Ministry of Justice consultation on Supporting earlier resolution of private family law arrangements. A consultation on resolving private family disputes earlier through family mediation.

Family Justice Council response

Supporting families to resolve issues earlier

Question 1: Are you in favour of a mandatory requirement for separating parents (and others such as grandparents) to 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?

Answer 1: We support the exemptions to MIAMS being used in these proposed arrangements but make the general observation, that those who fall within the exemptions should also have information provided to them from the very beginning of the process. The information to be provided should include information about the various forms of abuse, the court's duty to protect vulnerable witnesses and parties, the services available to them as carers and parties to litigation, how those services can be accessed and what the court process will involve for them. This information should be available online and would be helpful to those who fall within and without the exemptions. The information needs to be in accessible form including informatics, community languages, an easy read version and in a form accessible to those who are visually impaired.

In relation to those who fall out with the exemptions, we take the view that it is in the best interests for all carers, including parents and grandparents, to receive the fullest and best information that can be provided about alternatives to dispute resolution in court. However, we consider that it would be helpful to change the vocabulary used when providing this information. Instead of focusing on disputes and alternative methods of dispute resolution, the focus should be on finding solutions for children and their families. We suggest that signposting separating parents and others to methods of deciding upon solutions for their children and families would be more constructive. It would also be helpful if forms used referred to people by name rather than applicant, and respondent using the approach set out in Language Matters.

We consider it is unhelpful and imprecise to refer to the need to attend a co-parenting course before making child arrangement orders or other children's order. It would be better if the definition simply referred to those who wish to make an application under *S8 Children Act 1989- applications under S8 Children Act 1989 include child arrangement orders, specific issue orders and prohibited steps orders*.

We are strongly of the view that those who make applications under S14 Children Act 1989 - applications for Special Guardianship orders- should

(i) not be required to attend a MIAM before making an application to court and
(ii) should not be required to attend the suggested co-parenting course.

Those who make Special Guardianship applications are typically kinship carers or foster carers who make the application in circumstances which might otherwise result in public law orders. We do not consider that such applications are suited to MIAMs nor to the suggested co-parenting programme.

We are not in favour of a mandatory requirement to attend a shared parenting programme before an application can be made to court for a S8 Children Act order. True engagement with any parenting programme requires the participants to be willing participants. Mandating attendance is unlikely to be productive and may lead to *lip service* and consequent delay after a failed programme. However, we do favour those who fall out with the exemptions being signposted to a shared parenting programme at the conclusion of the MIAM. Such signposting will be dependent on the mediator's assessment of the suitability of those attending the MIAM to attend such a course. It would assist the process if mediators were trained to the same level as CAFCASS/CAFCASS Cymru in screening domestic abuse , coercive and controlling behaviours and were trained in working with neurodiversity.

We consider that any co-parenting programme to which people are signposted should be sufficiently flexible and adaptable to meet the needs of an individual case.

Question 2: If yes, are you in favour of this being required before mediation can start?

Answer 2 : No. An accredited mediator should have the skills to deal with some of the preliminary issues and will be best placed to signpost those suitable to co-parenting programmes .

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 information and assessment meeting (MIAM)

• at the parenting programme

• via an online resource

• by any other means (please specify)

Answer 3: Our answers to the specific questions are as follows:

- Information about the court process is already part of the MIAMS. It would be helpful if this information was also available at any co-parenting programme. The language used in the information provided is important (see above answer to question 1). It is important that it includes the effect of unresolved conflict on children and their families and the need to move away from concepts such as "winning" and "losing" . The focus should be on finding solutions for children and their families.

- The only online source should be on the website maintained by the UK and Welsh governments. We consider that other websites have been tried in the past and have not worked. Other websites come with issues of who owns the site and who updates it, with what and when.

- We consider that a media and public awareness campaign of the resources available to assist separating carers to find child focused family solutions would be useful . That campaign should ensure that the language used moves away from dispute resolution and focuses on finding solutions for children and their families. Any campaign needs to use and include informatics, community languages, an easy read version and in a form accessible to those who are visually impaired.

  In addition, we make the observation that question 3 begs the question what this information would look like. General information, such as what a child arrangement might look like is likely to be interpreted as the norm or the expected outcome. Family life and separation is far more complex and often needs bespoke arrangements to meet the individual circumstances of the child and their family. Information provided in a MIAM can be tailored to meet the needs of that individual child and their family.

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?

Answer 4: We have answered this question in part in our answer 3 above . We consider that it would be helpful if the online resource was independent of CAFCASS/CAFCASS Cymru and HMCTs. Separating parents and carers may never need to go to court or be part of the process. The information needs to be presented in various forms including informatics, community languages, an easy read version and in a form accessible to those who are visually impaired.

Question 5: Do you think it is appropriate for mediators to determine suitability for a co-parenting programme at an information meeting?

Answer 5: We have already answered this question, in particular please see our answers to questions 1 and 2 above.

Question 6: Can you share any experience or further evidence of pre-court compulsory mediation in other countries and the lessons learned from this?

