Supporting earlier resolution of private family law arrangements

Resolution's response to the Ministry of Justice

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 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

Mandatory mediation

1. Resolution agrees with the Ministry of Justice (MoJ) that for some families, reaching agreement themselves, either independently or with the support of a suitable, trained professional, including (but not limited to) a family mediator, is often the best way of arriving at a long-term solution, and in the best interests of any children.

2. **We welcome anything that can help families avoid court** where it is possible, safe and appropriate for them to do so. We broadly welcome the consultation proposals around early attendance by parents at a co-parenting programme where it is safe to do so and will not cause harm to the child. Mediation will also help many families, and can be a very effective method of resolving disputes. But it is not a panacea, not right for everyone/every set of circumstances and not the only way of resolving issues. Day in, day out, Resolution members seek to solve problems outside of court, where possible, through a *range* of out of court dispute resolution (OCDR) options including solicitor negotiation, mediation, collaborative practice, arbitration, roundtable discussions, private Financial Dispute Resolution (FDRs)/Early Neutral Evaluation (ENE) and other processes.

3. We are also very mindful that **delay** is harmful and prejudicial to children, as recognised by the Children Act 1989. There is already significant delay in the system, with private law children cases now taking on average 47 weeks to reach a final order, reflecting an upwards trajectory since 2016 and a doubling in the overall period taken. In practice building two

compulsory steps into the pre-court process without sufficient resources risks adding to that delay, without clear (/any) evidence that the model proposed will lessen demand on the court system. The impact of any (further) delay where the child is not seeing one of their parents is profound and may be capable of abuse by a parent seeking to establish a particular status quo. That risk has to be assessed and addressed.

4. **Resolution does not support a *requirement* for pre-court mediation** as proposed in the consultation paper. We guard against forcing families into mediation, regardless of whether it is the best way forward for them.

5. Mediation is a successful dispute resolution process in suitable cases. But the collaborative process, round table negotiations, arbitration (both the children and money schemes), private FDRs and **other forms of out of court DR may be more suitable** or alternative options in some cases. The model proposed is likely in practice to work against the provision of information on all options which may be suitable. There is a need for a semantic shift to <u>the most suitable alternatives</u> in the pre-court space, rather than forcing people down one route.

6. Compulsion to *find out about* family mediation and the different methods of OCDR is different to compulsion to *participate in* mediation (or other OCDR). People should never only be left with the single option of engaging with mediation, which may be unsuitable in the circumstances of the particular case, because they cannot access the family court to resolve their issues.

7. **Presently OCDR such as mediation and collaborative practice are voluntary. It is, in our view, essential that they remain so,** as they work best where both parties are genuinely willing to engage, albeit having been properly informed and encouraged (and appropriately supported by legal advice). It is the voluntary nature of OCDR which makes these approaches more effective and maintains their credibility. Whilst some who may have been unwilling to consider mediation have reached agreed outcomes once made to find out about it, there remains a need to monitor the <u>quality</u> of mediation provided and of the outcomes achieved. If people are broadly coerced into mediation to reach 'an outcome', or if an agreement doesn't address the conflict between them, then it may leave them without a lasting solution and needing more help and court time further down the line. Any children risk being left caught in the continuing conflict between their parents. The proposals do not adequately appreciate and reflect the fundamentally voluntary nature of mediation.

8. As the consultation paper recognises, compulsion to take part in mediation raises particular concerns where there is any risk of domestic abuse or other safeguarding issues are in play. **A survivor of domestic abuse should never be put in a position of being/feeling forced, or having no real alternative, but to enter into mediation**. Abuse, particularly controlling and coercive behaviour (including financial/economic abuse) can continue within the process (as it can within and during court proceedings). It is essential that the abuse does not affect a party in the process, their judgment and decision-making.

9. What is not fully captured by the proposals is the needs of those without prescribed evidence, including those subject to emotional abuse, coercive control and/or economic abuse. Some survivors will not make a formal disclosure to anyone so will not be able to provide formal evidence, or will not have been screened for abuse by a prescribed evidence provider. Compelling people who have experienced domestic abuse to attend mediation

risks exposing them to further abuse and may dis-incentivise them from applying to court, perpetuating the cycle of abuse.

10. In addition, and fundamentally, the model proposed is not buttressed by legal advice. **The consultation paper makes no reference to the importance of, or provision of, legal advice**, before during or after mediation, whether any mediation takes place before or after the making of an application to court. If a requirement for pre-court mediation is introduced, the provision of professional legal advice and support around that will be even more important. Mediation without access to legal advice is not a proper or effective mediation model, and not funding access to advice will likely prove a false economy as lasting/any outcomes are unlikely unless mediation discussions are buttressed by timely, tailored advice. If mediation is to succeed there must be a level playing field and both parties must understand the issues and the range of likely outcomes. Family mediators cannot provide legal advice, so both parties require independent advice if mediation outcomes are to be fair and robust.

11. We believe that the needs of families would be more appropriately and better met, and demand on the family courts reduced, by helping more former couples and parents make *informed* choices to find the route that gives them the best chance of reaching constructive, lasting outcomes about child arrangements and family finances on divorce.

Enhancing the current structure/working with what we have

12. More could be achieved through some better architecture around the current system, supported by public education, by the proper and consistent enforcement of Mediation Information and Assessment Meetings (MIAMs) provisions at the gatekeeping stage and beyond, and judicial oversight of such/exercise of existing powers to encourage the use of OCDR.

