



Justice Committee

Lord Bellamy KC
Parliamentary Under-Secretary of State for
Justice

By email only

12 July 2023

Dear Lord Bellamy,

I am writing to share with you the Justice Select Committee's response to the Government's consultation on supporting earlier resolution of private family law arrangements. The Committee held an oral evidence session on [19 June 2023](#), where we heard from relevant stakeholders, namely, the Children and Family Court Advisory and Support Service (CAFCASS), the Domestic Abuse Commissioner, the Family Mediation Council, the Family Mediators Association, Resolution, the Family Law Bar Association and the Family Solutions Group. The Committee has considered this evidence in formulating our response to the consultation.

Overall aims of the consultation proposal

We are supportive of the overarching principles of the consultation which aims to improve ways of supporting separating families, where suitable, to resolve disputes and reach agreements without the need to go to court. The consultation focuses primarily on the use of mediation to encourage dispute resolution and whilst the Committee agrees that this can be a useful resolution tool for some families, it is not the only form of non-court dispute resolution (NCDR) available to separating parties. We therefore think greater consideration should be given to alternative forms of NCDR's, alongside mediation which is just one form. We understand that for some separating families, particularly in cases which involve domestic abuse and child protection issues, applying to the court for help to decide on arrangements will continue to be the most appropriate course of action.



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The Committee recognises the benefits of supporting earlier dispute resolution for families and considers it vital to keep the view of the child at the centre of decision making. Jacky Tiotto, chief executive of Cafcass told us it is important to listen to the child's voice, and to think "what does it feel like for the children?", when considering how to reduce adversarial approaches to resolving disputes in children cases. She told us that the most effective resolution that she has seen across her career has been when parents hear the impact their conflict has on their child, directly from the child, either by letter, in the court report, or personally.

The Committee is concerned about the increasing number of applications for child arrangement cases being made to court and the length of time it is currently taking for cases to be completed. In their written response to the consultation, Cafcass stated that in March 2023, they had 32,904 open active children's cases (53,463 children within those cases), whilst the average length of private law proceedings up to the first hearing is currently 12 weeks, and for proceedings after the first hearing it is 61 weeks. The Committee is additionally concerned that during the time it takes for proceedings to conclude, children within these families may be exposed to prolonged stress and high levels of uncertainty. Anna Vollans, a practising mediator and Chair of the Family Mediators Association told us there is a huge benefit to reducing parental conflict at an early stage and thereby the impact on children and young people. Susan Grocott KC, representative of the Family Law Bar Association, told us "the longer a case goes on, the more corrosive and the more divisive it is, not just for the parents but also for the children, and where you have those situations where the children are not seeing one parent, the longer it plays out the more harm that occurs and the harder it is to put that family back together again—assuming, of course, that it's safe to do so".



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The Committee therefore welcomes the focus of this consultation and considers it a vital opportunity to make effective changes to the area of private family law arrangements and dispute resolution.

Working together to support separating families-resources and guidance

When relationships end and families are separating, they need to be able to access accurate, trusted, and clear sources of information and support. There will be many issues to consider, and families need to decide on the most appropriate route for them to take. The consultation asked for views regarding the Government providing an online tool to help family members, including children, in child arrangement cases to access information, support and guidance, and additionally asked when information on the court process should be provided to those with a private family law dispute.

The Committee considers that separating families require access to appropriate resources and guidance at the earliest stage possible, when considering their options about arrangements, and this information needs to be easy to find. Anna Vollans explained the current difficulties some people have when trying to determine their options, she told us “I see people trying to wade through lots of information that is either word of mouth or is available on the internet, some of which is excellent and some of which is not”. Jo Edwards, Chair of Resolution Family Law Reform Group, agreed, telling us there is some very good information available online, “but it is not very joined up”. She provided various examples of information being available on Cafcass’ website, and the Gov.uk website, but noted this was “quite disparate”. She further told us that 82% of family court cases now have at least one unrepresented litigant in them, which may be due to them not being clear about the options available to them.

The Committee is aware that not all families have access to the internet and therefore we consider that other forms of information are required alongside any internet-based



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tool. Jo Edwards reflected that people access information in different ways and stressed the need for improved education in the area of family separation. She said, "I think it is important to have public education and awareness of the devastating impact on children of acrimonious parental separation". Susan Grocott KC, agreed with the view that education is key, providing the example that information leaflets on separation and support services could be provided in public places such as GP surgeries.