Answer 6: It is our understanding that parenting co-ordination has been successful in other jurisdictions. We are aware of research which has been undertaken which shows that it is beneficial to children and their families. Such research is referred to by the Parenting Co-ordinations Alliance on their website https://parentingcoordinators.co.uk/ . We have not undertaken any research of our own and cannot verify its outcomes.

Question 7: How should the 'MIAM' pre-mediation meeting under this proposed model differ from the current MIAM?

Answer 7: The Family Mediation Council issued undated guidance in August 2022. We do not think that that model needs to change.

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?

Answer 8: What is a reasonable attempt to mediate is a subjective evaluation. The factors listed are unlikely to help answer the question. Requiring the mediator to answer the question risks placing the mediator in a position of conflict with one or other, if not both, of those they are working with. An approach to mediation which focuses on bringing about child focused solutions is a better way of proceedings than considering who is/is not being reasonable.

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?

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

Answer 9:

a) The information that can be imparted to all through a MIAM is likely to be useful to all provided that the information can be given safely. As we have stated in our answer 1, we make the general observation, that those who fall within the exemptions should also have information provided to them from the very beginning of the process. The information to be provided should include information about the services available to them , how they can be accessed and what the court process will involve for them. This information should be available online (with a 'quick exit' button for safety reasons) and would be helpful to those who fall within and without the exemptions. If a MIAM can be conducted safely, and they should be able to be so conducted, then all should be able to attend a MIAM

b) We consider that there needs to be a pre-action protocol which provides an objective assessment of what is urgent. That definition should be linked to a risk of immediate harm, a risk of imminent removal from the jurisdiction and/or the risk of immediate dissipation of assets.

Question 10: If you think other circumstances should be exempt, what are these, and why?

Answer 10: We do not consider that there is a need to widen the exemptions but do consider the existing exemptions need to be clearly communicated to all.

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?

Answer 11 : We do not agree with the underlying premise that mediation should be compulsory. MIAMs, however , should be. A MIAM takes place prior to mediation and does not affect the voluntary nature of mediation

Question 12: What are your views on providing full funding for compulsory mediation pre-court for finance remedy applications?

Answer 12 : As already stated we do not support compulsory mediation as true engagement can only be achieved voluntarily. We do however support the availability of full funding to ensure that those who wish to engage can do so without financial bar. We consider that pre-court remedies for family finance should remain separate from those from issues concerning children.

Question 13: Does the current FMC accreditation scheme provide the necessary safeguards or is additional regulation required?

Answer 13: The FMC are reviewing the accreditation scheme . It is hoped that the review will address the issues which deter people from training to be accredited mediators.

Question 14: If you consider additional regulation is required, why and for what purpose?

Answer 14: Nothing further to that which we have already set out.

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? b) What are the advantages and disadvantages of expanding the requirement? c) If for 15a you answered 'other forms of non-court dispute resolution (NCDR)', to what other forms of NCDR should it be expanded? 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? 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?

Answer 15: If a MIAM is conducted properly , the participants will receive information about other options. We have already made the observation above that the language that is used is important . We would prefer to have a system which signposts participants to means of achieving a solution for their children and family.

We consider that Early Neutral Evaluation, private FDRs, arbitration, collaborative solutions and parenting Communications all have a role to play.

A positive step might be for the mediator to provide the participants with a certificate at the conclusion of the MIAM which could set out which avenue the mediator considers suitable for the participants going forward e.g. a parenting course voucher, early neutral evaluation/FDR, arbitration etc.

We do not consider that completion of another form of dispute resolution should exempt the participants from a MIAM or mediation.

We are clear that any form of mediation or other NCDR should be conducted by an appropriately regulated professional and should be accountable.

The advantage using mediation and other NCDRs is that the court system will be able to concentrate on those cases to which the exemptions apply and which are likely to be the most complex and serious cases. Those who participate in NCDRs are likely to have outcomes sooner than through the court process and are unlikely to be traumatised/re-traumatised by the court process. The disadvantages include the possibility that using alternative avenues may itself be used as a vehicle of coercive control. There is also the risk of delay. If NCDR is unsuccessful, it may build in delay to any court resolution.

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?

Answer 16: Access to justice is a fundamental human right and should not be fettered. The overriding objective and the factors taken into account when applying it , could be used at each stage of the private law court process to ascertain whether the participants have accessed mediation or other NCDRs . At each stage the court could and should consider whether the participants should be referred back to mediation or to another form of NCDR. Unreasonable litigation conduct should be taken into account when considering the issue of costs. A failure to mediate and/or participate in other NCDRs may be regarded as litigation conduct but that should be a matter of discretion for the individual judge.

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?

Answer 17: please see our answer to question 16

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?

Answer 18: please see our answer to question 16

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?

Answer 19: Access to justice and thus the courts is a fundamental human right that should not be fettered. The overall objective of the family justice system , including the fees it charges, should be to ensure that the courts and thus justice is available to all. There is a real risk that by implementing a system which requires a greater contribution from parties to the court service they access, the most vulnerable and disadvantaged and those who are arguably in the greatest need will be deterred from accessing the courts and justice will be placed beyond their means. That would be a denial of their fundamental right of access to justice.

Family Justice Council

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