meet a child's welfare needs in normal circumstances, depending on age and other factors. Some years ago I called for there to be a statement of what 'normal looks like' to be available for parents to consider when they separate. The EI model is not, however, favoured by those who advise me in the Private Law Working Group and, for the present, the Pathfinder Pilot does not include guidance of the sort that EI requires. I remain of the view that this is a concept that should be the subject of further consideration during the evaluation stage of the current pilots.

Away from mediation, a very significant shift in practice has taken place by the introduction of the 'one lawyer: two clients' model – of which more anon.

A further dynamic for change is likely to be provided by the report of the Justice working party on 'Improving Access to Justice for Separating Families', which is to be published on the 13th October.

[3] 'Early Interventions pathway; parental separation and children' [2020] Fam Law 716; 'Section 8 – the need for more formal guidance for separating parents' [2022] Fam Law 813.

Another sign of the times is the publication earlier this year of an excellent self-help book, '(Almost) Anything but the Family Court'[4], by solicitor and mediator Jo O'Sullivan. Within its pages, parents will find reference to the growing list of options and models of advice and support for resolving parental dispute without resort to a court. The book lists 'Twelve options for avoiding family court', of which pure 'mediation' is but one.

More widely, the pilots that have now been running for six months in North Wales and Dorset are beginning to demonstrate that the new, more proactive approach, based upon earlier and more assertive intervention by CAFCASS and the court, is bearing positive fruit and is being welcomed by parents and professionals alike.

Another indication of movement and an appetite for change is the focus on the language that is used by us all around separating parents and children. The Family Law Language Project, led by Emma Nash of Fletcher Day and others, has in recent years been raising awareness of this topic. Helen Adam, to whom we owe so much as the leader of the Family Solutions Group and this year's Bridget Lindley Memorial lecturer[5], has led the call for there to be a recalibration of the use of language. I am grateful to the small group, again led by Helen, who has responded to my request to produce a paper on this important topic. The paper is to be published shortly on the FSG website.

Data available from the Legal Aid Agency[6] shows the volume of funded assessments over the past 15 years. The figures are for assessment meetings for both finance and children mediation where both partners attended (either together or separately – in which case the two separate interviews count as one). In 2006/7, the total number of assessments was 22,758. By 2012/3 that had risen to 30,336, but the following year the figure dropped significantly to 13,390. It continued to fall until its lowest point, in 2018/9, of 10,506 before rising back to 12,336 in 2021/2.

[4] Published by Bath Publishing for 'Only Mums and Dads' (2022).
[5] https://www.judiciary.uk/announcements/speech-the-bridget-lindley-memorial-lecture-2022/
[6] https://www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2022

The figures for mediation starts and completions follows a very similar curve, albeit that the figures are proportionately lower than those for assessment with 13,612 outcomes in 2006/7 and 8,067 last year. Given the overall aim of increasing resort to mediation, this substantial drop in numbers if of concern.

The interest in, and commitment to, Family mediation of the previous government was clear. There has been the welcome and investment of some £5.4 million in the Mediation Voucher scheme during the past year, with positive outcomes for a good proportion of those who have used the vouchers. Some 11,700 vouchers have been issued to date.

In a press release in June, Dominic Raab MP, the Deputy Prime Minister and Lord Chancellor said:

> "Mediation protects children, by removing the bitterness of parental disputes from the amplifying effect of a court room – and allows the family courts to focus on adjudicating cases with serious safeguarding concerns, including domestic abuse."

Earlier, in November 2021 Mr Raab told the Justice Select Committee:

> "The vast majority of the remainder [that is cases not involving safeguarding or domestic abuse] should not really go to court. It should not be so easy just to say, 'We'll go to court'. …. We ought to be much, much better at using ADR, mediation in particular. We need to reconcile the incentives for going both to ADR and to court. Frankly, most of these cases should not be going to the family courts. I have been doing this job for only a few months, but I would be in the market for something quite drastic and bold in that area."

The final, and possibly most significant, indication from government of potential change is that, on 26 July, the MOJ issued a consultation document on 'Increasing the use of mediation in the civil justice system'.

Under the Government's proposal, unless an exemption is granted by the court, all parties to a defended small claim will be required to attend a free telephone mediation appointment with HMCTS before their case can progress to a hearing. Any non-exempt small claim will be stayed for 28 days and referred to HMCTS' 'Small Claims Mediation Service' for an appointment with a court-trained mediator on a compulsory basis.