The Committee agrees that this is an important issue, as the lack of a range of available information could lead people to believe court action is their only viable option. Susan Grocott KC, said this was her experience, stating "Most of the families, certainly probably about 60% of the families in private law children's arrangements, will simply be there because they do not know anything else".

Both Anna Vollans, and Caroline Bowden, a practising mediator who appeared on behalf of the Family Mediation Council, referred to the Midlands region protocol, 'What the family courts expect from parents' guide', as being a good example of the provision of information setting out options and expectations for separating families. They suggested the Government could consider creating a similar website when deciding on the best way to publicise the relevant information pertaining to this consultation.

The Committee is supportive of the Government providing a gateway, via a website, covering various areas linked to information for families, including family separation which would allow people to access support services. This would allow families to understand the various options available to them at an earlier stage and allow them to make decisions about how best to make arrangements for their family. The benefits of mediation, as well as other forms of non-court dispute resolution options could be explained within this information along with non-tailored legal information. Our view is that this website (or online tool) should not sit in silo however, and relevant



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information needs to be made accessible to those who are less confident in using, or do not have access to, the internet. To improve public understanding and awareness of support that is available to separating families we support the need for increased education and public messaging.

Shared parenting programmes

The consultation sought views on a mandatory requirement for separating parents (and relevant others such as grandparents) to attend a shared parenting programme, if their circumstances were suitable, before being able to make an application to court for a child arrangement order. The Domestic Abuse Commissioner, Nicole Jacobs told us about her concerns in relation to victims of domestic abuse and how careful consideration needed to be given to the suitability and safety of mandating completion of a programme in certain situations. She highlighted the need for a robust screening process to ensure victims of domestic abuse are not mandated to complete a programme that could be detrimental to their safety and well-being. She added that the screening and assessment process must be a continuous one, rather than a one-off piece of work, and told us anybody completing screenings and assessments must be properly informed and qualified to do so.

Anna Vollans told us about some of the benefits of families completing shared parenting programmes at an earlier stage, adding that at present these programmes are generally only available for those families already in the court system. She said “We heard some really good feedback. We definitely hear reported real change in behaviours that have really brought about significant change for the family moving forwards. We would be really supportive of parenting programmes being able to be accessed more readily in the pre-court space”.

The witnesses we heard from were largely in favour of families being given access to a parenting programme at an earlier stage, and before a court application is made.



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However, most witnesses disagreed with the idea of programme attendance being made compulsory, explaining the use of language needed to be carefully considered. Dr Jan Ewing, an associate research fellow at the University of Exeter, and member of the Family Solutions Group explained to us about the importance of language stating, “not everybody can co-parent, and not everybody should be expected to co-parent, especially if they are victims of domestic abuse”. Dr Ewing also told us she supported the use of more neutral language such as ‘separated parents programme’ and added that whilst a programme requirement should not be mandatory, it should perhaps be an “expected first step”.

Jacky Tiotto said Cafcass was supportive of families accessing programmes at an earlier stage but added that it did not currently have the resources to enable it to be involved in the pre-court space. Susan Grocott, KC told us the Family Law Bar Association was also in favour of a parenting programme “as long as it was readily available. It would have to be online for it to be readily available, that is an essential”. She cautioned that a lack of programme availability could add to further delays in the court system, something which needed to be avoided.

On whether a programme requirement should be mandatory before mediation is able to start, we heard conflicting views. In its written response to the consultation, the Family Law Bar Association said it supported the idea of mandatory attendance prior to mediation beginning, subject to safeguarding exemptions, as attendance at a parenting programme can help to educate parents in advance of discussions held later at mediation (or other forms of non-court dispute resolution). Whilst Caroline Bowden provided the alternative view that mediation attendance could prepare some families in advance of them completing a parenting programme.

The consultation additionally sought views on whether it would be appropriate for mediators to determine suitability for a co-parenting programme at an initial



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information meeting. This was also met with conflicting views from our witnesses. Jacky Tiotto stated either mediators could be enabled to complete screening for a programme, although she stated the mediation sector did not have capacity to do this currently; or Cafcass could be enabled to see families and children at an earlier stage, which she again said could not be resourced at present. Caroline Bowden countered this by telling us the mediation sector would have sufficient resourcing to meet this demand, but that this assessment was not currently in their remit. Anna Vollans supported this view, stating it would be appropriate for mediators to make this decision, but further training and collaboration would be required. Jo Edwards and Dr Ewing both disagreed with the idea of mediators assessing for suitability of a parenting programme. Dr Ewing said it should be the responsibility of the programme provider to make the assessment.

