



## **Bar Council response to the Ministry of Justice Consultation on Supporting earlier resolution of private family law arrangements**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice Consultation on Supporting earlier resolution of private family law arrangements.<sup>1</sup>

2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

4. The Bar Council fully endorses the following response of the Family Law Bar Association (FLBA) to this consultation.

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<sup>1</sup> Available here: <https://www.gov.uk/government/consultations/supporting-earlier-resolution-of-private-family-law-arrangements>

Bar Council<sup>2</sup>

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<sup>2</sup> Endorsed by the Legal Services Committee and the ADR Panel



This is the Family Law Bar Association’s response to the consultation ‘**Supporting earlier resolution of private family law arrangements**’.

The FLBA has nearly 2200 members. The elected National Committee is based in London and is headed by a team of Executive Officers. In addition, the FLBA has a strong regional network as a result of a number of regional committees, which are based across England and Wales.

Through conferences, webinars and accredited CPD lectures the FLBA supports the professional development and training of its members, across a wide spectrum of family law topics.

The FLBA is regularly consulted by both the Judiciary and Government Departments, including the Legal Aid Agency and the Ministry of Justice, in all important initiatives affecting family law, family courts and family barristers and it responds to consultations on matter of policy and practice which fall within the expertise of its members and which are relevant to the practice of family law in the jurisdiction of England and Wales.

Our members are specialist advocates in the field of family law. Within our membership are highly qualified and experienced mediators, arbitrators and part time Judges, as well as retired members of the judiciary. Our membership therefore have experience both of the conduct of non-court dispute resolution (“NCDR”) and of court proceedings, their relative advantages and disadvantages.

## **GENERAL OBSERVATIONS**

1. The FLBA endorses the aim of encouraging out of court resolution for private family disputes regarding children and finances, and is of the view that this should include cases in which financial issues arise out of cohabiting relationships. The current MIAMs system is too frequently used as a means to an end, the end being the issuing of court proceedings. Whatever the outcome of the consultation, there needs to be a

more rigorous approach to engagement with that part of the process and particularly for those cases that are suitable for mediation and other forms of out of court resolution.

2. For reasons that are addressed below, the FLBA considers that ‘compulsory mediation’ is too narrow an approach, is not the answer for all and is likely to be unsuitable in many cases, particularly the majority of private law children disputes in which domestic abuse has been alleged. Mediation rests on the concept of it being voluntary and whilst it is acknowledged more needs to be done to resolve disagreements away from the court arena, compelling people to engage in one avenue of NCDR, to which they are not psychologically signed up, is likely to undermine the likelihood of its success.
3. It is the experience of the FLBA that NCDR in all its forms, including shuttle mediation, arbitration, private FDRs, early neutral evaluation, collaborative practice, round table meetings and more traditional mediation, can offer separating couples greater individual control over their futures than recourse to court. A level of choice should remain available for those separating couples who cannot agree, rather than shoe-horning every case into one pathway of potential resolution. Each case is fact specific and there needs to be careful consideration of all non-court options to better inform the family as to their choices going forward.
4. As set out below it is the FLBA’s view that initial meetings, signposting to broader forms of NCDR, which can be tailored to meet the needs of the separating couple would offer the best chance of achieving the aims of the consultation. There are a range of options and suggestions for encouraging or ensuring more active attendance at those forms of NCDR, which are considered in more detail below.
5. The FLBA also see great force in enabling and providing parenting programmes prior to court proceedings provided it is safe to do so. The options presented prior to court must be as full as possible and structured to inform separating couples before they seek out the court as their only option. Frequently, the SPIP as it was previously called (now Planning Together for Children) was directed but did not always materialise, as the referral was lost in the system, or it came too late in the process to have any real impact and when the parties were locked in litigation. The provision of a programme that enlightens parents as to the harm that children frequently suffer when parents do not

co-parent together and effectively, can prove crucial to future pathways for the child and the family. These programmes can better equip the parents to have the tools to be able to understand the significance of resolution of any issues arising away from the court, as they attempt to agree child and other arrangements.

6. There should be a ‘frontloading’ of resources and support and information at the earliest opportunity for separating parents, well before any court process is considered or instigated. The FLBA responses to the questions below are predicated on this basis.

## **RESPONSE TO QUESTIONS**

**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, subject to the safeguarding exemptions/special circumstances criteria.

