resolution | 40 YEARS

Strengthening existing rules and Practice Directions to encourage earlier resolution of private family law children and financial remedy arrangements

Resolution's response to the Family Procedure Rule Committee

Resolution's 6,500 members are family lawyers, mediators, collaborative practitioners, arbitrators and other family justice professionals, committed to a non-adversarial approach to family law and the resolution of family disputes. Resolution members abide by a Code of Practice which emphasises a constructive and collaborative approach to family problems and encourages solutions that take into account the needs of the whole family and the best interests of any children in particular.

Resolution members seek to solve problems outside of court, where possible, through solicitor negotiation, mediation, collaborative practice, arbitration, roundtable discussions, private FDRs/ early neutral evaluation and other processes.

Resolution is committed to developing and promoting best standards in the practice of family law amongst both its members and amongst family lawyers in general.

We also campaign for better laws and better support for families and children undergoing family change.

Responses to consultation questions

General comments

1. The FPRC will be aware of Resolution's longstanding calls for:

    - Tailored legal advice to be available as an integral part of encouraging the use of non-court dispute resolution (NCDR) and maximising its chances of success, and to manage people's expectations before the making of an application to court.
    - Respondents to also be required to attend MIAMs, subject to exemptions.
    - Statutory Mediation Information & Assessment Meetings (MIAMs) should be replaced with Advice and Information Meetings (AIMs) delivered by a range of suitable family justice professionals.

2. There will need to be future alignment between the Standards (the Standards) governing mediators' conduct of Mediation Information and Assessment Meetings and any changes made further to this consultation (and the current Ministry of Justice consultation on supporting earlier resolution of private family law arrangements). Those Standards, developed by the MIAMs Working Group of the FMSB, came into force on 1 October 2022 further to consultation with the family mediation community. Resolution and the other Membership Organisations of the Family Mediation Council were consulted and participated in the MIAMs Working Group.

3. Resolution are supportive of any initiatives that have the effect of lessening the burden on the family court system by diverting appropriate cases into NCDR. However, without the NCDR process in question being properly buttressed by legal advice, it is unlikely to result in any/any long-lasting resolution.

Section 1: MIAMs

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?**

Yes.

- Regarding the proposed amendments to r3.8(1)(d):

  - There are potential issues around what "participated in another form of NCDR" means. Some concerns have been voiced that people may seek to bypass the MIAM requirement on scant evidence of targeted NCDR having been attempted, for example, having engaged in solicitor negotiation via a very short exchange of correspondence, which in our view should not be sufficient. The difficulty is how this could be identified and defined beyond lawyer self-certification- how can an authoritative and objective judgement be made on whether or not a genuine as opposed to a flippant attempt to resolve matters has been made? The number of letters exchanged would not necessarily provide anything objectively meaningful or helpful, albeit might be the more realistic approach; it is the content and depth of those letters which is key, i.e. a qualitative rather than quantitative measure.

  - How will 'NCDR provider' be defined, and what evidence is 'evidence from the NCDR provider' for the purposes of exemptions based on participation in another form of NCDR/ should this be prescribed? The NCDR provider should certainly only be asked to provide basic factual information which can easily be provided, for example, what was attended and on what date/s. How will an attempt to negotiate or collaborate be evidenced? In all NCDR processes, when considering the evidence to be provided, the importance of respecting the privileged/confidential nature of the process in question will need to be prioritised. This could mean that a quantitative analysis – how many meetings were attended/how many letters written – becomes the focus, over a qualitative analysis.

  - It seems counter-intuitive to remove r3.8(1)(d)(ii) to ask parties who have may have been in NCDR for some time and intend that to continue post-issue, to be required to attend a MIAM.

- Regarding the proposed amendment r3.8(1)(o), it would be reasonable to have to provide details to the court of no more than three contacted mediators.

- We agree that r3.8(2*)(c)* is not currently needed, but there could be reasons to reintroduce a catch-all exemption in the future.

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)?**

Yes.

We wonder if there should there be further clarification of the meaning of urgency linked to medical treatment, safety and dissipation of assets. We believe there is a wide interpretation of urgency, which can be subjective, especially by unrepresented parties.

We wish to make clear that, whilst the use of NCDR is not automatically precluded in every case where there has been abuse, a victim should never be put in a position of being forced, or having no real alternative, but to enter into mediation.