The Committee considers that more separating families should be encouraged to attend parenting programmes and we feel this would be advantageous to complete at an earlier stage than programmes are currently being offered to families. The existing Planning Together for Children programme, delivered by Cafcass, provides information and support on coparenting after separation and encourages parents to take steps for themselves which may include developing agreements without court intervention. Attendance at co-parenting programmes is currently a requirement that is directed through either the courts, or by a Cafcass Family Court Advisor once court proceedings have already begun. Cafcass state they would support the extension of the Planning Together for Children (programme) e-learning modules which have been designed to also be suitable for parents and carers before they make a court application. In their written response to the consultation Cafcass highlighted that in 2022 they began working with the MOJ to offer parenting programmes earlier on in the court process with referrals coming from their advisors rather than being court ordered at the first hearing. They said an evaluation of this process showed that parents/carers who had sufficient time to attend a programme prior to their first



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hearing had the highest resolution rates. Cafcass added that expanding access to this service pre-court would not incur additional licensing costs but would require increased administrative and technical support.

We think the name of any pre-court programme for families should be carefully considered as we have heard evidence that the language used in this context is important. The Committee is additionally aware that family members other than parents are involved in private family law arrangements and this needs to be considered in the formulation of any extension of parenting programmes. On whether such a programme requirement should be mandatory, the Committee's view is that this should be *encouraged* or *expected*, rather than *compulsory*, taking into account safeguarding assessments. Should a pre-court programme requirement be introduced to benefit more separating families, we are not of the view that this would need to be completed before mediation, or other forms of NCDR could begin, as we have heard evidence that undertaking mediation/other forms of NCDR, can support the process of engaging with a parenting programme. Currently, the suitability of completing a programme requirement is determined either by the court, or by Cafcass (through its Family Court Advisors). The Committee believes that whoever would be responsible for assessing suitability for any pre-court programme, it is imperative that they have completed robust training to ensure screening for domestic abuse or other safeguarding issues continues to be prioritised.

Mediation Information and Assessment Meetings and Compulsory pre-court mediation

Mediation Information and Assessment Meetings (MIAMs)

The consultation focuses on encouraging more families to engage in mediation to try to reach agreement and resolve disputes in situations of family separation and child arrangement decisions. Currently, any parent or carer who wishes to make an application to the family court for assistance in making arrangements, must first



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attend for a Mediation Information and Assessment Meeting (MIAM) appointment. The MIAM appointment is delivered by an accredited mediator who will share information about the mediation process, along with other alternatives to court and make an assessment as to whether the dispute is suitable for resolution via mediation. There are exemptions to attending a MIAM, which parties can claim, in which case they can make an application directly to court without having to attend the appointment. The exemptions include those made directly by a potential applicant, such as urgency and evidence of domestic abuse, and those which need to be certified by a mediator, such as the case being unsuitable for mediation. We heard evidence that too many families are currently exempted from MIAM attendance, and as a result were missing out on vital information and guidance on the range of options available to them. Jo Edwards told us “We need to narrow those exemptions-tighten them up”. She provided a further view that the scope of those able to deliver information sessions should be widened, along with widening the scope of the content of the sessions to include legal advice and signposting around this area.

Susan Grocott KC, told us “MIAMs have failed; they are a tick box exercise”. She added that the focus of MIAMs is purely on mediation, and not on other ways in which people can potentially resolve disputes. She told us there could be scope to use the sessions as information appointments, to complete safeguarding assessments and then be used to help steer people away from a court process that may not help them. She stated, “I think most of the families, certainly probably about 60% of the families in private law children’s arrangements, will simply be there because they do not know anything else”.

Nicole Jacobs raised concerns that the MIAM sessions, at approximately 45 minutes in length, are not sufficient to enable a thorough risk assessment to take place. She told us that an initial assessment/information gathering appointment in a domestic abuse service setting would take upwards on an hour to complete “and that is someone who



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comes to you and tells you about domestic abuse. There is a lot to unpick in terms of the dynamics of coercion and control, and the voice of the child, to do this properly". She voiced concern that should mediation be mandatory, as per the consultation proposal, this may result in victims of domestic abuse, and other unsuitable people finding themselves entering into mediation against their will, which could put them at further risk of victimisation.