7. We are of the view that early information about positive separate co-parenting, the adverse impact upon children of the behaviour of their separating parents and the possible harm for children being involved in court processes can play a vital role in assisting separating parents in their choices and guiding them as to their children’s best interests.
8. Many children disputes arise from the power struggles between the parents, often fuelled by fear, at a time when futures are uncertain and other stressful issues such as financial matters are present. Understandably perhaps, many see separate lawyers as the first port of call to protect their interests. Children issues can be subsumed into this wider need to control and protect. As a result, language and approach to resolution of all issues very quickly become adversarial from an early stage.
9. Shared parenting programmes as a requirement can play a vital role in changing the narrative for a family before the escalation into the court process. In addition, the value of shared parenting programmes lies not only in the information provided but also in

reinforcing to separating parents that theirs is not a unique set of circumstances, that many others have faced similar and difficult family transitions and that a legal fight is not their only option.

10. Perhaps equally importantly, the programmes can have significant impact in changing the lens through which arrangements for children and separated parenting is viewed; an important shift from adversarial combat through lawyers, often escalating to court proceedings, to one of joint resolution of issues, positive outcomes in the round, and the impact upon every child being at the forefront of parental considerations.
11. Those delivering SPIPs (now Planning Together for Children) stated clearly at the recent MOJ Roundtable<sup>1</sup> that though some parents may first be resistant to attending parenting programmes, they reported extremely positively about the educational value of attending. Further, that it helped them adapt their behaviour and approach to arrangements for their children. The PTC providers also agreed on the benefit of mixed gender groups in such programmes, to enable viewpoints from all sides.
12. However, there are currently numerous and varied parenting programmes. Parents, advisers and the courts are often unaware of the full range of options for parents, and how to access them. We support regulatory measures that require all providers to comply with minimum relevant content, together with a central register of providers to enhance accessibility. We have considered and endorse Resolution's proposal as to the content of such programmes, whilst inviting any additional suggestions from existing PTC providers and other professionals in the field.
13. We also support the courses being available to wider family members and/or relevant accessible information online for those living with or closely connected to those separating, in the same way that other organisations supporting people struggling with personal/life events have separate areas of information for the extended family to access.
14. We invite discussion around possible reduced court fee incentives for attendance.

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<sup>1</sup> MOJ Early Resolution Consultation Roundtable - Pre-Court Support 10<sup>th</sup> May 2023.

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

Yes, subject to the safeguarding exemptions/special circumstances criteria.

15. A shared parenting programme requirement educates parents in advance of discussions.
16. As detailed in Question 1 above, it has the possibility of changing the language and approach to parties entering into mediation. Mediators can assist the parties to build upon the programme's approach and facilitate the discussions along the line of travel already in place.
17. Mediators or other NCDR professionals can use the work done in the earlier parenting programme as a platform for the groundwork for more effective co-parenting. It often acts as a building block and can be enlightening for some.
18. Caveat: These programmes should be available without delay, otherwise one of the core benefits of NCDR, namely swift resolution of the issues, will be lost. This is extremely important. If the programmes take a long time to deliver, or are not easily accessible or available, then any benefit derived will come too little, too late. The programmes should be government funded, if they are to be made compulsory. The FLBA would not oppose a proposal for higher-income families contributing to the cost of the programmes.
19. We suggest that all professionals working within the out-of-court dispute resolution arena (not just mediation) are encouraged to experience a parenting programme for themselves, as part of their general CPD. In this way, they too stay up to date with current thinking and approaches around shared parenting issues.

**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)**

20. We are of the view that the information proposed should not solely focus on the court process. Rather, it should include full details of all out-of-court options. The provision of information around possible outcomes is likely to be beneficial as a way to understand what the court might consider reasonable and this may assist parents in settling future arrangements between themselves. However we recognise that this may also be delivered as provision of initial legal advice, to actively inform participants and encourage agreement. The information should also signpost alternative safeguarding routes for those who may be experiencing domestic abuse. Such information should be available for use in the widest possible domain - both in digital and non-digital format.

21. A non-exhaustive list might include:

- i. Government websites, including Advice Now.
- ii. Court and court websites
- iii. CAFCASS
- iv. Local Authorities and their websites.
- v. CAB, Advice UK, Relate and their respective websites
- vi. GP surgeries and websites
- vii. Debt agencies and websites
- viii. Schools and their respective websites
- ix. Pre-school, playgroups and their respective websites
- x. Women's Aid, Rights of Women and others supporting those experiencing domestic abuse
- xi. Organisations supporting those with mental health issues
- xii. Other organisations supporting families with difficulties e.g. AA.

22. People take time in deciding to separate. Their decision-making often fluctuates. There is rarely a linear propulsion. Many people may reach out for advice and support on individual issues not relating to separation (e.g. debt, alcoholism) but which may later become reasons for considering separation. Leaflets may be picked up in passing and put on one side for later consideration. Digital information available from the widest



possible range of organisations can signpost people to their options at a very early stage in their considerations.