13. Our additional main recommendations for change are set out below.

(a) Provide families with access to legal advice

Tailored legal advice should be available as an integral part of encouraging the use of OCDR and maximising its chances of success, and to manage people's expectations before the making of any application to court.

The experience of our members is that the provision of early/timely legal advice and signposting often leads to families choosing a non-court-based approach – sometimes mediation, but sometimes other (more appropriate) forms of resolution. Where they are underpinned by even a relatively small amount of information and advice about the law, these solutions are far more likely to succeed and the outcomes reached, endure. The National Family Court Statistics consistently show that the annual volume of uncontested financial remedy applications consistently far outweigh contested applications, which must largely be as a result of the use of OCDR in all its forms.

Resolution surveyed its members from 9 September to 8 October 2021 about their experience of dispute resolution processes over the then previous 12 months (through conducting these processes themselves or referring clients to them). 367 members responded to the survey in full. The results indicate that lack of support from a legal

professional is one of the main reasons for parties not taking up OCDR where it could resolve their case (64% of those who responded cited this as a main reason in private law children cases, and 71% in private finance cases). 69% of those who responded thought that one or both parties not being supported by legal advice alongside the process was one of the main reasons for OCDR not resulting in settlement of a finance dispute.

It is well known that since legal aid reforms of 2013, publicly funded family mediation numbers have plummeted, placing further pressure on overstretched family courts. Ten years since legal help was removed for the majority of family work, mediation numbers for legal aid cases are at about half the level they were before the cuts, demonstrating the importance of legal advice in guiding couples into mediation as recognised in the LASPO Post Implementation Review. Help with mediation under the legal aid scheme is rarely accessible due to the lack of reasonable fees for preparation of a consent order confirming a Memorandum of Understanding following mediation.

The Family Mediation Voucher Scheme has been welcome but is only part of the solution – it doesn't fund legal advice to support and inform the mediation process on any legal issues within the mediation and make it more robust, as a protective measure and to facilitate implementing what the participants have agreed workably and via a legally binding consent order, including in complex situations.

Since 2020, Resolution has been working with Law for Life to provide affordable legal advice to those who would otherwise have gone on to represent themselves and navigate their way through overburdened family courts. Findings from the evaluation of the Affordable Advice Service show that users welcomed the development of a 'Where do I stand?' appointment, which enabled litigants in person (LiPs) to access advice at an early stage in their legal journey and helped inform them of whether they should deal with issues via court.

Part of provision of public funding for legal advice would be for government to support scaling up this service to increase its capacity to provide potential LiPs with a "Where do I stand?" appointment to support the use of out of court DR; and to support the mediation process and make it more robust. Referring to advice provided via the service would reduce the need for mediators to provide legal information and enable them to focus on facilitating agreement between the two parties, as well as enabling more people to have legal advice on any legal issues arising within the mediation.

(b) Expand the scope of the existing Family Mediation Voucher Scheme

Vouchers should be available for mediations about finances on divorce, and for the drafting of consent orders, as well as mediations relating to child arrangements. The mediation process differs from the court process and the current restrictions can make the mediation process more complex and restrictive than necessary.

(c) Provide sustainable legally aided family mediation

In light of the Government and President of the Family Division's (appropriate) emphasis on the importance of reducing conflict between parents and separated families, and keeping private law matters out of court where possible, it is essential to have a simplified process (to explain, evidence, apply and audit) to access eligibility for family mediation and to increase the number of families accessing/benefiting from it. Not enough importance is

given to funding mediation or other OCDR, which also needs to attract qualified staff, so that the burden on the court system is reduced.

Family mediators are one important part of legal aid services and face similar issues to legal providers due to the low rates of remuneration (including for all issues child inclusive mediations), the lack of an increase in remuneration for so long (also the removal of the willingness test fee), and onerous administration. Resolution has long called for a realistic increase in legal aid rates paid for family mediation; a separate fee element for child inclusive mediation where the mediator meets with the child; and properly funded MIAMs. We renew those calls.

(d) Replace Statutory Mediation Information & Assessment Meetings (MIAMs) with Advice and Information Meetings (AIMs) delivered by a range of suitable family justice professionals

Giving both parties access to a broader and more rounded AIM would provide advice on options/processes and early legal information. It should be earlier in the separation process, before minds are set on court and an application to court is considered, about the different ways of proceeding and to help couples and parents make an assessment of what might fit best for their circumstances and produce a fair and lasting outcome.

A wide range of family justice professionals with appropriate specific training would be well-placed to deliver AIMs. It should not be limited to mediators. It is important to recognise that there are still those who will go first and possibly very early to a solicitor, well before any focus on court gatekeeping. A first advice meeting with a solicitor would be one of the ways to provide the content of an AIM, as well as providing initial and individualised legal advice.

In any event, ***respondents should also be required to attend statutory MIAMs***, subject to exemptions. We would support bringing respondents into the scope of s.10 of the Children and Families Act 2014.