In her evidence, Dr Ewing told us the MIAM appointment, or similar information meeting which may be introduced under the proposals, could be used to triage the needs of the parents and children, "so the parents who need court absolutely get directed to court and the parents who need support get directed to some counselling or to mediation". Dr Ewing emphasised the triaging, as a first expected step: "it is really important, with an emphasis on safety first for children and vulnerable parents. How we get that triage set up is incredibly important".

The Committee is of the same view; we believe the proper triaging of families is fundamental to helping them to achieve the best outcome for their child/ren and to ensure relevant support is made available to vulnerable parents/carers. Some of the witnesses we heard evidence from suggested mediators were best placed to make this triage assessment, whilst others considered the remit could be widened to include other family justice professionals. All witnesses supported the need for robust safeguarding assessments to be made, and the Committee echoes this view.

Compulsory mediation

A central proposal of the consultation is the introduction of a requirement for separating families to mediate prior to an application to court being made. The response from the witnesses we heard evidence from was unanimous in opposing this idea. Caroline Bowden called the notion of compulsory mediation "horrifying", describing it is an oxymoron. She told us: "the very heart of mediation is that it is a



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voluntary process”, and that it works because both parties have the commitment. She added “it is not a third-party adjudication, they own it, and that is what can make it so powerful”. Nicole Jacobs raised concerns about the use of language of compulsory mediation on victims of domestic abuse stating it would have “a chilling effect on a victim who is separating and thinking about what to do- “Should I just agree? Should I just capitulate? She described the proposal as potentially “dangerous, difficult, and traumatic” for such victims.

The Committee believes that the proposal to make mediation compulsory is potentially counterproductive; the power of mediation is in the commitment of both parties having the willingness to try to reach a resolution which puts the interests of the child/ren first and is long-lasting. Forcing families into mediation against their will, will not serve the best interests of the child/ren at the centre of the dispute. Whilst we acknowledge that the consultation states that appropriate safeguards would be in place, we agree with the Domestic Abuse Commissioner that there would remain a residual risk of placing victims of domestic abuse at further risk of harm.

The proposal for compulsory mediation appears to be based on the Government’s own assessment of its Mediation Voucher Scheme which was introduced in March 2021, which it says evidences the positive role that mediation can have in helping families to reach agreements without the need to use an adversarial court system. This scheme allowed eligible families to access mediation with the support of up to £500 worth of funded mediation. 13,500 vouchers had been issued by the Government by January 2023. Family Mediation Council survey data from the first 2,800 vouchers provided under the scheme shows that 65% of families who attended mediation sessions reached a full or partial agreement away from the family courts.

In our oral evidence session, Jo Edwards told us there did not seem to be a proper evidential base for the proposed reforms. She said, “while we absolutely support the



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mediation voucher scheme, which has been a huge success and we support its extension, I note that the sort of proposals made here are based on only a year's worth of evaluation and it's quite a big leap to assume that the success rates seen with that scheme [which is voluntary] are going to extend to mandatory mediation".

The Committee considers that if the use of mediation, as a form of dispute resolution is going to be encouraged by the Government, the use of other forms of NCDR, such as arbitration, should be considered also.

'Reasonable attempt' to mediate

Under the consultation proposals, parties seeking to resolve disputes would need to demonstrate to the court that they had made a 'reasonable attempt' to mediate before submitting an application for a court order, unless eligible for exemption. The consultation sought views on what could constitute a 'reasonable attempt' to mediate and whether the court should have a new power to require parties to make a statement to the court explaining their approach to pre-court dispute resolution. Furthermore, the consultation sought views on how the court might best approach cases where either parties' account of pre-court mediation is disputed; the consultation suggested parties could be asked to waive their right to confidentiality of the mediation process and ask their mediator for their view of what took place. The majority of witnesses we heard from raised concern with this proposal, highlighting the importance of keeping litigation and mediation separate. Caroline Bowden told us the Family Mediation Council was "not that keen" on being asked to provide an assessment to the court on whether a party/parties had made a reasonable attempt to mediate. She asked, "what on earth would reasonable be? even if it were attending one mediation meeting, you cannot drag someone into mediation". She further told us that mediators should not have any role in feeding back to the court to say what had happened because mediation was "an intensely confidential, privileged process". Jo Edwards agreed with this view stating nothing from mediation should be shared with



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the court and therefore the Resolution Family Law Reform Group was not in favour of an assessment of a 'reasonable attempt' being made. Susan Grocott KC, further supported this view detailing that the court should not be assessing whether a 'reasonable attempt' to mediate had been made, since mediation was voluntary in nature, adding that this could also cause further delays in court.