23. We suggest the information needs to cover:

- i. What the court process can look like.
- ii. The likely timescales of court processes.
- iii. The options of representing yourself and the possible implications of that.
- iv. Links to legal aid assessment.
- v. Reference to the need to fund legal costs, if represented.
- vi. That courts may adjourn anyway for parties to consider mediation or other ADR.
- vii. Parties lose control of decision-making. A judge may make a decision that pleases neither party.
- viii. Reference to the emotional costs and burden of ongoing proceedings to adults and children (see the Nuffield Family Justice Observatory research on children, <https://www.nuffieldfjo.org.uk/resource/uncovering-private-family-law-anxiety-and-depression-among-children-and-young-people>) .
- ix. Reference (identifying sources) to the harmful effect on children of court proceedings.
- x. Reference to the expectation of full and frank financial disclosure.
- xi. A list of out-of-court options available with a short definition of each and links to where these may be accessed.
- xii. Other useful websites such as ‘OnlyMums and OnlyDads’.
- xiii. Alternative support routes for those who may be experiencing domestic abuse.

**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?**

24. As an urgent initial step, we suggest a root and branch restructure of the current government website. Currently, the website suggests only mediation as an out-of-court option, with court the next ‘go-to’ step. We are of the view that the emphasis should

be that for many people, they do not need to go to court to have their issues resolved. Court should be a last resort.

25. We suggest signposts and links to:

- i. Mediation
- ii. Round table negotiations
- iii. Early Neutral evaluation
- iv. Private FDRs for financial matters
- v. Collaborative practice
- vi. Arbitration
- vii. Websites such as ‘Only Mums’ and ‘Only Dads’
- viii. Support agencies for those who may be experiencing domestic abuse

26. In addition, we propose the government fund county-wide online information hubs such as that provided in Devon and Kent at <https://www.ssfak.org.uk>

27. Separating couples should also be made more aware of the relevance of children’s views when part of a court process, and how it is seen through their eyes. This might entail a joined-up approach with CAFCASS and organisations representing the voice of the child such as the FJYPB.

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

28. Yes, mediators are one avenue by which suitability for attendance can be determined. The mediator can explore as part of the information meeting any safeguarding concerns or exemptions that may apply for each particular participant. There would need to be clarity from the course providers around the expectations for attendance and participation at the courses, as well as information around criteria for suitability, for the course to ensure consistency of approach.

29. However, subject to the caveat regarding delay above, the FLBA would recommend that participants attend a co-parenting programme before attending an information

meeting or commencing mediation or NCDR. Participants would be better assisted in making an informed choice about the avenues of NCDR which would best suit them if they started from a more informed base about the impact of separation, proceedings and conflict upon their children. Attendance at a course prior to an information meeting will enable the participants to have a fuller understanding of the impact of their decision-making as well as encourage them to adopt a more child focused approach to their choices and discussions.

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

**Please see the attached table.**

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

30. It is a general principle of all of the compulsory mediation schemes dealt with in the Table at question 6, that resolution is best reached through dialogue. There is a general direction of travel in all legal system studies in the Table produced in response to question 6 that consensual solutions are considered best for co-parenting.
31. In order to bring parties to the table of NCDR, MIAMs must be compulsory and effective. Too often, MIAMs serve no greater purpose than being a tick-box exercise to comply with the necessary formalities and a step taken to reduce the prospect of court sanctions for not complying. This must change.
32. MIAMs should focus on the provision of information, encouraging separating parties to take responsibility for trying to resolve the conflicts arising from the breakdown of their relationship outside of the expensive and time-consuming judicial system. This requires a different MIAM model than at present.

33. The FLBA proposes and invites discussion around the re-modelling and re-naming of pre-court compulsory NCDR information programmes, to a title that explains more accurately the content.

34. We suggest:

**Non-court Processes and Choices (NPC meetings) or**

**Choices, Processes and Outcome (CPO meetings)**

It is proposed there would be a two-stage process as follows:

**Session 1**

It is proposed there would be a compulsory **initial confidential individual meeting for each participant**. Prior to the meeting parties to be asked to complete a standard information form asking them to identify issues, needs and matters they wish to address.

The individual meeting would cover:

- i. Safeguarding for NCDR.
- ii. Explaining the expectation of full disclosure where finances are in issue<sup>2</sup>.
- iii. An exploration of all issues and needs and desired outcomes.
- iv. A full explanation as to NCDR options and discussion with each party as to their views as which may be worth trying and why.
- v. An even-handed explanation (without persuasion/coercion) of the expectation of courts with regard to parties attempting agreement between themselves.
- vi. Focus on what a good separation looks like.

Participants then have time to reflect and further consider the options.