14. We also have the following points or questions on the proposals as set out in the consultation paper:

    a. The Government's own impact assessment states that the proposed system is much different to the existing model and any estimate of the impact is **highly uncertain. This would need further investigation**.

    b. The proposals are based on an analysis of a voucher scheme largely operating where proceedings have not been issued and where parties are under no obligation to mediate. It is not known whether the success rate would be impacted (and to what extent if so) if these proposals were adopted.

    c. Will more potential parties consider making a court application to access a voucher, regardless of their attitude to mediation, and/or delay earlier use of another form of OCDR which may be more suitable for them?

d. For finance cases would any voucher include drafting a Memorandum of Understanding and how would it work in practice? What if one party/both parties did not provide voluntary full disclosure?

e. Will self-certified exemptions be more widely claimed?

f. The relationship between mediators, participants in mediation and the court needs to be more widely thought through. Mediators are not part of the court process, work in the shadow of the law and must maintain their distance and independence from the court, especially so that they can maintain some of the fundamental principles of mediation such as confidentiality and voluntariness. It is equally important, if mediation is to succeed, that the process does not become infected with aspects of any litigation. The way in which the two processes complement each other, whilst remaining distinct, is important to work through.

g. If the proposals are implemented, should the mediator decide that mediation is not safe or suitable at the 'MIAM' stage or once mediation has started, the case should proceed to court.

h. How will the voice of the child be heard under the proposals? Is consideration being given to a clearer framework and an appropriate level of public funding for child inclusive mediation (where mediators see a child or children as part of the parental mediation process) to ensure appropriate focus on the best interests of the child, particularly in relation to managing how parents hear and deal with what their child has to say about his or her situation? Evidence from the Voucher Scheme shows that mediation is more successful where children are consulted.

i. The MoJ estimates that were these proposals implemented there would be 24,700 additional mediations taking place each year (18,800 for child arrangements and 5,900 for finances).

We have concerns about the capacity of the FMC-accredited mediator community (and those working towards accreditation) to deal with future pre-court meetings and mandatory mediation, and avoid delay for families and children. How will the numbers be appropriately scaled up without reducing quality and what would a realistic timeframe be (certainly not by the end of 2024)?

Whilst we fully support the need for standards and training requirements, 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. Any trained mediator, or appropriately trained family justice professional, should be able to do so.

There are currently multiple barriers to achieving mediator accreditation, not least cost and viability. Qualified mediators who are available but not currently able to conduct MIAMs should be able to do so, increasing the pool beyond accredited mediators, and will be essential to increasing future capacity to speedily provide any new pre-mediation type meetings.

Careful consideration would also need to be given to how standards requirements (as well as the contract requirements of legal aid mediation providers who are falling in number) would impact on the numbers prepared to conduct voucher-funded mediations.

The future route to mediation accreditation needs to become less obstructive. Any future route must look less complicated and more achievable to unaccredited lawyer mediators. It cannot just become harder and harder, which we fear is the Family Mediation Standards Board's (FMSB) approach.

j. With the volume of LiPs in the system, will mediators in fact be undertaking a high volume of unpaid work not met by the extent of voucher payments?

k. Will there be an increase in shuttle mediations for which there are currently no standards? Even if you are on your own when meeting the mediator, this doesn't necessarily mean you can speak for yourself, instead being conditioned to agree to what your partner wants.

l. Will there need to be any separate considerations around how any changes would operate in Wales?

m. There will need to be future alignment between the Standards governing mediators' conduct of MIAMs and any changes made further to this consultation (and the Family Procedure Rule Committee consultation). 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.

n. Generally, the term 'out of court DR'/OCDR is preferable to NCDR.

o. We would also press for legislation to be amended to include family mediators on the list of professionals for whom enhanced Disclosure and Barring Service checks can be obtained.

We turn now to address Resolution's position on the specific questions within the consultation.

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?

Yes, there should be attendance at a parenting programme before an application to court can be made, unless it is not safe to do so or it will cause harm to the child, for instance by causing delay.

Resolution has long called for access to earlier and statutory Separated Parents Information Programme (SPIP) type content[1]. A SPIP and a MIAM are clearly different, but it makes no real sense why only one is compulsory before an application to court can be issued. Having a statutory SPIP (with exceptions) may be very useful in appropriate cases and in light of the value of early intervention.

In our members' experience, early access to co-parenting support and SPIP-type content can be extremely useful to mediation clients and those using OCDR and facilitate agreement or settlement. Building Bridges? (An evaluation of the costs and effectiveness of the SPIP) recommended it should be made available at an earlier stage, as voluntary self-referral and as a mandatory step before court proceedings in appropriate cases.

We don't think it will be helpful though to use the term 'mandatory programme', which risks creating resistance, or to refer to a 'shared' parenting programme which may imply particular outcomes to parents. Co-parenting might be a preferable term.

Robust and consistent screening for domestic abuse, child protection and other safeguarding issues will need to be in place. That does not mean one-off screening at the start of a process; it means an ongoing, dynamic assessment as to whether there are domestic abuse/safeguarding issues, which may only become apparent/an issue part-way through a process. There will be coercive control and safeguarding issues in play in many cases, which can be clever and subtle. Any element of compulsion to take part would be wrong where there is any risk of domestic abuse or there are other safeguarding issues, even where parents attend programmes separately. Being required to jump through yet another hoop could be a disincentive or hurdle to accessing the protection and justice needed.

Delay is of course hugely harmful to children, particularly where child arrangements have broken down. It is essential that the new programme does not build further delay into the system. Any programme must be widely available and accessible to all parents regardless of their work or domestic circumstances. To avoid delay, the MoJ may wish to consider whether the court process should continue in parallel with the parties being given an opportunity prior to the First Hearing and Dispute Resolution Appointment (FHDRA) to consider whether they wish to continue, on the basis that more cases will conclude at or before the FHDRA if parents have attended a co-parenting programme beforehand.