Where an exemption is claimed, the case will be referred to a judge who will determine whether to grant exemption. If a party fails to comply, after being given a further 28 days to do so, a judge will determine whether they should be subject to an adverse costs order or whether the claim or defence should be struck out. Parties would not be required to reach agreement through mediation, but they will be expected to engage effectively in the mediation process.

Whilst the current consultation is limited to a specific category of civil claims, the language of the document indicates an intention to look at compulsory mediation more widely. It is therefore timely to consider how such a proposal might sit within the Family Justice system.

Compulsory mediation in Family cases?

Litigation is compulsory in the sense that, if one spouse/partner/parent starts proceedings, the other is made a party and must join in (indeed can be forced to do so if necessary).

Many regard litigation as a poor substitute for a mediated settlement for resolving Family law issues. Litigation is likely to be lengthy and costly, both financially but, more importantly, in emotional terms. The impact on a child from being at the centre of contested court proceedings is now widely recognised as being abusive.

"Why?" it might be said "does the State make litigation compulsory for separating couples when one partner turns to the courts, but there is no similar element of compulsion to attempt to achieve a mediated settlement?".

Some will undoubtedly question how the concept of the court requiring parties to mediate can be compatible with the principle of voluntary participation which is associated with mediation. And, although any dispute resolution process would be extra judicial and undertaken by mediators rather than judges, the compulsory requirement may be said to render it as a component in the justice system, as opposed to being a free-standing process. These are matters that fall to be thought through and worked out.

In England and Wales we have already embraced the concept of requiring one of the parties to take the preliminary step of attending a MIAM. Whilst this is one important

step short of embarking upon mediation itself, it could be argued that the justice system has already extended itself into this space and any further development is a matter of degree rather than principle. In circumstances where, as I have suggested, the current MIAM scheme is not working as intended, there is a need to consider making changes.

The differences between a small, often single issue, civil claim between effective strangers, on the one hand, and an emotionally complex dispute between former spouses or partners following the collapse of their relationship, on the other, mean that the small claims proposals could not simply be mapped across to the Family Court. The idea of requiring both parties to attend a MIAM is, however, plainly meet for consideration, as is the expectation that they should make a reasonable attempt to mediate. Separately there is, in my view, a need to consider the current exemptions to the MIAM requirement and how these are applied for and policed. As *K v K* demonstrated, it is very easy simply to tick a box or two on an online form to claim an exemption, with that claim never being subsequently evaluated by the court and where there are no consequences for making a spurious statement.

For my part, I would also wish to consider whether the MIAM should be limited only to consideration of traditional Family mediation undertaken with the person who is conducting the MIAM. Given the range of other models to support resolution of Family disputes that are available, part of the process in a MIAM might be to raise the parties awareness of these other options. Going further, and I realise that this is controversial, the MIAM might well encompass some account of what a 'normal' arrangement for either the children or finances might look like (in line with the EI proposal) and could include some basic legal advice. If either of these latter developments were to be adopted, it is likely that, if the couple chose to proceed to mediation, a different mediator would have to take up that task.

Further questions arise as to the consequences of a failure to engage with the process; should that be reflected in costs orders or by other means. There will also be resource implications for the court in providing a judicial evaluation of a claim for exemption or failure to engage promptly so that the power of the court, which it would surely need to have in any 'compulsory' scheme could be used to require the recalcitrant party to attend the MIAM.

The new Australian law: a timely example

In September 2021, alongside the advent of a new unified Family court in Australia, a requirement was introduced for parties to make a genuine effort to resolve their dispute away from the court. Subject to certain exceptions, a process of Family Dispute Resolution is required before a court application can be filed. Dispute resolution is a broad term that includes negotiation through lawyers, collaborative practice, conciliation, mediation, FDR or arbitration. The expectation is that both parties will continue to look for opportunities to resolve disputes both before and during proceedings.

The court itself promotes a short video on its website entitled, with appropriate Antipodean bluntness, 'You can separate smarter'. It will be useful to monitor how the new Australian law settles down, and, in particular, how the wider emphasis on resolution via a variety of means – and not just mediation – has been effective.