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<sup>2</sup> It is the experience of FLBA members that frequently, cases come before the court for the simple reason that one party has failed to give full disclosure. Better in those cases that disclosure is resolved without recourse to court, by explanation of the expectations at CPO stage

## Session 2

If all safeguarding aspects are in order, then there would be a second **joint** meeting (in person or online, round table or shuttle) to discuss the chosen NCDR process and to set this up with the help of the professional adviser. This second stage would be compulsory.

In the event there is no agreement as to process, then the professional would record this (the fact of attendance and no agreed approach for NCDR) and the parties would have to then decide their next steps.

35. Although the MIAM meeting can be virtual, or hybrid, ideally the meetings should be in person and shuttle mediation is effective for parties who don't wish to be together in the same room.

### **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?**

36. The FLBA does not support compulsory mediation.
37. The FLBA does not support the idea that the courts should be considering whether ‘a reasonable attempt to mediate’ has been made.
38. The FLBA would recommend an approach which has as its starting point the parties fully engaging in an NCDR process, but which also allows participants to “opt out” of mediation or other forms of NCDR. It would be clear to participants that exploration and attendance at a form of NCDR was expected but that they could actively opt out. The criteria for opting-out would need to be narrow in order to avoid the return to the current default tick-box exercise used by some practitioners and parties when certifying a matter can proceed to court.
39. As already indicated, the FLBA believes that forcing families to adopt an approach that may or may not suit their situation is unlikely to be fruitful. Mediation is voluntary; it

is the voluntary nature of the process which underlies its success. Mediation is a process that encourages co-operation and communication through facilitated discussions. Removing the voluntary nature of mediation in particular risks unsustainable outcomes, which only give rise to conflict and potential litigation in the future.

40. There is a real risk that mandatory mediation would only serve to delay the ultimate resolution of the case through the court process, particularly where a party has already attempted but failed to resolve the case prior to issuing proceedings.
41. The FLBA supports an emphasis on early information and support for participants to access NCDR, whether that is through mediation, early neutral evaluation or other means. The focus for practitioners should be on ensuring participants feel able to make an informed decision about which form would suit their needs and also feel empowered to make such choices. There needs to be encouragement and a clear message from the earliest stages of separation through the information provided, that NCDR is a cost effective and meaningful alternative to the court process and that it is endorsed by the court as a starting point.
42. The FLBA would support compulsory attendance at the two-stage process outlined above as the provision of information and support is necessary for participants to engage in NCDR. There is, however, a significant difference between requiring attendance at an information meeting and requiring attendance at a mediation session.
43. The FLBA opposes the introduction of a ‘reasonable attempt to mediate’ criteria as:
  - i. It is not possible to conduct this form of assessment without breaching the privileged nature of mediation. A Judge will not be able to assess the participants’ attempts to mediate without evidence. To provide such evidence would mean considering the discussions which took place in the session. The approach would add further satellite litigation as the court would need to consider the evidence as well as the parties’ positions on the criteria and then ultimately determine the issue. This will inevitably place greater strain on an already severely overburdened court system.

- ii. The role of the mediator as neutral and impartial would be undermined if they have to provide evidence of the participant's engagement. The mediator would become an assessor. They risk no longer being seen as an independent professional who is there to assist and be neutral, but rather as someone who is there to assess the participants as an extension of judicial scrutiny;
- iii. The assessment would be of a subjective process. One participant's reasonable attempt to mediate will not be the same as another's. There will be mediations where progress has not been made in relation to the main dispute, however, communication has improved between the participants and tensions reduced; such situations will be difficult to translate into 'reasonable attempts' but may well have made an impact on the participants going forward and their respective decisions as to whether to go to court or not;
- iv. Physical attendance is not an indicator of engagement. One participant can attend multiple sessions but not meaningfully take part in trying to reach a resolution;
- v. The requirement risks creating further power imbalances between participants, such as where one party has sufficient funds to mediate and pursue litigation whilst the other does not;
- vi. There is real concern about the impact on those participants who have been in an abusive relationship, particularly around the effect of coercive and controlling behaviour on participants engaging in compulsory mediation. The threat of court sanctions being pursued by their former partner creates a number of issues around consent and meaningful agreement to mediation and its outcome;
- vii. Mediation may not be suitable for a particular family, for reasons which fall outside of the exemptions. Families should be offered a menu of options for resolution of their disputes outside of court, rather than being pressed into mediation.