There are also some concerns that there will be a need for more than a 'one size fits all' approach for different parents with different needs and to consider the needs of non-parents/other family members, albeit the same type of education is likely to be helpful to them. The Cafcass model only uses one provider and may not suit everyone. We think there is a need for a range of accredited parenting programmes of a certain standard, and an overarching national organisation to represent and/or support and nurture parenting support organisations and providers. Our members generally don't know what of the many programmes to endorse and refer people to.

Parenting programmes should include the following types of content:

[1] On 3 April 2023, SPIPs were replaced by the Planning Together for Children course

- Non-tailored legal information.
- Resolving issues out of court.
- The challenges of being a parent.
- The effect of unresolved conflict.
- How to listen to your child/ren and answer difficult questions.
- Considering the effects of conflict on children and children's perspective, and the impact of high conflict on different age ranges.
- The impact on children of being asked by parents to fulfil different 'roles'.
- Making positive change and minimising defensive behaviour.
- Communication - preparing for conversations, staying calm, seeing things differently and using neutral language. Communication issues are often part of why the relationship broke down and can perpetuate post separation.
- Accessing support networks.
- Introducing new partners.
- Next steps - what learned and how they will put this into practice.

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

No.

Co-parenting programmes are completely different to mediation, but we don't agree that this should be required before mediation can start.

We would be particularly concerned about delay/layering of delay, especially where the child has no (or limited) contact with one parent. Participation in a programme and the benefits of such for children could be further encouraged by a mediator during mediation.

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)

Non-tailored legal information should be provided at *every* opportunity including at any pre-meeting and at the parenting programme. A well-conducted MIAM should of course already provide legal information tailored to the individual concerned.

HMCTS online services should provide both legal information, including about how long the court process is likely to take, and signposting to legal advice.

As set out in our general comments above, families also need access to tailored legal advice to support earlier resolution of private law arrangements.

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?

Clarification of what is meant by 'an online tool' is needed. We have assumed that this means the provision of accurate information, rather than a 'tool'.

In family cases our members' general experience is that the earlier support and information is provided, the better, before the parties become positioned and before anger and distress becomes a dispute. For many people seen by our members it isn't necessarily the case that they have a 'dispute' in the first place, they just want a clear means of sorting things out between them.

We believe that many people cannot currently find information on and a pathway to out of court services together with the additional legal and/or other professional support they may need, or to assist them with post litigation life. The number of unrepresented parties must evidence that at least some parties have not had the necessary information to make informed choices.

A multitude of online resources is already available, separating adults currently facing a broad spectrum of online information. The issue is how best to co-ordinate/join up good information so it can be found and easily navigated without forgetting those without digital access, and keeping that information up to date. It is probably only government which is in a position to undertake or commission that work.

In terms of what any tool should prioritise, we suggest that some content on the Cafcass website, for both parents and children, could stand alone for those not going near or through the court system who probably wouldn't normally access that website. The content prepared by the Family Justice Young Peoples Board is probably underused and could be promoted.

It is of course not the only resource available but the type of information in our Parenting through separation guide could be shared with individuals and couples to improve education and awareness.

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

No.

We don't think mediators should 'determine suitability' for a co-parenting programme. However, they are well placed to explain, encourage, promote and signpost to co-parenting programmes and often do (where there is access). This can happen without the need for any pre-court mediation requirement. We know that separating/ed parents are often defensive about their parenting being perceived as 'less than' and may also lack confidence about their parenting abilities as a result of separation. Mediators need to be free to establish their neutrality, not to be perceived in any way as judgemental so that they are able to establish a level of trust in their relationships with potential clients and support parents.

Generally, in relation to domestic abuse and safeguarding, consideration should be given to further tightening the MIAMs standards and mediator training, arguably in line with the Resolution Together domestic abuse and safeguarding training and the frequency of such (and whether parenting programmes and mediation become 'mandatory' or not).

We do not consider that you would need to be a mediator to deliver an information meeting. It is training on domestic abuse and safeguarding which is most important. Other family justice professionals would also be well-placed to deliver a pre-meeting with appropriate specific training, increasing the pool beyond accredited mediators.

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

When considering international comparisons, how the wider context of varying issues, such as state support systems and approaches to wider law and legal frameworks, also need to be taken into account.

Mediation doesn't necessarily mean exactly the same thing in other countries. There will be differences in how requirements are introduced, around the language used to explain the process and (importantly) the level of public funding provided.

The learnings from Australian reforms are what we are most familiar with and trust that the MoJ will study the evaluations relating to those and any ongoing reform. The models used in New Zealand and Canada are also worth exploring.

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

We have many concerns about the proposed model, including for victims of domestic abuse. If it were to be adopted, to make the best use of the 'MIAM' pre-mediation, it would still have to:

a. Carry out appropriate screening for domestic abuse and make an assessment of risk factors in relation to safeguarding issues in relation to the protection of any child or adult from harm. This should include an understanding of coercive controlling behaviour as well as 'violence', and awareness of what is or may be going on in the background for families. This also raises issues about potentially further tightening the MIAMs standards and mediator training as referred to above.