The Committee does not support the mediation sector being required to make an assessment to inform the court as to whether either party has made a 'reasonable attempt' to mediate. We have heard evidence about the importance of maintaining appropriate boundaries between the mediation sector and the court and are concerned that people may lose trust in the mediation process if they thought their mediator would report their findings back to the court. If people lose trust in the process, it is less likely to be successful and therefore could undermine the purpose of attending mediation in the first place.

Some of the witnesses expressed the view that whilst they were opposed to the idea of mandatory mediation, they were supportive of a mandatory initial information and assessment meeting (akin to the current MIAM). The Committee is supportive of compulsory MIAM, or a new information and assessment appointment attendance, being mandated for suitable cases. Attendance at an initial appointment would ensure parties are provided with relevant information, informed of their potential options and can be provided with support in appropriate cases.

In her oral evidence, Caroline Bowden highlighted that at present only the applicant is obliged to attend a MIAM appointment, whereas the respondent is not. She expressed the view that both parties should be required to attend an initial appointment to help support understanding of the options available to the family. We concur with this view and consider therefore that both parties should be required to attend a MIAM/initial appointment. Caroline Bowden further proposed that attendance at this initial



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appointment could then be used as evidence of 'a requirement to consider mediation, and other forms of non-court dispute resolution', as opposed to 'a requirement to make a reasonable attempt to mediate'.

Funding compulsory pre-court mediation

The consultation states that the Government considers it important that families are not left financially worse off by any requirement to attend mandatory mediation. Accordingly, it intends to fund mediation for all children cases up to a value of £500 and that this would act as a long-term replacement for the temporary Mediation Voucher Scheme. For financial remedy cases, the consultation also sought views on whether to match the funding proposed for children cases, or to apply legal aid thresholds to applicants pursuing financial remedy cases.

The Committee is in favour of the Government funding any mandatory mediation requirement were it to be implemented, both in children and financial remedy cases. However, we draw attention to the wording of the consultation document which asks for views on the provision of "full funding for compulsory mediation pre-court for finance remedy applications". This question implies the provision for children cases will be fully funded, whereas the consultation document specifies it is considering matching the £500 currently available for eligible families. The witnesses we heard evidence from raised concern that the £500 currently funded by the Government, does not sufficiently cover the cost of mediation, particularly child inclusive mediation. Anna Vollans told us that whilst each case varies, parties will attend on average between 3-5 sessions of mediation and the £500 provision did not cover this amount. Jacky Tiotto reiterated this point and specified that in cases of child inclusive mediation, the cost would likely be greater than £500.

Jo Edwards told us that Resolution supported the Mediation Voucher Scheme, and its extension, but drew attention to the fact that the average cost of mediation was £832, and that evidence suggested there was a correlation between the amount spent on



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mediation and its success rate. She stated, "I think there was a 76% success rate in mediations where they had gone above the £500, as opposed to 66% in mediation cases where they had gone below". She said Resolution was not suggesting or expecting a "money tree" but suggested the amount currently available should be assessed further in order to determine an appropriate level of funding. In its written submission to the consultation, Resolution highlighted the importance of the voice of the child being heard under the Government proposals, adding that an "appropriate level of public funding for child inclusive mediation" was required.

The Committee believes that careful consideration should be given to the funding the Government provides to families entering mediation/other forms of NCDR and that it needs to be commensurate to the cost of the services undertaken. Families would likely require varying provision of mediation sessions in order to achieve dispute resolution and a lack of funding could prevent a successful outcome from being reached. The Committee is also of the view that any funding provision from the Government would require further evaluation to ensure it is commensurate to the rising cost of provision delivery. Caroline Bowden told us "It should be index linked for inflation".