Having referred to Australia, it may be helpful to point to another development there which might be replicated here. It is called 'The Lighthouse Project' and it is aimed at enhancing the court's knowledge of the risks that some parents and/or children may face during the court process or, in the language of the Project, 'to reduce the risk of family safety issues, while parenting-only matters are progressing' through the court.

The Pilot has three core features:

1. Risk screening through the 'Family DOORS Triage', an online questionnaire in which litigants can raise their safety concerns with the Court.
2. Case triage: referrals to the appropriate support services and appropriate case management pathway.
3. Specialist Case Management pathway: a pathway for high-risk litigants which focuses on early intervention and timely resolution under the leadership of a Judge-led multidisciplinary team.

The triaging of litigants to different case management pathways based on risk screening on filing is a significant innovation to the way the Court operates. This type of risk-informed practice is said to offer great potential to shed more light on the nature of

litigant risk and needs, and how best to differentiate the Courts' response in line with need.

The formal evaluation of the Lighthouse Project has yet to be published, but early signs are that its piloting in three trial courts over two years has been a success. Elements of the Project have strong echoes in the pilots that are currently underway in our two 'Pathfinder' areas in North Wales and Dorset. But it seems to me that a model which immediately engages in a risk assessment and subsequent triage of cases where allegations of domestic abuse or other safeguarding concerns are raised, has significant benefits over our current model which simply has these matters recorded on the forms submitted by one or both parties, leaving any judicial evaluation of risk to a much later date.

The obvious, and most important, benefit is that such a process of risk assessment and triaging is likely to improve the court's ability to protect those who require its protection. But a secondary benefit, and of significance in the context of this address, is that those parties who raise allegations, but where, on analysis the risk is not seen to be a bar to possible non-judicial dispute resolution, may not avoid the requirement to attend a MIAM in the way that is currently the case by simply ticking the 'domestic abuse' box on the form.

Reform: a mistake to focus entirely on mediation

Mediation is but one part, albeit an important one, in a patchwork of resources that should be available to support separating parents, spouses and partners to resolve disputes. There is a clear need for the public to be much better educated about, or have far greater access to, information and advice about, parenting after separation. A survey conducted by Resolution for 'Good Divorce Week 2021' indicated that two-thirds of separated parents surveyed considered that they lacked help and advice about how to put their children first when they split up[7]

[7] https://resolution.org.uk/news/parents-left-to-fend-for-themselves-as-record-numbers-of-children-caught-up-in-family-separation/

I believe that it is a mistake to focus on mediation and ignore other necessary initiatives. All should be interrelated. The impact of the whole network of facilities should be greater than any one part of it.

In terms of headlines, the FSG report identifies the following key factors as part of an entirely different regime of support which is 'holistic and relational':

- "A framework and language which promotes child welfare and a co-operative parenting approach.
- Access to information and direct services for children.
- Mechanisms for the child's voice to be heard at the time when decisions are being made which affect them.
- Access to information and direct services for parents about how to parent following separation.
- A consideration of the emotional state of the parents and the impact this has on their parenting decisions.
- A multi-disciplinary response, involving therapists, parenting specialists, mediators and legal services.

These do not form part of the administration of justice and currently there is no framework for the provision of suitable services, clearly signposted and accessible to all".

In the FSG scheme, mediation is part of an 'holistic', 'multi-disciplinary response'. There is no silver bullet that can, on its own, meet the needs of all separating parents who are in dispute and it would be a great mistake to focus solely on 'family mediation' as providing the answer. In so far as it is appropriate for me to do so as a judge, I am continuing to encourage policy makers to adopt the wider perspective of the FSG and see that what is needed, as well as far greater resort to mediation, is a wholesale cultural change supported by information, guidance, education and access to multi-disciplinary professional services (including mediators, therapists and lawyers) in the manner that is so clearly spelled out in 'What about me?'.

What do we mean by 'Family Mediation'?

Although 'Family Mediation' is still a relatively young profession – and looking round this room that is palpably the case! – by which I mean a relatively new profession – it is still developing, but there is now a clear cohort of legally qualified mediators within the overall body of those undertaking this work. Whilst a mediator, whether legally qualified or not, cannot offer legal advice to the parties, he or she can give information about the law and may assist the parties by steering them away from solutions which are outside the range of options that would normally result from court proceedings.