And our view is that whilst there is much safeguarding good practice, how the mediator profession better identifies the more subtle forms of domestic abuse - coercive and controlling behaviours- and associated manipulating behaviour needs to be addressed in a more joined-up way. The Standards and screening training requirements should be kept under review and tightened as necessary. Our Resolution Together: Domestic Abuse and Safeguarding module could provide a basis for potentially mandatory training for all family justice professionals.

The mediator should carry out appropriate screening and make an assessment of risk factors in relation to the protection of any child or adult from harm, understand coercive control as well as 'violence', and be aware of what is going on in the background for families. Assessment of the capacity of the individuals concerned to take part in mediation and its suitability for resolving their particular dispute with appropriate safeguards, is critical. Abuse, particularly controlling and coercive behaviour can continue within an NCDR process, as it can within and during court proceedings.

There is a view that further consideration should be given to the domestic abuse exemptions for attending a MIAM, as court may or may not be the best option in the specific case. It is also potentially a missed opportunity if the exemption from attending a MIAM prevents the victim/survivor from receiving the assessment, support, signposting, time and safe space that they require to meet their individual needs and those of their children.

As set out in our response to Question 3, a well conducted standalone MIAM can and should screen for domestic abuse, child protection and safeguarding issues and signpost to specialist support services. Like other family justice professionals, where the mediator is the first family justice or other professional who a person has had contact with, they may be 'first noticers' of domestic abuse which can come as a shock to the victim/survivor concerned. The MIAM should provide a safe space in which to discuss and explore the issues and take active steps to safeguard and signpost; and to explore with the victim/survivor all options to inform their decision on how to safely resolve the dispute.

Amendments removing further exemptions, for example, might be explored, subject to capacity within the family mediator community; improving confidence in mediators' understanding of domestic abuse and coercion and control and screening for risk factors (linked to domestic abuse, child protection and safeguarding training); and the views of relevant specialist organisations.

Other general points to make are that:

- The professional opinion of the MIAM provider that the applicant is a sufferer or victim of domestic abuse should be accepted for exemption purposes. This would better meet the needs of victims, who may simply not have access to any other form of evidence.

- The rules, PD 3A, and the court forms Form C100 and Form A should be amended to refer to "domestic abuse" rather than "domestic violence" with "domestic abuse" defined as in the Domestic Abuse Act 2021. Paragraph 20 of PD3A should be aligned with the current legal aid gateway provisions, which themselves need to align with the 2021 Act definition.

- The references to joint MIAMs should be removed from the court forms Form C100 and Form A where the authorised mediator has to sign (reading "The prospective applicant and respondent party(s) attended the MIAM together" and "Both the applicant and respondent have attended a MIAM (separately or together").

  As recognised in 'Assessing risk of harm to children and parents in private law children cases' (Hunter, Burton & Trinder, 2020, Ministry of Justice), joint MIAMs should never take place and this is set out at paragraph 5 of The Standards[1] and paragraph 5 of the accompanying Guidance[2].

- MIAMs compliance should be checked at the point of issue and entry to court. Leaving this until the first hearing does not work with the aim to encourage NCDR, and is potentially unfair where the child is having no contact with one parent.

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?**

Yes.

There is value in a pre-application standalone MIAM for an applicant, however disengaged a respondent might be. Lots of useful information can be provided at a MIAM type meeting which is not necessarily about mediation, and the MIAM itself is not mediation.

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[1] "…suitable conditions are created to permit the exploration of issues of abuse, exploitation and safeguarding without either participant being able to influence the other – MIAMS must therefore be conducted separately with each participant; and there is a strong presumption against immediately consecutive meetings whether in person or online from the same home, with the consequence that mediators must demonstrate and record how any such practice has been delivered safely."

[2] "Separate MIAMs
The safety of participants in mediation is of paramount importance. The mediator cannot know in advance of the MIAM how two people will behave in the same actual or virtual space. Delivering MIAMs to participants separately provides each with an opportunity to discuss the issues which arise without being concerned at the response of the ex-partner. It also ensures that discussions are as open and honest as possible, to enable an effective assessment of safety to take place, without fear of harm or undue pressure from the ex-partner."

Guidance is also given on the strong presumption against the practice of immediately consecutive MIAMs, mediation immediately following MIAMs, inviting other potential participants to a MIAM and on methods of delivery.

A well-conducted MIAM is an important part of the triage process. It has the benefits of providing screening for domestic abuse, child protection and safeguarding issues which might not already have been identified by the applicant and/or others; a range of other information, including legal information, information on other NCDR and a parenting information and information for children; and signposting to support services, including IDVAs and ISVAs, children's services and those relating to housing, finance and/or debt which the applicant may not get elsewhere.