   Like other family justice professionals, where the mediator is the first family justice or other professional who a person has contact with, they may be 'first noticers' of domestic abuse which can come as a shock to the 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 to specialist support services; and to explore with the survivor all options to inform their decision on how to safely resolve the dispute at hand.

b. Assess the capacity of the individuals concerned to take part in mediation (including their capacity to speak freely and to negotiate on their own behalf) and its suitability, with appropriate safeguards if necessary, for resolving the particular dispute.

c. As well as signposting to appropriate support where domestic abuse, child protection or other safeguarding issues are identified, signpost to agencies of advice and support on other issues such as debt (beyond situations where there is actual or suggested abuse).

d. Provide legal information **and** emphasise the importance of legal advice to support and inform the mediation process and as a protective measure, as well as information about the range of protective orders available from the court.

e. Provide accurate and tailored information about the full range of means of resolving matters and joined up approaches, so people are truly informed about the routes to settlement, and this opportunity is not lost. There should be a discussion and 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. What could be most suitable, and why, can be considered in the participant's particular circumstances and within their financial resources, with an expectation that some couples will be directed to other processes.

   It does seem potentially confusing though for this to happen but to then have to proceed to mediation where another process may be (and often is) more suitable.

   In any event, mediators might be asked now to certify that yes, they have provided information on specified processes. It should also be borne in mind that there will likely be ongoing innovation/expansion in the forms of OCDR available and integration of services; it will be important to ensure that mediators are able to keep up to date with expansion/change.

Most importantly, mediators should be able to continue to say whether mediation is suitable or not without giving reasons in order to protect survivors of domestic abuse. And they should be able to say that another form would be more suitable. 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.

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?

We think it would likely be impossible for a court to try to assess/pin down whether or not participants have made a reasonable attempt to mediate. A better overarching focus would be on making clear to people what resolving matters without reference to the court looks like (and on education about the sometimes devastating consequences of court/the fact that it is not the panacea many imagine).

A factual approach on the number of sessions of OCDR and time taken would be the simplest approach, but that is only one measure, could not be definitive and risks becoming a formulaic tick box exercise. For example, a party may attend mediation but not provide any financial disclosure or take a totally unreasonable position during that mediation. One session of mediation in one case may have been qualitatively better than three in another.

There is much (appropriately placed) concern about not breaking mediation privilege and confidentiality, in exploring one party's reasonableness (or not) in how they attempted mediation. A person's approach to mediation is subjective and the mediator should not be expected to provide information on that. Mediators should definitely not be asked to give subjective views on whether there has been a reasonable attempt to mediate, as this could undermine the trust in the process and start to alter the integrity and confidentiality of the process, as well as putting people at risk.

If mediation was assessed as not suitable at the MIAM or equivalent, or if once the mediator began to mediate s/he was of the view that mediation should not proceed or continue, for whatever reason, that should be accepted without the giving of reasons.

The consultation makes reference to how the court might best approach cases where either or both parties' account of pre-court mediation is disputed for the purposes of correctly applying a costs order. Why would parties waive their right to confidentiality of the mediation process and ask the mediator to give a view on what took place, and why would a mediator feel comfortable doing that in light of the established precedent in relation to the confidentiality of the mediation process? It is not realistic.

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.

Any element of compulsion to take part in mediation would be wrong where there is urgency, any risk of domestic abuse or other safeguarding issues are in play. The definition of domestic abuse used should be in line with the Domestic Abuse Act 2021, and it should be recognised that prescribed evidence may not be available at the time of the making of the application to court.

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

We believe there is a wide interpretation of urgency, which can be subjective, especially by unrepresented parties. Circumstances linked to medical treatment, safety and safeguarding, and immediate risk of removal of the child from or within the jurisdiction/failure to return the child to the person with care, change of school or dissipation of assets constitute urgency.

Once the urgency has passed, for example, if there is no longer a threat of removal or if an interim protective order has been made, there could/should then be a 'MIAM' type meeting.

We have considered whether a child not spending any time with one parent at all should constitute urgency or another type of exemption. This is difficult as any reduction in time with a parent can be prejudicial to a child, but not spending time with a parent can become an embedded reality for some children.

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

The court rules would need to exempt from the requirement to attend mediation where the case is assessed as unsafe or unsuitable, including because a party lacks capacity to take part in mediation, following a 'MIAM'.

Even if not exempt from attending a 'MIAM', there will be cases which may not be suitable for mediation depending on the assessment of the mediator. A 'catch all' for other exemptions to be assessed by the mediator would be needed (there may also be reason to re-introduce a catch -all exemption if r3.8(2)(c) of the FPR is removed).

It is also the case that not all survivors of domestic abuse have prescribed evidence. Mediators should have the power to make someone exempt from the requirement to mediate on the basis of domestic abuse even if the party cannot provide the normally expected evidence, for example, of financial/economic abuse. This would better meet the needs of survivors, who may simply not have access to any other form of evidence. They may not have reported to anyone or not have identified themselves as a victim/survivor. Or prescribed evidence should include the professional opinion of a mediator that the applicant is a survivor of domestic abuse.

The proposals do not capture matters where there may be a complete economic imbalance of power at the outset (meaning that mediation may not be appropriate) but which may become more appropriate once that balance is restored during the lifetime of court proceedings. Of more value would be attendance at a further MIAM before the matter is listed for a Financial Dispute Resolution Appointment or final hearing in financial remedy proceedings. This is also likely to make it easier for the judge to encourage the use of suitable OCDR/take the potential next step of adjourning for suitable OCDR to take place.

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?

This would depend on the exemption.

Urgency, child protection and domestic abuse evidence exemptions which are self-certified would need to be properly considered by the court, so resource would need to be devoted to this and a robust approach taken.

We note the concerns expressed by domestic abuse specialist organisations that survivors of domestic abuse may feel that the possibility of being directed to make a reasonable attempt at mediation where they have applied for an exemption could be seen as pre-judging cases.