For a lay person attending mediation sessions led by a mediator who is also a specialist Family Law solicitor, the line between being given information about the law and straightforward legal advice may seem hard to discern.

Looking at this issue from another perspective, I am aware that there will be some mediators who hold, as a first principle, that it is not the role of the mediator to influence the decision-making of the parties. The highly respected mediator and trainer, Marion Stevenson, described the approach in this way in 2015:

> "… the fundamental basis of mediation is respect for client autonomy, or the client's right to self-determination. This is what differentiates it from all other processes and it is universally acknowledged amongst mediators as a core principle. Therefore, this should be our ethical test: are we taking over responsibility for outcome in a way that threatens or could undermine that autonomy? If we are, then it could be that we are engaged in a slightly different activity, which I am going to call 'settlement-broking. This broking might be helpful; the question is not whether it is or is not at particular points in some cases. The question is whether it accords with the principle of self-determination'.[8]

Ms Stevenson went on, in part two of her article, to accept that there was a place for settlement-broking where the parties fully understood that that was what was taking place.

The practice of Family mediation is not my world, and this audience will know far better than I can, but my hunch is that mediators may feel drawn away from the principled, pure mediation, approach, which affords priority to the autonomy of the parties. Separating parents and partners are entering an alien world and are likely to

[8] [2015] Fam Law 575.

welcome information about the legal ground rules and some understanding of what a 'normal' outcome to a dispute such as theirs might look like.

The NFM website gives a hint of how the delicate line between genuine mediation and something more directive is to be trodden when describing the training and experience of Family mediators:

> "Family mediators do not express a point of view or make a value judgement. Their expertise and experience allows them to give information to help you understand the legal and financial issues involved. And they can guide you to the best legal solution in your case."

Whilst that sentence is easy to read and understand, I suspect that in practice the line it describes is a very difficult one to tread without actually telling the parties what a court is likely to do in any particular case.

And if that is right, then, I would suggest, that difficulty is most keenly felt by those Family mediators who are also specialist Family lawyers.

I am, as I wish to make as plain as possible, making these observations from outside the Mediation tent and without first-hand knowledge of the practice of Family mediation, but if we are looking, as I hope that we are, to a very significant expansion in resort to Family mediation – at least as a result of the proper and robust policing of the current MIAM requirement, or yet further expansion as a result of some form of compulsion – it is surely important for there a good deal of transparency about the nature of the process that is being undertaken and for all involved – the parties, the mediators, the parties' lawyers (if they have them), the courts and policy makers in government – to know what that is.

Going one stage further, as a result of the amendments made by the Divorce, Dissolution and Separation Act 2020, which allowed couples to make a joint application to end their formal relationship, there is now a market for legal advice to be given on the 'one lawyer, two clients' (or 'one couple, one lawyer') model. 'The Divorce Surgery', an early entrant into this field[9], is an arms length agency run by two

[9] https://www.thedivorcesurgery.co.uk/

members of the Family Bar. For a fixed fee, which varies depending upon the type and complexity of the issues, the Surgery will appoint a barrister to meet with the two parties, absorb the relevant detail from each about their circumstances, and then deliver advice as to the likely outcome if the contested issues were to litigated before a court. The model is applied to issues relating to both finance and children.

Some leading firms, such as Withers, Mills & Reeve, and O'Sullivan Family Law are also providing a similar service and this month Resolution is to launch its own scheme.

These developments have breathed life into proposals made by Mavis Maclean and John Eekelaar in their important 2016 study of 'Lawyers and Mediators'[10] where they promoted the case for bringing the two key services provided by lawyers and by mediators together in one service.

There are very plain differences between Family mediation and the 'one couple, one lawyer' model, but if, and I repeat that this is my 'IF', mediation has now moved nearer to embracing a process during which the mediator offers information about the law and information about the likely outcome in court, then such differences may only be of degree as opposed to ones of principle.

This takes me to my final 'if' in this rather 'ify' run of propositions, if Legal Aid is available for mediation in this context and of the type that I am contemplating, then there is need at least to consider the provision of legal aid to fund a 'one couple, one lawyer' referrals.