Standalone MIAMs can currently take place in circumstances where the victim/survivor and/or mediator conclude that it would not be safe to invite the second participant. In this situation the mediator is able to use the MIAM to great effect by signposting the victim/survivor to domestic abuse services and, in any event, has a professional duty to safeguard any children of the family.

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?**

No.

We support any focus on resolving matters out of court where appropriate and safe to do so. In light of this, and the requirements in section 10(3) of the Children and Families Act 2014, we agree with the proposals set out in paragraph 22 of the consultation paper. And we hope that practice and working knowledge of the range of processes has already improved and evolved further to the revision of The Standards last year.

Resolution believes that many former couples and parents are potentially uncertain about the purpose of the MIAM and sometimes wrongly think that their only options are mediation or issuing a court application (which defeats the purpose of the MIAM). Mediation is an important and successful dispute resolution process in suitable cases. But the collaborative process, round table negotiations, arbitration (both the children and money schemes) and private FDRs may be more suitable or alternative options in some cases. The understanding of different processes by a professional, and the accuracy of the information and the explanation provided by a professional, are also fundamental to people making an informed choice i.e. knowing about a process, understanding it, believing it is appropriate for them and starting to use it successfully. Otherwise, they may not know about a process at all or simply assume it isn't suitable.

To make the best use of MIAMs, accurate information must be given to individuals about the full range of means of resolving matters and joined up approaches, with a detailed explanation of how processes can work to resolve disputes and enable people who maybe can't speak to each other to have a constructive, assisted dialogue aimed at finding solutions. This also better supports mediation in the context of multi-disciplinary working and as part of a range of joined up approaches, rather than it being perceived as a siloed hurdle to court proceedings.

Resolution's view is that you don't need to be an accredited mediator to deliver a MIAM (which is not mediation), with mediators receiving robust MIAMs training as part of qualifying as a mediator. There are currently multiple barriers to achieving mediator accreditation, not least cost. Whilst we understand that the issue of who should conduct MIAMs is outside of the scope of this consultation, we would ask the FPRC to press the FMC to authorise qualified mediators who are available but not currently able to conduct MIAMs to be able to do so, increasing the pool beyond accredited mediators. This is going to be essential to future capacity.

Question 5: Do you agree that the person conducting the MIAM should "assess" the suitability of different forms of NCDR at the MIAM?

No.

We think this probably goes further than what is expected by the current section 10(3). Even if all mediators were equipped to make "assessments", there are concerns that it would be difficult to assess suitability of all forms of NCDR within the current costs and timeframes for statutory MIAMs conducted by authorised mediators, especially those funded by legal aid. The mediator would also likely need to have been able to see both participants before being able to "assess" what would be appropriate next.

People need 'tailored information' on the suitability of mediation and NCDR. We suggest removing the word 'assess' in paragraph 22 and replacing it with 'discuss and explain'. A well-conducted MIAM is a tailormade process. What could be most suitable, and why, can be considered in the participant's particular circumstances and within their financial resources.

A form could be provided at end of the MIAM to show which form of NCDR the MIAM-provider suggested might be appropriate and suitable for the participant, probably more than one.

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?

Yes, survivors of domestic abuse can face barriers and delays in obtaining evidence for a domestic abuse MIAM exemption.

If any changes are made, the court would of course need to check any required evidence at the point of issue and entry to court, meaning ensuring that there is appropriate resourcing and training.

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?

No. It can only be an advantage compared to the current situation. The respondent could still challenge the exemption at the first hearing.

Ideally though this should generally happen at the point of issue. As referred to in our response to Question 2, delay will tend to favour one party. It could be 6 to 8 weeks before the gatekeeping stage, only for the application to be bounced back then, which makes no sense and is frustrating for applicants (and may cause hardship on the ground and engrain the status quo). We understand that the HMCTS online private process should be able to stop people proceeding if they are not MIAMs-compliant.

We also assume that there are lessons to be learned from the current pathfinder pilots, which should be explored.

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?

No (unless a different exemption applies currently). And it should still be for the mediator to conduct separate MIAMs and indicate whether or not that case is currently suitable for mediation without giving reasons.

Even where an exemption has been claimed at the beginning of financial remedy proceedings, there can be value in attendance at a further MIAM before the matter is listed for an FDR or final hearing, This is also likely to make it easier for the judge to encourage the use of suitable NCDR/take the potential next step of adjourning for suitable NCDR to take place.

__Section 2: Dispute Resolution__

Encouraging Engagement with NCDR

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?