When discussing the cost of funding dispute resolution, some witnesses suggested the cost of the MIAM/initial information and assessment appointment could be funded by the Government, as the current £500 support towards mediation does not cover the MIAM. Anna Vollans said, "If the view was that the most critical thing is to get two people to attend a pre-mediation MIAM, should some consideration be given to funding those meetings, rather than funding the mediation?". Likewise, Susan Grocott KC suggested funding could be made available for a programme requirement and an initial information appointment, in place of the mediation sessions. Dr Jan Ewing said that 'family aid', rather than legal aid, could be made available in the private family law arena to ensure adequate support can be offered to separating families. She



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added “It is not about spending more money; it is about spending what is already spent more wisely, for better outcomes—we might be front-loading some of that spending, for example”. In her oral evidence Nicole Jacobs raised the point that the wider compulsory mediation was made, the less cost effective it may be in terms of the overall process as “we will be getting into more complex cases”, which would inevitably require more time and provision of support.

The Committee concurs with the view that providing funding earlier on in private family law arrangement cases may reduce the amount of money that is currently spent supporting separating families with navigating the court process. Our concern is that if the system is not funded appropriately, it will be difficult to implement a positive change in this area.

In respect of financial remedy cases, Caroline Bowden told us the Family Mediation Council considers the Mediation Voucher Scheme should be extended to cover these cases, but also applying some form of means testing criteria to funding. Jo Edwards told us Resolution would also support the £500 funding being extended to include financial remedy cases. The Committee agrees with this view and is supportive of funding being extended to support those with financial dispute cases on a means-tested basis.

How to get the mediation sector ready

The Committee is concerned that any roll out of funded provision of non-court dispute resolution cases without full assessment of capacity in the sector, may lead to problems with families accessing the support they require. This could have the knock-on effect of increasing the amount of time it takes families to reach dispute resolution, and for families that ultimately go through court having been unsuccessful at managing their own dispute resolution.



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We heard evidence from Jacky Tiotto who told us Cafcass did not have the capacity to work in the pre-court arena currently and Resolution raised concern that they did not consider the mediation sector could cope with a sudden influx of cases. Counter to this however, Caroline Bowden told us the Family Mediation Council assert they would have the capacity to manage an increase in cases needing support.

The Committee considers that any changes to funding or requirements be fully analysed prior to implementation to ensure the sector can sufficiently meet demand.

Gatekeeping and Enforcement

During the oral evidence session, some witnesses told the Committee that they perceived greater gatekeeping and enforcement is required by the courts. With regards to MIAM exemptions Jacky Tiotto stated, “60% of the applications to Cafcass and the family court have an exemption ticked for the mediation”. She posed the question of why MIAM exemptions are so high currently, and why the standard of having a pre-mediation assessment is not enforced by the courts. Adding to this point, Jo Edwards told the Committee that Resolution believed the courts could use their power more frequently to pause proceedings and check whether a MIAM appointment should have taken place. She reiterated the view that “we have got the architecture in place; we (the court) are just not using it appropriately at the moment” and added, “it is about effective gatekeeping. Again, the tools are there; it is just not happening at the moment. I know that complaint is appropriately made that in only about 35% of children cases in 2020-21 was a MIAM attended, and the question is asked: what happened to all of the others? Why wasn’t a MIAM attended?”. Anna Vollans added the view that the Family Mediators Association think that the court should retain its powers to pause proceedings and ask parties to attempt to mediate where appropriate.



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The Committee's view is that prior to the Government introducing a requirement that directs either attendance on a programme or a requirement to attend mediation, current gatekeeping and enforcement processes require review. Given the current number of parties exempting themselves from the already mandatory MIAM attendance, we are concerned that a new, and potentially more intensive requirement may not be adhered to as expected unless gatekeeping processes are firmly and appropriately embedded.

Cost orders

The consultation document stated the Government is keen to see the courts using cost orders in appropriate cases "to hold people accountable if they do not make a reasonable attempt at mediation or if they unreasonably pursue an issue". It also stated the Government intends to make changes to the legal framework to increase the use of costs orders and make it clearer that both parties to a private family law dispute must make a reasonable attempt to mediate, or otherwise to reach agreement outside of court (where appropriate), or face consequences in terms of costs orders.

