

## **Draft Mediation Screening and Assessment Resource (MSAR) Resolution's response to the FMC and FMSB**

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.

Our members include solicitors who refer family clients to assessment for mediation and and/or other OADR processes, support clients through mediation and have clients required to attend statutory MIAMs; and mediators. Our members are often working with victim- survivors of domestic abuse.

### **Response to consultation questions**

#### **1. Do you think the questions outlined in the toolkit are the right questions for mediators to be asking clients in the MIAM?**

We appreciate that it is challenging to balance time and cost against depth of inquiry during in initial meetings, which are often limited to 60 to 90 minutes. During this time mediators need to build rapport and trust; explain the mediation process (and other OADR processes in a statutory MIAM); conduct a risk assessment including around domestic abuse and power imbalance; and gather basic facts about the dispute.

We are concerned that the volume of questions in the MSAR could make this unmanageable within a single MIAM, especially for sole practitioners managing caseload pressures. Lengthy, detailed questioning (e.g., about emotional abuse, finances, intentions) can understandably consume a disproportionate amount of time, especially if phrased in a manner that requires nuanced, reflective answers or prompts emotional responses. Whilst a two-tiered assessment model (initial and enhanced) might be more ideal, this of course creates issues about paying for two meetings rather than one.

More importantly, some of the prompts seem to overlap, creating potential for fatigue and confusion, especially for participants already experiencing trauma, as well as the volume of questions being overwhelming for them.

We suggest consideration of condensing and streamline of some of the questions for practical use in MIAMs.

In Part three, question 1 we consider that the words “ever intentionally” should be removed. Many victim-survivors are manipulated by a perpetrator to believe that physical harm was “unintentional” or provoked.

In question 2 of Part three we don’t understand why the words “and they believed them” are included. Threats to kill are abusive behaviour whether or not the victim-survivor believed that threat to kill would be carried out.

**2. Do you think that the correct indicators are included to identify risk of mediation taking place?**

There is a lack of clear criteria for unsuitability for mediation. While the draft MSRA flags “red” and “amber” risks, it does not provide objective criteria or guidance on how to make sound suitability decisions.

There also don’t seem to be references to legal exceptions. This is a missed opportunity to cross-reference to key legal frameworks, for example exemptions from MIAMs or legal aid gateway and eligibility.

We would like to see more emphasis on ensuring prompt referral to agencies of immediate support and protection and/or information/guidance for obtaining urgent legal protection.

We are very concerned by the, perhaps unintentional, implication that mediators might deem individuals suitable to participate in mediation where there is or has been domestic abuse as long as the mediator considers mediation will be safe or can be made safe. We know that what ‘safe’ means is different to different mediators and similarly to vulnerable individuals. We share the concerns of others that victim-survivors who do not want to mediate will feel pressurised to do so because the mediator has deemed them to be medium or low risk, and that mediation is suitable. We discuss this further in our response to consultation question 3.

**3. Would this resource give you confidence that the mediator will be able to identify risk of harm and safely assess suitability of mediation in this context?**

It is so welcome that this resource is being developed and is clearly well intentioned. We would urge the FMC though to take sufficient time to finalise the resource, rather than rushing it through or being perceived to do so.

For all victim-survivors considering the option of any NCDR there needs to be robust and continuing assessments of:

- i. **Risk:** Family justice professionals need to recognise that knowledge of domestic abuse of any kind, including current and historic abuse, may not be disclosed by and/or apparent to the victim-survivor;
- ii. **Suitability:** The capacity and suitability of an NCDR participant to take an active part in the process, including being able to speak and to negotiate on their own behalf. As a guide, the professional must consider whether the NCDR participant can disagree, challenge, and speak up for themselves without feeling threatened, intimidated or worried about reprisals during or after the NCDR process; and
- iii. **Safeguards:** The professionals must ensure there are appropriate safeguards in place within the NCDR process to make it safe for the individuals concerned. This is an ongoing process and the need for safeguards required may change during the NCDR process, depending on what becomes apparent during the course of NCDR. This must include consideration with the individual as to their

safety (and that of any children) outside of the mediation, especially if those involved remain under the same roof.

There would be more confidence in the resource if it could make it explicitly clear that:

- The purpose of the resource is not to ‘diagnose’ the presence of abuse in a relationship, but to assist in assessing suitability for mediation and whether it will be a safe environment in the particular case.
- Family mediators have a responsibility to ensure the safety of any individual involved (and especially any child or children) and are required to assess carefully ahead of any mediation the suitability of the mediation process for the individuals involved, given the circumstances reported to them.
- There should be appropriate assessment for risk factors, as to whether there is or has been (or is risk of) domestic abuse of any kind, together with assessment of the capacity of the individuals concerned to take part in the process (including their capacity to speak freely and to negotiate on their own behalf) and its suitability, with necessary appropriate safeguards **where the parties agree**. Clearly where there is or has been a pattern of abusive, coercive or controlling behaviour, individual capacity may be a particular issue as victims may be very aware of the consequences of not complying with what their partner wants from any mediation process and/or may lack confidence or self-esteem to negotiate freely. The potential for re-traumatisation should also be recognised.

We are also concerned about how it will be suggested that this lengthy document should be used in a time limited MIAM without some sort of guidance to explain how it should be used to meet the ‘best practice’ expectation around it and ensure quality of responses. We fear that mediators may use this resource as checklist or tick list rather than a guide to having a proper conversation and continuing assessment.

We also suggest that the resource would be strengthened by emphasis on when to refer to solicitors and safeguarding authorities, and where there is a duty to refer to children’s services (per Working Together to Safeguard Children guidance); and specific referral pathways for legal advice, IDVAs, MARAC, social care, and housing.

There is no mention of supervision mechanisms/support by supervisory review, especially where a decision is made to proceed despite “amber” or “red” flags.

#### **4. What other questions/indicators (if any) should be included?**

Child abuse could be a potential indicator of domestic abuse, and vice versa, and is also relevant to assessing suitability for mediation.

An informed choice of the mediation process provides autonomy for the victim-survivor. We wonder if there should be a specific direct question on whether the participant wants to mediate, with the mediator being alert to a participant agreeing to a process they think the perpetrator wants.

The examples of behaviours that might indicate a change of risk (Section C) should pick up on behaviours by a participant which may indicate that they are a perpetrator, as well as behaviours which may be indicated by a victim-survivor.

There is no reference to the mediator needing to be alert to a mediation being used as a delaying tactic, or as a means of exerting pressure on victim-survivors to agree unfair settlements.

**5. Do you have any comment on the language used? If any concerns, what alternatives might you suggest and why?**

Some of the listed questions are phrased in a quite a blunt style. While factually direct, this this may risk re-traumatising clients who are emotionally raw, may cause an individual to 'shut down' and feel unable to raise concerns they may have and/or eroding trust by appearing interrogative rather than supportive.

We would like to see mediators adopt a phased, empathetic, and flexible approach that prioritises safety, including emotional safety, and avoids overwhelming, while still gathering essential information that is appropriate for an initial, time-limited meeting.

Some example questions are:

- Would you feel comfortable sharing any concerns you've had about safety or control in the relationship, now or in the past?
- Have there been times when the children were present during difficult or distressing situations between you and the other parent?
- Have there been situations where issues with the children have felt like a source of tension or pressure between you and the other parent?
- Have you had any concerns about access to money or control over financial decisions during the relationship?
- How are you feeling about the idea of sitting down with the other person? Are there any worries you'd like to share?
- Do you feel safe meeting and speaking with the other person?
- Do you feel able to speak openly and make decisions, or do you worry that you might feel pressured or overwhelmed?

**Resolution  
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