<u>What can 'Family Mediation' do to be ready for these changes?</u>

If there is to be an increased focus on resort to Family Mediation, and if many more couples are to be despatched to a MIAM, or even in compulsory engagement in mediation itself, is the Family Mediation profession ready for such a large step-change in the take up of its services? You in this audience will have your own answers to that question, and I do not, but I suspect that the size of the profession has adapted to the current level of demand and that it would be difficult for it to cope immediately with

[10] 'Lawyers and Mediators' (Hart 2016)

a very sudden upturn in numbers. If that is right, then the time to address that issue is now. Even if there is no more significant reform, at the very least there is going to be a tightening up of the MIAM requirements and an increase in the number of such appointments.

I would also offer a thought about branding. It is put forward gently, rather than a statement of a firm conviction, but I wonder how well the term 'mediation' is understood by the parent in the street. I suspect that for some it is confused with conciliation, and then reconciliation or even marriage guidance. It may sound, to parents who may be angry, hurt and heavily defended as altogether too soft an option for them at that time. For others, mediation may be perceived simply as a 'hurdle to jump' before getting to court, and not as a serious route to a sustainable solution in its own right.

I may be wrong, but I suspect that I am not alone. If I am right, the message of what you are offering is either not getting out there or it is the wrong message. What mediation offers is a structured and safe environment in which those in dispute can discuss and hopefully resolve their problems. It is professional help with problem solving. If someone's car breaks down, the advertising message is 'Call the AA, the 3rd Emergency Service'. I feel that 'Family Mediation' needs a strapline that sits, in bigger font, above the word 'mediation' along the lines of 'Need to resolve problems with your Ex? Don't go to court, call FMA – we can help you both work out a way forward on your own terms'.

The above is just an idea, and it is part of the overall, and much bigger need, to cut through to the public so that they can understand how best to resolve their private disputes, rather than arriving like rabbits in the headlights before a judge some months after one of them has issued a court application.

Whilst on the topic of public facing information, and the potential for confusion, I suspect that the different models of Family Mediation that are now available can only increase that potential. Is there a need during a MIAM for the mediator not only to explain what they can offer, but also to alert those attending to the other options for dispute resolution that may be available? Does this happen already? Does it happen everywhere?

An idea

In closing, can I leave you with an idea. It is, I hope, one that naturally flows from all that I have said thus far. It is partly driven by a concern that drawing mediation and the mediator into the direct functioning of the justice process, by making it compulsory, may be a step which unnecessarily compromises the essential integrity of the concept of mediation. It is also formed by a desire for separating parents to be exposed to straight-forward advice on separation, on the law and on the full range of dispute options available to them, beyond mediation alone. It arises from my view that mediation, legal information and parenting advice should not be presented as alternatives, but as part of a unified whole. Separately, I question whether it is wise for the mediation profession to resist a move to legally assisted mediation, or mediation supported by legal help.

My idea is that, if there is to be compulsion, the compulsory event should be attendance at an 'IAM' rather than a 'MIAM'. That is, the meeting to which both parents should be required to attend should be with a generalist professional who can impart information ['I'], guidance and advice ['A'] more generally about parenting after separation, or, as it may be, resolution of financial issues. The advice would include basic neutral advice about the law and the legal structure. It should, in my view, also include a description of 'what normal looks like', along the lines proposed in the EI model.

There should be the ability to refer parents to attendance at a Separated Parents Information Programme [SPIP] or to any one of a range of local resources – one of the twelve, if you like, in Jo O'Sullivan's book – and not just to formal Family mediation. The professional conducting the IAM might be a mediator, a lawyer, social work or otherwise have sufficient skill for the task. Where there are domestic abuse or safeguarding issues, the IAM could refer the matter immediately back to the court. If mediation is to follow, it would be undertaken by a different mediator. The IAM should be supported by readily available web-based resources so that both before and after the meeting parents can read, and watch, material aimed at improving their

understanding of their position and how best to face the future; transmitting the message, in Australian terms, 'You can separate smarter'.

Conclusion

I hope that what I have said has demonstrated that there is indeed a head of steam building for change in the way that separating parents and former partners can be supported in resolving disputes. Family mediation must play a central part in any such scheme of support. There is a need for Family mediators to be prepared for this change and to be agile in determining how best they can meet what will be a greater need for mediation and other services. Now is the time to prepare for these potential changes as I hope that, if I were to deliver a speech on this topic in another 12 months from now, we will not be looking at the FSG proposals as a blueprint for the future but as a map of the present. We shall see!

Sir Andrew McFarlane
President of the Family Division
28 September 2022