In our evidence session Jo Edwards told us the court already has the power to award cost orders in cases where a party fails to engage in reasonable negotiation. However, these are rarely used in children cases as increased costs can impact negatively on family circumstances. In regard to financial remedy cases she added "Resolution and most practitioners would agree that in appropriate cases, they (costs) should be made more routinely, and that maybe further judicial training around that is needed; perhaps there should be an expectation that the judge has to say something in their decision about why they have or have not made a cost order". With regards to children cases though, she cautioned that "cost orders are too blunt a tool" and do little to support resolution. Susan Grocott KC told us "it is not helpful at all", adding "you want to take the adversarial nature out of any private law children proceedings. This is about reducing defences, so that the focus is on the children, as opposed to



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the litigation”. Jo Edwards concurred and said, “It would be unfortunate if there was any assumption that in children cases, a good way to compel people to go to dispute resolution—as we have said, that should not be happening anyway—is through the use of cost orders”. Caroline Bowden told us that the Family Mediation Council did not support the increased use of cost orders in children cases either.

The Committee concurs with these views, and we do not support the increased use of cost orders in children cases. We caution against the threat of cost orders being used as a means to force people into using non-court dispute resolution, which we have already stated should be entered into willingly. We do not consider costs orders to be a useful tool to use against parties the court may deem to have failed to have made a ‘reasonable attempt’ to mediate as this could be used to further harm vulnerable parties, such as victims of domestic abuse. As stated previously, the Committee supports the ethos of families being supported and encouraged to consider its wider options in terms of alternative dispute resolution methods, and the use of cost orders may frustrate this process.

Fees

Finally, the consultation sought views on the fee structure of private family law applications and asked for views on whether the current fee of £232 was sufficient. The consultation stated the court fee had ‘never been close’ to covering the typical cost of private law applications, with the Government stating, “only around 20% of the private law system is recovered by court fees – the remainder is covered by general taxation”. The consultation further explains that the cost of a court fee may compare unfavourably to the cost of alternative forms of dispute resolution, such as mediation. The consultation asked whether parties should be required to make a greater contribution to the costs of the court service that they access. Jo Edwards provided the view that neither she, nor Resolution consider fees to be the right way forward, stating this would “have a disproportionate impact on the most vulnerable”.



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She explained that fees were not the way to deter people from bringing applications to court as these were “life-changing matters, and it is a life-changing transition that couples are going through”. She cautioned that there would need to be proper exploration of the likely detrimental impact of increasing court fees.

The Committee does not support an increase in court fees as this may put some people off from accessing the court system, who genuinely need to make an application. It could further prevent vulnerable people from trying to leave unhealthy relationships and could be used by some as a further means through which to assert control over the other party and prevent them obtaining fair access to justice.

Further areas for consideration

The Committee heard evidence from Caroline Bowden that mediators are currently prohibited from obtaining enhanced security checks (DBS) as they are not on the list of named professionals for whom these can be accessed. The Family Mediation Council provided us further written information which stated they are unable to make security checks a requirement as a change in legislation would be needed to add mediators to the list of professionals for whom enhanced DBS checks can be obtained. This is a pertinent point because the importance of the child’s voice and the importance of the provision of child inclusive mediation was raised by witnesses during the oral evidence session. The Committee is concerned that professionals working unattended with children are unable to access a security and clearance check, and, believe this issue requires further investigation by the Government.

During the evidence session, problem solving courts and the pathfinder courts in Wrexham and Dorset were highlighted as a better way of dealing with private family law arrangements. These pathfinder pilots were launched in February 2022 with the aim of piloting a less adversarial approach to private law applications, to better support victims of domestic abuse and improve information sharing between various agencies and the court. Jacky Tiotto told us that in these pilot areas Cafcass are applying to see



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the child and the family earlier in those cases where it is necessary and/or would speed up the process to close the case earlier. Whilst an evaluation of these pilots has not been completed, Jacky Tiotto informed us that anecdotal feedback showed that “where Cafcass is there earlier and the court is able to see the family earlier, there are fewer hearings and a swifter conclusion to the case”. Nicole Jacobs told us she is “very enthusiastic” about the pathfinder courts, stating she agrees with the approach taken within these courts. She said “what is being learned in those multi-agency working provisions, which result in more important information being brought to the court more quickly and more thoroughly? It does cost, but I imagine that we will find it is more cost-effective”. She concluded, “Again, I do not want to prejudge the evaluation, but I have talked to survivors of domestic abuse who have been through those courts. They do not know the counterbalance of what it would be somewhere else, but they felt really well understood and heard, and that it was comfortable for their children. Also in the pathfinder courts, the voice of the child or children is considered as well. There is so much there that orients us to that less adversarial approach, which is what families need, and I think it would pay off in dividends”.