44. If the requirement for ‘reasonable attempt to mediate’ is adopted, the FLBA suggests that the focus would need to be on attendance at the information meeting and whether any form of alternate dispute resolution was attended or canvassed, rather than a focus solely on mediation. The parties could be directed to explain why they had not attended any form of alternate dispute resolution without referencing the contents of any discussions, which took place in a privileged setting. The decision to order statements on this issue would need to remain discretionary as the court should be able to assess on a case-by-case basis the appropriateness of this requirement.

**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?**

***Urgent applications***

45. The FLBA agrees that there are circumstances in which immediate access to court is necessary to avoid harm and risk of harm to children and/or to a parent who is alleging domestic abuse, abduction or in other urgent cases. In those circumstances, which include retention of a child by a parent who is a risk, cases in which there is an imminent risk of abduction, it is appropriate for there to be an exemption from requirements to attend pre-court advice meetings or to attempt resolution of the issues by agreement before attending court. Those circumstances appear to be adequately dealt with in FPR r3.8 (1). This does not preclude the attempt to resolve the issues out of court once immediate protective orders have been obtained. At that stage, the court might then revisit the idea of an information meeting and potentially out of court resolution. This would not necessarily apply to cases where domestic abuse applied as the exemption may still be relevant.

***Child protection circumstances***

46. Child protection circumstances are defined for these purposes at FPR r3.8 (1) (b) (ii) as a child being subject of an investigation under s47 of the Children Act 1989 or subject of a child protection plan, both of which are at the upper end of the scale of concern for local authorities. The FLBA agrees that child protection circumstances for the purposes of an exemption to attend NCDR are appropriately defined here. The FLBA notes that



at present, cases in which there are safeguarding or child protection concerns are specifically excluded from some forms of NCDR, for example arbitration. The existence of a s47 investigation or child protection plan does not necessarily preclude NCDR once proceedings are issued and the circumstances have been considered fully. This should be made clear within the new scheme.

### ***Domestic abuse***

47. The experience of attending court (whether remotely or in person) in private family law proceedings can be adversarial and particularly difficult and re-traumatising for those who have experienced domestic abuse. The family court is engaged in a process of change around support for victims of domestic abuse, including special measures and the prohibition of cross-examination of victims by perpetrators.
48. The FLBA agrees that requiring victims of domestic abuse to attend in-person mediation, in the same room as the perpetrator of abuse is inappropriate. These are vulnerable clients and even in a shuttle mediation format, this might be triggering or fortify and bolster a particular dynamic that is deemed abusive. In cases of domestic abuse, a different pathway will need to be adopted with no pressure on parents who fall within these cases.
49. However, it may be that bypassing individual advice appointments completely, where they might signpost to other support services (e.g. in respect of domestic abuse services) and involve provision of information about other forms of dispute resolution, may represent a missed opportunity.
50. The FLBA would invite the MoJ to consider joining up the approach to NCDR in cases where domestic abuse is alleged with the arrangements for earlier CAFCASS intervention in the private law pilot scheme (IDAC), making use of CAFCASS practitioners, suitably trained, to offer information meetings in advance of the issue of proceedings. Even if NCDR is not suitable at the outset and the exemptions apply, there may be issues that can properly be resolved out of court at a later stage. Anecdotally, the experience of practitioners in courts where CAFCASS officers attend FHDRAs (which in many court centres is not the case) and each party is represented is that many issues resolve with the assistance of CAFCASS.

51. To be clear, the FLBA wholly supports the separate, specialist approach and treatment of victims of domestic abuse when it comes to feeling compelled to do anything that would reinforce any abuse and/or feed into a dynamic that is considered abusive. This treatment must be protected and extra caution applied at all times.

**Question 9 b) What circumstances should constitute urgency, in your view?**

52. The FPR offers a suitable definition of urgency at FPR r3.8 (c). Whilst this is often not specifically applied in practice, the rule is fit for purpose in the view of the FLBA.

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

53. The FLBA does not propose that the exemptions are expanded. The current exemption involving a mediator not being within a 15 mile radius seems otiose given the availability of online mediation.

**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?**

54. The assessment of exemptions should be made as early in the process as possible and may be carried out by mediators, lawyers or other professionals involved in the pre-proceedings process. If exemption is being claimed on urgent grounds, the first judicial office holder to see the application should make the assessment at gatekeeping stage. On child protection grounds, the most recent report or referral from the local authority should be provided to the court with the application to enable the court to assess the circumstances – the FLBA does not propose that social workers conduct any assessment but that information is provided to enable the court to do so.

55. Where domestic abuse is alleged, the existence of abuse and management of the case will ultimately be a matter for the Judge. At the MIAM or information stage, the Cafcass

safeguarding process already involves an element of assessment of suitability for mediation and the ‘domestic abuse’ pathway for information meetings proposed above would allow for Cafcass to conduct an initial screening.