Yes, the power to adjourn for a MIAM or NCDR already exists and should be exercised, albeit with a note of caution. Any perception of judicial 'coercion', as opposed to encouragement, may impact some parties.

The judiciary will also need to be very mindful of the more subtle forms of domestic abuse and imbalances in negotiating power, and the risk of victims of abuse, for example, agreeing to adjourn for mediation if they feel forced to do so by the court.

The power should be exercised on a case specific basis, with a clear timetable around the length of the adjournment within the court proceedings and for the next stage of the court proceedings if necessary. Adjournments and delay often favour one party. The exercise of this power shouldn't exacerbate this and penalise one party. It would be better for any NCDR to take place within a natural lull in proceedings, rather than causing further delay.

There are reservations amongst some of our members about a court ordering an adjournment for the purpose of NCDR because if unsuccessful, it could result in extended delays to the detriment of one party and/or the child, and also may prejudice subsequent judges' views. A 'firm steer' towards NCDR during a natural adjournment could suffice, rather than an adjournment for the specific purpose of NCDR.

And if the court is going to redirect cases away from court to other processes that are not properly supported, for example, without legal advice supporting the redirection, resourced/affordable or available in a timely way, then this will not improve matters for the litigant in person, or indeed ultimately the use of court and judicial time.

There are also practical questions around how the court will determine which form of NCDR is currently suitable and whether a MIAM is still needed to screen and help identify the best option. Please also see our response to Question 8 above.

With appropriate additional training and resourcing the role of judges as dispute resolvers cannot be overstated. Many of our members report that there are pockets of excellence, e.g. in Manchester, where within the court process (and sometimes even during live evidence), judges seek to encourage concessions, narrow issues and lessen the pressure on court time, sometimes where conventional NCDR has been tried and failed.

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)?

Yes.

We agree that an adjournment might be appropriate on a case specific basis at any time after the first hearing for private children law cases. The earlier the better is a good general rule (especially in terms of direction to a co-parenting course), and preferably before the filing of witness and position statements, but other effective times may be after the filing of a Cafcass report or other expert evidence.

The appropriate timing for the court to adjourn in financial remedy cases should be at the discretion of the court. It needs to be case specific, recognising that whatever NCDR is proposed needs to be suitable and that the adjournment does not prejudice the interests of one party.

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?

No, on the basis that it is proposed that judicial discretion will be retained.

We have long called for a formal further encouragement of out of court dispute resolution by adding a specific reference to Part 3 in Part 28.

Section 3: Costs Orders

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?

Yes, this proposal may cause issues.

We support the more robust application of the rules as to costs in financial remedy cases. Generally we suggest that judges may need more focused guidance on where it is appropriate to make a costs order and might be required by a rule change to confirm in judgments, even where no order for costs is being made, that they have at least given consideration to the issue of costs whether or not to make a costs order and why they reached the decision they did.

In principle we support the FPRC's proposals in paragraph 43 of the consultation paper where NCDR is suitable, again on the basis that it is proposed that judicial discretion will be retained. Conduct is already a factor the court must have regard to in deciding what order (if any) to make.

Costs orders should, however, be imposed with some caution. What may be regarded as engagement is subjective, and what is an appropriate level of engagement? And there is a need to be sensitive to safety and coercion, and any fear around not inflaming matters further, and other factors such as mental health.

A factor of course would be whether or not the NCDR provider considered and agreed with the court that the particular process was safe and suitable. Mediators must be able to continue to say whether mediation is currently suitable or not without giving reasons to protect people and/or avoid conflict escalation.

We agree that there is a risk of potential disputes over costs in financial remedy proceedings, and possibly trust in NCDR providers by users, but this might be a risk worth taking. There is also concern about not breaking NCDR privilege and confidentiality, in exploring one party's reasonableness (or not) in how they engaged with NCDR.

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)?

Yes to factual questions, no to subjective views.

Attendance at NCDR should be determined through neutral and factual questions only asked of the NCDR provider with answers obtainable via easily accessible information. They should definitely not be asked to give subjective views on engagement, as this could undermine the trust in and start to alter the integrity and confidentiality of any NCDR process, as well as putting people at risk.

A factual matrix/tick box questionnaire, about whether they attended for example mediation if suitable, and if so, how many/dates of sessions attended and time spent in mediation is all that could be expected. A mediator cannot give views in that s/he undertakes an impartial role, and one person's engagement is different to the next. It would be an additional task for the service provider for which mediators should be paid.

Similar considerations would apply in relation to collaborative practitioners and FDR providers.