Where an exemption cannot be self-certified, any mediation should surely only go ahead if the mediator considers that it is suitable and the participants have capacity to take part. Judges should not go behind that. The difficulty is that within a compulsory system, how the mediator is viewed by the users could be completely skewed if they are seen as part of court gatekeeping.

The Impact Assessment refers to mediators confirming to the court if a reasonable attempt to mediate and reach agreement at mediation was made and assumes this would not represent a substantial burden. Mediators should not be put in this position.

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

In our view, in principle, vouchers should be funded for any compulsory mediation pre- court relating to financial remedy applications in the same way as for children cases. Separating families are often under considerable financial strain and would struggle to fund mediation without such. How small and insufficient assets can be distributed can be more difficult to settle than high net worth cases.

More than one mediation session is likely to be needed – there would need to be an initial session and then drafting of Form E type information to be exchanged by the second session, and £500 will not go far for some.

Means testing can be very onerous and is somewhat arbitrary. Any means testing would need to be mindful of avoiding trapped capital taking people out of eligibility.

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

Yes, we would not be seeking additional regulation of mediators.

We suggest though that, whilst there is much safeguarding good practice, how better the mediation profession identifies the more subtle forms of domestic abuse - coercive and controlling behaviour- and associated manipulating behaviour needs to be addressed in a more joined up way.

Anecdotally, the competence of some of those who are not also legally qualified may be an issue, especially when seeking to resolve finance cases. Qualified lawyers are well-placed to draw on their legal knowledge and practice to 'assist' settlement.

The FMSB's current training and accreditation processes are though onerous and expensive. We know from reports from our lawyer mediator members that the complexity of standards and route to qualification currently inhibits new entrants to mediation (and statutory MIAMs providers), from our membership.

Generally, there should be rigorous (which does not mean complex, costly or difficult to attain) standards and there is a need to balance standards (and Continuing Professional Development requirements) with the needs of mediation businesses and the wellbeing of individual mediators (and the need for appropriately scaling up) so that they can continue to meet the needs of families and children.

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

Not applicable.

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?

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

We very much welcome (and indeed encourage) a widening of policy focus to other forms of OCDR. Compulsion to find out about all options, with some exemptions, is helpful.

However, as we say, for mediation, we do not agree that there should be a pre-court *requirement* for OCDR. All forms of OCDR are consensual and require co-operation. Similar considerations and concerns would apply, for example to collaborative practice and private FDRs, as for mediation, and around what reasonable attempts at another form of OCDR would look like.

If government does decide to introduce a pre-court requirement, it should not be limited to mediation, and there should be scope for other forms to be brought into the scope of the legislation via secondary legislation. This is because mediation is not suitable for everyone but other approaches may be suitable or more suitable than mediation in the particular circumstances of the family. People should have a choice of OCDR if there is to be any compulsory requirement. AIMs providers should say what they think is suitable if mediation isn't. The challenges of compulsory OCDR and the issues raised would be the same as for compulsory mediation, but no harder to deal with.

NCDR (which, as we have indicated, would be better termed OCDR) would need to be clearly defined for these purposes.

There would need to be appropriate urgency and safeguarding exemptions in place, and screening for suitability by the relevant OCDR provider.

How this would be funded, if people are being compelled to do something, would also need to be addressed.

Our members find that their clients take into account and balance some of the following factors when deciding which dispute resolution process (court or otherwise) to participate in:

a) Finding the safest option for them and their children.
b) Feeling in control of the decisions being made about their family's future.
c) Whether their financial affairs are complicated and unclear.
d) Being up against a powerful personality, and not dealing with things on their own.
e) Believing they will need support to secure an outcome that is fair.
f) Needing to keep control of the costs.
g) Avoiding delays or a lengthy battle.
h) Finding an option that will bring certainty and closure.
i) Looking for a process that is as painless as possible.
j) Having the opportunity to understand and influence what is happening.
k) Whether they qualify for legal aid.
l) Finding an option that is private.

Mapping Paths to Family Justice provided much-needed evidence on the outcomes of OCDR (solicitor negotiations, mediation and collaborative law) including resolution rates.

Our member survey conducted to inform our response to the MoJ's DR Call for evidence in 2021 demonstrates the range of effective OCDR methods which help people avoid court on some or all issues; mediation is not the only effective one. The survey asked members how often issues are settled (either partly or fully) in their experience of using/conducting or referring to certain processes.

In private law children cases:

a) 40% of survey respondents said issues are almost always or usually settled partly or fully in solicitor negotiations; 50% said this happens sometimes.
b) 37% said that issues are almost always or usually settled partly or fully in mediation; 45% said this happens sometimes.
c) The majority of respondents had not had experience of arbitration or collaborative practice but where used the majority of respondents said these almost always resulted in issues being partly or fully settled. The vast majority also said that there is never or rarely a subsequent court application other than by way of consent, or any contested court hearing, post engagement in collaborative practice or arbitration.

In finance cases:

a) 66% of survey respondents said issues are almost always or usually settled partly or fully in solicitor negotiations; 28% said this happens sometimes.
b) 38% said that issues are almost always or usually settled partly or fully in mediation; 50% said this happens sometimes.
c) The majority of respondents had not had experience of arbitration or collaborative practice but where used the vast majority of respondents said these almost always resulted in issues being partly or fully settled. The vast majority also said that there is never or rarely a subsequent court application other than by way of consent, or any contested court hearing post-engagement in collaborative practice or arbitration.
d) The majority of those who had used private FDRs said most usually or almost always partly or fully settled issues.