56. The FLBA has some concern about Judges having a significant role of oversight in terms of every case because this is likely to cause further hearings and resources being used when the system is already overloaded. This may contribute to further delay particularly if there is filing of statements or reasons etc. If the role is to be fed into the court process then there needs to be an efficient system built in so that gatekeeping is allocated to the right person and at early stages.

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

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57. Whilst the FLBA supports full funding for any compulsory process in principle, it is likely to be difficult to implement in practice. The FLBA takes the view that vouchers should be funded for parenting programmes and information meetings. *If* compulsory mediation is implemented, funding would be important. However, it would be important to ensure that any funding is at such a level that the mediation provided is of sufficient quality to be meaningful. It would also be important to ensure that it extends to more than one session as it is usually the case that more than one session of mediation is necessary in financial remedy cases.
58. There would also be concerns about means-testing and ensuring that this was applied in a consistent and fair manner. It can be difficult and time-consuming for busy practitioners to administer and might sometimes arbitrarily exclude meritorious claimants.
59. In financial remedy proceedings it is frequently the case that full disclosure is directed at FDA and there is a significant gap then before the FDR can be listed. Where this is the case, the FLBA would support further encouragement by the court into NCDR.
60. The FLBA would further endorse a voucher scheme which can carry over into the proceedings, to be used where NCDR is considered appropriate at a later stage.
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**Question 13: Does the current FMC accreditation scheme provide the necessary safeguards or is additional regulation required?**

61. The FMC has been responsible for assessing competence and accreditation of family mediators since 2007. The FMC requires successful completion of an approved training course (following a foundation scheme), plus a period of supervised practice leading to submission of a detailed portfolio (three case studies) successfully assessed, before accreditation.

62. Whilst it is a robust accreditation scheme, it is extremely time consuming (average of 100 hours) costly and onerous. Requirements include:

- i. 3 case commentaries of mediations involving 1 of each of the categories- children, money, and all issues or 4 case commentaries if no “all issues” mediations have been completed
- ii. 3 anonymised files to be submitted alongside those 3 case studies.
- iii. The 3 case studies to be cross referenced to extensive FMC competencies grid, referencing at least 40 competencies (at least twice) within the three case studies.
- iv. A detailed commentary of 2 MIAMs ,
- v. A written response to 3 of 5 assessment case scenarios
- vi. A report (max 2000 words), of a reflective account of experience as a mediator,
- vii. A training and development plan – certifying CPD for the last 3 years , in addition to a CPD plan for the coming 12 months, identifying proposed skills development .
- viii. An up-to-date CV, training certificates from Foundation Training, and MIAMs training.
- ix. Confirmation of satisfactory completion of an obligatory one day course “*child inclusive mediation awareness and understanding*”; paid for by the mediator.
- x. An obligatory 3- day refresher course if initial foundation training is more than 3 years before submitting an application for accreditation, irrespective of mediation experience since initially qualifying.

- xi. An obligatory statement from the mediation supervisor (PCC) PCC; paid for by the mediator to observe 1 mediation session.
- xii. Confirmation of the mediator having observed the PCC in 1 mediation session.
- xiii. An additional 10 hours with attendance with the PCC (again paid by the mediator seeking accreditation).
- xiv. Evidence of at least 4 hours CPD per year, to maintain accreditation.

63. The total cost for accreditation can easily exceed £2,500. This is in addition to the costs of initial training – which itself is an 8 day process with fees (inclusive of VAT) of £3,000 - £4,000.

64. As a result of the current framework, accreditation tends to be the preserve of those professionals whose employers are willing and able to fund the significant cost and time commitment. In a world where non-court advice services are being delivered by a wide range of professionals, and with the rise in the numbers of the consultant solicitors, the FLBA would support a review of the accreditation scheme, to enable recruitment from a wider pool of competent professionals.

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

N/A

65. The present scheme is too onerous and will put people off training; it needs reconsideration, because at present it does not create better mediators but merely fills in a tick box. This would need to be the subject of a separate consultation.

**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?**

66. The view of the FLBA is that the parties should be required to attend a form of pre-court NCDR subject to exemptions. As set out above, the FLBA proposes parties would be required to attend a two-stage process (currently the “MIAM”) at which the various different forms of NCDR would be explained to them. It would be necessary to re-name

these initial meetings to be clear that it was not limited to mediation, for example a “CPO” meeting: Choices, Processes, Outcomes. They would then be required to attend the chosen form of NCDR.