There also needs to be consideration of whether there would be any data protection issues by the time requests for information were made, around for how long information on mediation or other clients should be held.

Another approach might be to ask for 3rd party costs spent on NCDR to be included and separated out on the Form H. The level of costs could be more indicative of how much time was spent in NCDR and how seriously it has been taken. And LiPs may have committed costs say to the mediation process which they could be asked to provide.

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?

Yes in relation to both a) and b) and on the assumption that the parties would have sight of each other's pro-forma in both private children and financial remedy cases. However, the FPRC may wish to consider and explore whether it would be appropriate for only the judge to see the pro-formas without the parties having sight of each other's pro-forma. In any event, there is the possibility of redaction of serious allegations of abuse.

The main issues seem to us to include:

- Whether parties may feel pressured to use NCDR when it is not suitable because of costs.
- May a victim of domestic abuse be reticent to be open about their situation, for fear of repercussions/counter-allegations?
- A party might not want to give reasons in an open statement (or any statement) for fear of inflaming the situation or advertising her/his concerns in a way that could be used on the ground by the other party, reducing the chances of a successful negotiation between solicitors and settlement.
- a) is almost akin to a position statement, even on a tick box basis. Could that be abused or used tactically to delay or waste time?
- How would a LiP know what to write? Will this inadvertently widen the gap between those who are represented and those who are not, with a different approach on costs depending on the type of litigants involved?
- How would a pro forma work in practice? How would the information be gathered and be consistently and objectively considered across courts?

Our Pensions, Tax and Financial Remedies Committee has suggested that in reality the court is unlikely to have time to look at another separate form and further issues, which will also potentially increase parties' costs. Position statements lodged for hearings might include the steps taken outside of the court process. Or any additional information sought might be better worked into an existing form/s or a specific question on costs spent on NCDR worked into the existing Form H.

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?

No to required, yes to requested.

A standard requirement would facilitate consistency, but where do you draw the line on what is required when? We would prefer any such pro-forma to be requested by the judge at any time, subject to their discretion according to the circumstances of the case.

Question 16: Do you have any suggestions for what the pro-forma should look like or should include?

No, not at this stage. Further consideration with stakeholders would be needed if this course were being explored.

As set out above, asking a question about costs spent on NCDR could be better and more effective than introducing another form which might not even be looked at or in practice facilitate objective consideration of the level of engagement with the wide range of NCDR.

Question 17: Do you consider that there is a way to ensure that this proforma is not requested from victims of domestic abuse?

Yes, in so far as a relevant MIAM exemption already successfully claimed should stop a request from being made. And please see our response to Question 14.

But otherwise an applicant who is a victim of domestic abuse may not have claimed a relevant exemption or been identified by the court as a victim, especially in financial proceedings.

The same considerations should apply to respondents.

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

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?

Yes.

Single lawyer models and ENE are of course different things and there are many different versions of each. Properly done, single lawyer models and ENE carry the general advantage of a former couple hearing the same privileged advice or steer at the same time and provided by qualified legal practising professionals.

In principle both are potential options for separating couples, like other options, but any suggestion of compulsion to use either would in our view be unworkable. And single lawyer models, including Resolution Together, are not a form of NCDR. Within court proceedings it would be essential for there to be clarity on what the model is, what the regulatory framework is, and how the model will be delivered and funded in practice.

Single lawyer models used outside of court proceedings have to be suitable for the former couple or parents concerned. Resolution Together is a new model and only 120 of our members have begun their training at this stage, although there is significant demand for training. Whilst potentially suitable for all separating couples, it may ultimately only be suitable for a fairly small minority and will no longer be suitable where any legal conflict arises[3].

[3] 184 Resolution members attending the Finance Update at our recent National Conference participated in a poll on one lawyer, two clients. 72% were planning to do this work in the future or already doing this work. Only 12% thought one lawyer, two clients will be the predominant way of resolving private family disputes in 10 years time.

Our current view is that Resolution Together will be unsuitable for use within proceedings as the probability of a clear legal conflict is extremely high – the parties are already in conflict if a court application has been issued. The model is not designed for use with that cohort. No one will offer the service if it is uninsurable.

We will be providing further information and views on 'The Single Lawyer Solution' proposed by the FPRC's Working Group by the end of July 2023.

We potentially see more of a possible role for an ENE model with clarity and consensus on what is an ENE for these purposes and the process to be followed. And there are currently no agreed standards and principles for practice of ENE.

For further information please contact:
Rachel Rogers, Head of Policy: rachel.rogers@resolution.org.uk

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