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

If there is a requirement, the main advantage of expanding that would be that more cases would likely be resolved and conflict reduced without use of the court than if the requirement was for mediation only, albeit that compulsion would still be in play.

The disadvantages would be as for introducing the mediation requirement including:

- How cases where coercive control is in play would be identified and impacted.
- How a reasonable attempt at OCDR would be defined/pinned down and fairly judged.
- How to explore one party's reasonableness (or not) in how they attempted OCDR without breaking privilege and confidentiality.

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

Initially, subject to the caveat that compulsion rather than judicial and other encouragement would not be helpful, we would suggest:

1. Collaborative practice.
2. Private FDRs undertaken by a regulated legal professional.
3. ENE by a regulated single legal professional, such as a barrister or accredited specialist who will usually be a solicitor or legal executive, providing a neutral evaluation/case assessment giving an indication of the likely outcome in an individual case. (This is distinct from one lawyer, two clients.)
4. Arbitrations conducted by members of the Institute of Family Law Arbitrators.
5. Solicitor negotiation and roundtable meetings where there is a genuine attempt to reach a negotiated settlement. We have thought carefully about recommending whether this type of collaborative working should be included and concluded that we should recommend it. This is because we believe that most cases probably settle in this way and much good can come of it in the same way as other processes.

The legislation would need to make provision for other processes to be added.

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?

Collaborative practice

Only qualified practising solicitors regulated by the Solicitors Regulation Authority (SRA), regulated financial advisers and qualified therapeutic professionals are recognised for entry to training, governed by Resolution's Ethical standards for collaborative practitioners. Regulated solicitors and financial professionals involved may be members of Resolution's Specialist Accreditation Scheme in areas of law in which they specialise, including private children and financial remedies.

Resolution also proposes to introduce Specialist Accreditation for collaborative practitioners via our Specialist Accreditation Scheme.

Private FDRs

Qualified legal practising professionals, regulated by their own professional regulatory body (for example, SRA for solicitors and Bar Standards Board (BSB) for barristers).

Resolution has formed a working group with the Family Law Bar Association (FLBA) and IFLA to look at A Good Practice Guide or principles and standards for practice.

ENE

Qualified legal practising professionals, regulated by their own professional regulatory body (for example, SRA for solicitors and BSB for barristers).

Resolution has formed a working group with the FLBA and IFLA to look at A Good Practice Guide or principles and standards for practice.

Arbitration

Arbitrators who are members of IFLA and are in practice as legal professionals will be subject to their own professional and regulatory standards (for example, SRA for solicitors and BSB for barristers). They may be members of Resolution's Specialist Accreditation Scheme in areas of law in which they specialise.

Solicitor negotiation and roundtable meetings

Only qualified practising solicitors regulated by the SRA (CILEX for legal executives) who may be members of Resolution's Specialist Accreditation Scheme in areas of law in which they specialise.

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?

Yes, albeit that 'completion of' is probably not the right term to use.

It may be argued that whilst one form has been tried and unsuccessful, that doesn't mean that mediation would be unsuccessful. That this is not a reason not to try. But mediation may not be suitable or successful and how many hoops should people be put through? How much delay should be built into the system?

Like the current MIAM requirement, some concerns have been voiced that people may seek to bypass any new requirement on scant evidence of targeted OCDR having been attempted. How to define another form of dispute resolution for these purposes would need to be considered. We think an exemption should definitely apply, and you should be able to proceed to court:

- Where there has been voluntary disclosure, exchange of settlement proposals and a private FDR has not resulted in full settlement.

- Where proper collaborative practice has broken down, mediation or other evaluation will have been considered and is worthy of an exemption.

- Where there is an agreement to submit a dispute to arbitration (meaning there will be an outcome precluding the need for compulsory mediation).

- Any form of OCDR that has involved at least one substantive and/or joint meeting where the identified issues have been narrowed.

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?

The following points need to be carefully considered:

- How could and would this be done in practice? How would the information be gathered and be consistently and objectively considered across courts?
- May a survivor 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.

And, in our view, courts should not have the power to require parties to explain what has happened in mediation.

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?

We don't think that courts can determine whether parties have made a reasonable attempt to mediate (see above).

No more than a judicial discretion to make an order for costs might be considered (for example mediation might be unaffordable for those individuals concerned). But there is a risk of significant potential satellite litigation, and even the threat of costs orders could make survivors of domestic abuse feel unprotected by the family courts.

And if the mediator did not think mediation suitable that should be accepted without the giving of reasons, with no question of costs arising for failing to make a reasonable attempt.

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?

There are issues around how a more robust costs order regime, as envisaged in the consultation, would work in practice, particularly in the context of people possibly being pushed down the wrong road, around how reasonable attempts could be measured and without affecting the integrity of the process. It is not possible to go behind what happened in mediation so the court would have to rely on a report from the mediator which raises all the issues discussed earlier.

A mediator or other OCDR provider should definitely not be asked to give subjective views to inform costs decisions, as this could undermine the trust in and start to alter the integrity and confidentiality of the process, as well as putting people at risk. Only neutral and factual and easily accessible information might be provided.

There is reference to the mediator confirming to the court if a reasonable attempt has been made to reach agreement at mediation. If not, the court may impose a costs order. This will surely impact how participants view their mediation and the role of their mediator. It will infect the process and make it less likely to succeed.

There is also a very real likelihood that this will create more demand on family courts, as those who cannot mediate become potentially involved in satellite disputes over costs.