67. The reasons why it should not be limited to mediation are:

- i. Different types of dispute require different approaches in terms of NCDR. For example, private FDRs in financial remedy cases, where an evaluator gives an opinion as to the likely outcome if the matter proceeds to final hearing, are frequently used, including pre-issue, and are successful in achieving positive outcomes.
- ii. Private “quasi” FDRs also often take place in disputes involving claims under the Trusts of Land and Appointment of Trustees Act 1996, involving cohabitees. The input of having a neutral third party evaluation of the merits of a case can often be beneficial in these types of case, particularly as more specialist knowledge and experience may be helpful and where the powers of the Courts are particularly limited, in contrast to financial remedy cases.
- iii. It is noted that the Family Procedure Rules Committee (“FPRC”) in its recent consultation wishes to ensure that people attending MIAMs are provided with information which enables them to consider multiple forms of NCDR, not just mediation (para 20 of its Consultation Document); the FLBA agrees. Depending on the outcome of the FPRC consultation, not limiting the form of NCDR to mediation would be consistent with the proposals of the FPRC.
- iv. There can often be misunderstanding around the term ‘mediation’ with some believing it to be some type of reconciliation programme or therapeutic process.
- v. In addition, some NCDR processes may lead on to other NCDR processes. For example, a party may move from an unsuccessful mediation to a roundtable meeting with lawyers, a private FDR or arbitration.

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

68. The advantages are, as set out above, that the parties are able to select the form of NCDR which best deals with the nature of their dispute. The traditional “family” mediation model where the parties are brought together to discuss what they consider would be a fair outcome in their case may not be suitable in many cases where the benefit of input from an experienced and expert evaluator and representation is needed.

69. Further advantages are:

- i. Private FDRs: these are working extremely well in practice; as a result, many cases are removed from the Court system and the parties are saved time, delay and further expense.
- ii. Arbitration: there may be many reasons why parties prefer to arbitrate rather than litigate in court; factors might include costs; delay and privacy. If parties wish to go to arbitration, again this takes the matter out of the Court system reducing backlog and delay.
- iii. It is not considered that there are any disadvantages to expanding the range of NCDR, as long as the parties are properly and fully informed about the different types of NCDR available and those delivering the NCDR are trained and competent. This would require the initial meeting to be conducted by an accredited person and to carry out the role in an independent and impartial way.

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

70. It should be expanded to the following forms of NCDR (cf para 10 of the CPR Practice Direction – Pre-Action Conduct and Protocols):

- i. Mediation, a third party facilitating a resolution: this includes family mediation, including shuttle mediation where necessary; civil style mediation); hybrid mediation (very similar to civil style mediation); Evaluative mediation (where parties agree in the mediation agreement to call for an evaluation which shall be at the mediator’s discretion if progress is not being made.)

- ii. Arbitration, a third party deciding the dispute. For those cases where the parties would like a conclusive and binding determination to be made.
- iii. Private FDR/early neutral evaluation, a third party giving an informed opinion on the dispute. Particularly for financial remedy matters where private FDRs have been very successful and also cohabitee disputes where specialist knowledge of the law is often needed.
- iv. Collaborative law.

71. Lastly, parties may also find the “one lawyer” model of use in some cases. This is not a formal NCDR process as it is regulated advice, albeit given by one lawyer. This may be another model worth signposting at the outset alongside other NCDR models.

**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?**

72. The FLBA recognises that at times, issues arise with non-legally qualified mediators facilitating agreements in principle between parties which are not legally appropriate or indeed possible. For that reason, legal qualification on the part of the broker of an agreement or outcome becomes important if further cost and delay is to be avoided. Other forms of NCDR, for the purposes of any reform, should be conducted by qualified legal professionals such as barristers and solicitors who are regulated by their professional body. Insofar as they are not practising barristers and solicitors then the person conducting the NCDR would need to be regulated by a separate body, such as the Family Mediation Council or CEDR (for arbitrators).

73. There is some concern in respect of ensuring diversity of those conducting private FDRs in particular. Some work has been done in respect of this by Kate Landells of Withers and also via the Financial Remedies Journal website which maintains a list of private FDR judges, in order to try to ensure that the lists of those suggested to conduct the private FDRs are diverse. It would be necessary to ensure diversity in terms of those



conducting NCDR if more cases are dealt with in this way, rather than through the Court system.

**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?**

74. The FLBA believes that if a different form of dispute resolution is undertaken then this should lead to an exemption from the requirement to attempt mediation. It would be open to the parties to consider which form of NCDR best suited their case.