The Committee are in favour of the ethos of problem-solving courts permeating through the area of private family law and support, where appropriate, moving from an adversarial approach to a solution-focussed approach. We understand further data and review of the pathfinder pilots is required but nonetheless we are encouraged by the anecdotal evidence provided within the oral evidence session. We would be grateful if the Department could keep the Committee informed on the progress of these courts. A system that works with the voice of the child at the centre is one we wholeheartedly support.

Summary of recommendations

- **Resources and guidance.** Separating families require access to appropriate resources and guidance at the earliest stage possible when considering their options and relevant information needs to be accessible. We support the provision



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of an online tool but believe information needs to be provided in other formats alongside this, to support those who are not able to access the internet.

- **Parenting programmes.** We are in favour of encouraging separating families to attend parenting programmes which should be made available at an earlier stage than they are currently. We consider that completion of a programme should be *encouraged* or *expected*, rather than be made *compulsory*, taking safeguarding assessments into account. We do not agree that it should be a requirement for a programme to be completed before mediation, or other forms of NCDR can begin.
- **Determining suitability for a parenting programme.** We consider that whoever is responsible for assessing suitability for a parenting programme needs to be appropriately qualified to do so to ensure domestic abuse and other safeguarding issues are accurately risk assessed.
- **Mediation Information and Assessment Meetings (MIAMs)/Initial information meetings.** We believe that a MIAM or similar initial information meeting should be used to triage the needs of the parents/carers and child/ren in separating families. Those who undertake triage meetings must be adequately qualified to complete robust safeguarding assessments.
- **Compulsory mediation.** We think the proposal to make mediation compulsory is potentially counterproductive as the power of mediation is in the commitment of both parties having the willingness to reach resolution. We support MIAM (or a new initial information) appointments remaining mandatory for suitable cases.
- **Other forms of Non-Court Dispute Resolution (NCDR).** We believe that greater consideration should be given to others forms of NCDR, alongside mediation, as a way of supporting families to achieve earlier dispute resolution.
- **'Reasonable attempt' to mediate.** We do not support the mediation sector being required to inform the court of whether parties have made a reasonable attempt to mediate. It is important that appropriate boundaries are maintained between the mediation sector and the court.



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- **Funding mediation.** We are strongly in favour of the Government funding any mandatory mediation (or other form of NCDR) requirement were it to be implemented, both in children and financial remedy cases. The level of funding requires careful consideration and should be commensurate to the cost of services undertaken. The impact of any funding provision requires full analysis prior to implementation to ensure the mediation sector can sufficiently meet demand.
- **Current gatekeeping and enforcement processes.** We consider that prior to the introduction of any requirement that mandates attendance on a parenting programme, or any requirement to attend mediation, current gatekeeping and enforcement processes should be reviewed. This is important due to the high level of cases which are currently exempted from attending mandatory MIAM appointments.
- **Cost orders.** We do not support the increased use of costs order in children cases and we caution against the threat of cost orders being used as a means to force people into using NCDR, which we have already stated should be entered into willingly. Additionally, we do not consider cost orders to be a useful tool to use against parties that the court may deem to have failed to have made a 'reasonable attempt' to mediate as this could cause further harm to vulnerable people, such as victims of domestic abuse.
- **Fees.** We do not support an increase in court fees in private family law cases as this may put some people off from accessing the court system who genuinely need to make an application, and this may have a detrimental impact on the vulnerable.
- **Security/DBS checks.** Mediators are currently prohibited from obtaining enhanced security checks. We believe this issue requires further consideration by the Government to promote and support effective safeguarding.

Conclusion

At the end of the evidence session Dr Ewing stated that "court becomes a container for the emotion of the breakdown." She suggested the use of court allows a



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controlling person to further control the other party through the use of ongoing litigation. She posed the question "Is not saying, 'Here is a better way of doing it, and we will fund some of it,' a much more humane way of dealing with family breakdown?" and added the Government have to be bold and take this opportunity to say "we have finite money; let's spend it better, on better outcomes, by getting early resolution, and getting people the early help that they need, so that we can keep out of court those who can be kept out, and free up court space for people who desperately need it".

The Committee reflects these sentiments and we hopeful that any developments implemented as a result of this consultation support its stated aims; to better protect families, particularly children, from the harmful effects of lengthy disputes.

Yours sincerely,

Sir Robert Neill MP
Chair



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