We are firmly of the view that any strengthening of the approach via legislation must still include judicial discretion for all levels of judge, and a wider discretion than appears to be envisaged within the consultation.

The use of costs orders in private family children law proceedings should remain limited for the reasons given in the third paragraph of page 37 of the consultation.

In relation to financial remedy proceedings, we don't think that the powers provided within the current costs regime are effectively used, perhaps due to lack of judicial time to consider costs issues. There could be more use of costs sanctions where court orders are breached and most practitioners would encourage that approach.

We have long called for a formal further encouragement of OCDR by adding a specific reference to Part 3 in Part 28. And 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 whether or not to make a costs order and why they reached the decision they did.

There may be scope for the strengthening of powers to order costs in finance cases. But we reiterate that judges should continue to have discretion to decide when to make orders and what specific costs to include. We have a discretionary system and there will always be a need to look at individual cases.

Any costs orders should, however, be imposed with some caution. What may be regarded as a reasonable attempt to mediate is totally subjective and difficult to define. 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. What will be done to protect and safeguard a party where there is financial abuse and controlling and coercive behaviour? How would the more subtle forms of domestic abuse/imbalances in negotiating power be considered?

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?

Unless another exemption applies, it might make sense for the court to have this power in the context of the system proposed. But this again raises issues around how a reasonable attempt to mediate would be defined and judged; the voluntary nature of mediation; and a possible perception of judicial coercion.

The judiciary would 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 proceedings for mediation if they feel forced to do so by the court.

If mediation was in fact unsuitable or 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 mediation during a natural lull in the court process would suffice.

Of more value would be attendance at a further MIAM before the matter is listed for an FDR or final hearing in financial remedy proceedings. This is also likely to make it easier for the judge to encourage the use of suitable OCDR/take the potential next step of adjourning for suitable OCDR to take place.

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?

Private family law proceedings have a serious purpose. The need to make an application to court is often a complex one about the future of family relationships and children. It may be needed due to protection, safeguarding and child welfare factors.

The case for setting court fees purely on the basis of cost of the service (which is not an effectively functioning service) provided by the courts has not been persuasively made in relation to family proceedings, in this consultation or elsewhere. In 2015, the then government agreed that it was wrong in principle to seek to increase the cost of court proceedings associated with the breakdown of family relationships.

Whatever the value to individuals of pursuing a legal remedy (which is their right under statute) and of the proceedings, there is the issue of affordability. Increased fees will be beyond the reach of many vulnerable people and risk people being trapped in conflict to the detriment of their children and/or in an abusive relationship.

The capital and income thresholds in the Help with Fees remission scheme are too low to make a realistic difference for many and people may not even know it is available to them in the absence of legal advice. Whilst there is a separate consultation on increasing those thresholds, which is welcome, this does not of itself justify a significant increase in court fees.

The higher court fees become, the ever less likely it is that individuals will access any sort of legal advice. They may not pursue their rights to see their children or money claims, or do so in a way that increases the amount of court time that they need.

All told, there is already a potential cost of £1,100 to pay a divorce application fee, the fee to pursue a contested money claim and a further fee if there are contested issues with regard to children. That is already a significant sum for many people.

The Impact Assessment does not cover changes in court fees and that would of course be necessary, especially to consider any disproportionate impact on women, victims of domestic abuse and any groups with protected characteristics that are over-represented in private family law cases.

We also agree with The Law Society that the judgment of the Supreme Court in Unison (R (Unison) v Lord Chancellor [2017] [2017] UKSC 51 is relevant. That declared that employment tribunal fees were unlawful because households on low incomes were expected to sacrifice an acceptable living standard to afford legal costs, with the Judge citing the Minimum Income Standard in determining an acceptable living standard. Lord Reed states in the judgment 'Where households on low to middle incomes can only afford fees by sacrificing the ordinary and reasonable expenditure required to maintain what would generally be regarded as an acceptable standard of living, the fees cannot be regarded as affordable' (para 93).

In order to access the courts the proposals on mandatory mediation already add the hurdle that either someone has to prove they are a survivor of abuse or that they have made a reasonable attempt at mediation. In addition, significantly increasing court fees is likely to deny many access to the courts and to justice.

Research demonstrates a clear link between deprivation and private law applications (Cusworth et al. 2021 and Cusworth et al. 2020) with an over-representation in private law adult parties living in the most deprived areas. It is apparent from research carried out by the Nuffield Family Justice Observatory that adults involved in private family law cases are statistically far more likely to suffer mental health difficulties, addiction problems and domestic abuse; these cases involve some of the most vulnerable children and are amongst the more complicated type of cases which the family courts may have to deal with. There should be no barrier financial or otherwise in families accessing the courts in these cases.

Whilst court fees shouldn't be a barrier to issuing an application and access to justice, there is a view that the current court fee structure does not incentivise participation in OCDR/deter litigation and the level of court fees may perversely encourage some to circumvent the pre-court process. The MoJ may wish to consider whether there is a case for the introduction, for example, of staged or final hearing fees in money cases and to explore any learnings relating to the impact on access to justice of the 'pay as you go' system introduced in Scotland. The introduction of a new court fees system is not however Resolution's policy position, and we would wish to take the temperature of our membership on any specific proposals relating to court fees.

It is worth noting that anecdotally our members report that high net worth clients don't notice court fees and wouldn't notice a hike, but those on those on low and middle incomes would and would be disproportionally affected.

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