**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:**

75. The FLBA notes that the FPRC has suggested that one option might be to require any party who does not attend mediation/NCDR to provide a witness statement to the Court setting out why he/she has failed to do so, along the lines of an “Ungley” order in civil cases. It is acknowledged by the FPRC that this would have to be in an open format, in contrast to the position under the CPR when it is not shown to the Court until the question of costs arises. The FLBA considers there to be some merit in this approach and that where a party refuses to attend NCDR they might be required by the Court to set out why. It would be very important, however, for the Court to retain discretion in this regard, particularly where there has been abuse, including coercive and controlling behaviour. In financial remedy cases, there are concerns that it might be used by the financially stronger party against another more vulnerable party and to place them under undue pressure to settle. It is hoped that retaining judicial discretion would enable the Court to strike the correct balance between ensuring that the parties attend NCDR whenever appropriate whilst recognising issues such as abuse, including coercive and controlling behaviour.

**(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?**

76. In respect of financial remedy cases, the Court already has the power to make an order for costs where it considers it appropriate to do so because of the conduct of a party in relation to the proceedings (FPR rule 28.3(6)). Rule 28.3(7) sets out factors the court must have regard to in deciding what costs order (if any) to make.

77. The FLBA believes that “conduct” should include failure to attend at a MIAM-type meeting. It would fall to be considered as part of the Judge’s discretion as to costs. This would be consistent, and in tandem with, the increasing willingness of the Courts to make costs orders in financial remedy cases. It is also the approach taken thus far to mediation by the civil courts (although the FLBA is aware that the question of whether mediation should be compulsory is to be considered by the Court of Appeal on 28 June 2023 in *Churchill v Merthyr Tydfil*).

78. It is considered that there would be difficulties in determining whether a party has made a “reasonable attempt to mediate” given the confidential nature of mediation and NCDR generally. It would also be very difficult to establish, potentially requiring the mediator or evaluator to give evidence to the Court giving rise to all kinds of ethical issues and giving rise to further litigation and cost. For this reason, “failure to attend NCDR” is thought to be a preferable approach, being easier to determine. It is also consistent with the approach proposed by the FPRC.

**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?**

79. This has been largely considered and set out at 16 (ii) above.

80. The question of whether and if so how the management of costs might be revised and reformed to complement this process should probably be the subject of further consultation.

81. At present, the standard orders invite the parties to set out their costs to date on the face of the order and their own estimates of the future costs to the next stage ie at first appointment the order would record costs to date and estimated costs of each party to FDR. One *option* would be to increase the role of the Form H in financial remedy matters to include more detail in respect of the costs spent at each stage of the proceedings, including costs predicted to the conclusion of the proceedings, similar to the first page of a Precedent H in civil proceedings. The amount of each party's costs to the conclusion of the proceedings would be formally recorded in the Order at the First Appointment, whether as agreed by the parties, or if not agreed, subject to the Court's determination, in a similar way to that under the CPR, i.e. costs budgeting "light". This may serve as a prompt for courts to comply with Part 3 (as commented upon below), but as set out above, this ought sensibly to be the subject of broader consultation, with fully-formed proposals set out for comment.
82. The FLBA consider that it would be helpful, in any event, for the parties to set out the amount that they have spent on NCDR as an item on the Form H. The amount would be a useful indicator of engagement in NCDR processes.

**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?**

83. Part 3 of the Family Procure Rules 2010 imposes on the court the duty to consider NCDR and the power to order a stay of proceedings to enable attendance.
84. The committee does not support the court's powers being extended to include ordering parties to make a reasonable attempt at mediation, even if circumstances have changed, for the reasons already outlined above. We are concerned that such an approach would only serve to delay proceedings, create satellite litigation and lengthen court disputes. If the participants are not willing or able to meaningfully engage in NCDR then they will return to court for a resolution. In such a scenario, the participants have delayed

resolution of their disputes and expended further unnecessary costs in NCDR, whilst still having to resort to the court process.

85. The FLBA suggests that Judges are provided with training on compliance with Part 3 FPR 2010 and the duty to consider NCDR at each stage of the process and if circumstances change. A change of circumstance would include provision of disclosure that was outstanding or receipt of a report from a CAFCASS officer or expert containing recommendations for the parties to adopt. For example, in financial remedies cases where full and frank disclosure is ordered at first appointment there is frequently a lag in time before the FDR can be listed. In those circumstances it would be appropriate to consider NCDR again.

86. The FLBA would support the court being empowered to order attendance at CPOs and for the court to have the discretion to order the parties to provide statements explaining why they have not attempted NCDR when exemptions do not apply.

**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?**

87. The FLBA is of the view that it is very important that those who need to access the Family Courts are able to do so. We would strongly oppose any steps which might include increasing court fees, as this may mean that those who need access to justice are otherwise denied it.

88. An option considered by the FLBA, however, is that higher Court fees might be charged to those who, for example, refuse to attend a MIAM-type meeting, e.g. the Court fee is £x but increases to £y if a party fails to attend the meeting.

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