Ministry of Justice

Supporting earlier resolution of private family law arrangements

A consultation on resolving private family disputes earlier through family mediation

March 2023

CP 824

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Presented to Parliament
by the Lord Chancellor and
Secretary of State for Justice
by Command of His Majesty

March 2023

CP 824

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About this consultation

To:	This consultation is open to the public. We would be particularly interested to hear from organisations representing separating families, family justice practitioners, mediation service providers and individuals who have been through the family courts or mediation.
Duration:	From 23/03/23 to 15/06/23
Enquiries (including requests for the paper in an alternative format) to:	Family Justice Policy Team Ministry of Justice 102 Petty France London SW1H 9AJ Email: privatefamilylawconsultation@justice.gov.uk

How to respond:	Please send your response by 15 June 2023 to: Family Justice Policy Team Ministry of Justice 102 Petty France London SW1H 9AJ Email: privatefamilylawconsultation@justice.gov.uk
Additional ways to feed in your views:	A series of stakeholder meetings is also taking place. For further information please use the "Enquiries" contact details above.
Response paper:	A response to this consultation exercise will be published in due course at: https://consult.justice.gov.uk/

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Foreword

Family separations are never easy or straightforward, especially when it involves making new financial arrangements or dividing up a child's time between parents to fit with the changing circumstances.

When it comes to children and finances, some families struggle to agree about what should happen next, putting a strain on everyone but particularly on children. This is damaging in the short-term as conflicts spill over into everyday life, but it can also be harmful to children's longer-term development.

Every year around 55,000 families end up in the family courts to work through their differences and resolve these disputes, often with protracted proceedings that put prolonged stress on all involved.

At a time when our courts are facing unprecedented pressures following the COVID-19 pandemic, cases can be even more drawn-out than usual – leaving children and families in limbo for longer.

The Government believes that more disputes could be resolved without going to a courtroom, sparing families from this unnecessary stress and children from avoidable anxiety.

The clear exception to this would be with cases involving domestic abuse or child protection concerns – these cases must go to court. And by reducing the overall number of disputes from reaching court, we can create space and free up time so that these cases can be heard more quickly.

Providing families with an affordable, appropriate and effective alternative to court will help achieve this.

Mediation can play a role where there is the will to find common ground – not just between separating parents or couples but other family members as well. This is clearly demonstrated by the success of the Government's Mediation Voucher Scheme.

With an impressive 69 percent success rate, the scheme has made it possible for over 13,500 families to enlist the help of mediators and reach full or partial agreements, without the need to go through a potentially long and adversarial court process.

We are determined to build on that success – to make sure that, where it is safe and appropriate to do so, parties in private family law disputes make reasonable attempts to mediate and reach solutions before applying to the courts as a last resort.

And we want to empower judges to hold accountable those who do not engage seriously with mediation, and who draw proceedings out unnecessarily by refusing to reach reasonable settlements.

This consultation seeks views on how best we can do that – so that we can better protect families, particularly children, from the harmful effects of lengthy disputes.

I would urge anyone with an interest to give us their views. These bold proposals will make for a less adversarial approach to resolving family disputes – an approach that puts children's welfare first.

Rt Hon Dominic Raab MP, Deputy Prime Minister and Justice Secretary

Introduction

When families separate or experience a change in circumstances, they often need to make arrangements for the future, for example to agree who their children will live with and how much time they will spend with the other parent or relative. The vast majority of parents still reach agreements about arrangements for their children privately. However more parents/carers[1] are turning to the family courts[2] to make child arrangements than ever before.

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1 Whilst 90% of applications for child arrangements are made by parents, others (such as grandparents, aunts/uncles and extended family and carers) are also entitled to apply or can seek the court's permission to do so. The categories of people who can automatically apply for, or can seek the court's permission to apply for, other private law children applications, can also vary. For the purposes of this document, we have used the term 'parents/carers' to refer to every adult who makes (the applicant) or responds to (the respondent) a private law application regarding arrangements for children.

2 References to "family courts" are intended to mean both the Family Division of the High Court and the family court.

In 2021 there were 56,7544 applications made for child arrangements orders, compared to 52,944 a decade earlier in 2011.[3] There were also 48,666 applications for financial orders (of which, 12,438 were contested and 36,228 were uncontested), compared to 46,348 in 2011 (15,602 contested and 30,746 uncontested). In that same time period, the government invested significantly to increase the amount of time judges spend hearing families' cases in the family courts (this is known as sitting days). There were 54,569 sitting days for private law and other family cases in 2015, and this increased by 52% to reach 82,991 in 2021.[4]

Despite this large increase, it is taking longer for some cases to be completed, largely due to the impact of the pandemic. It took an average of 26.1 weeks in 2015 for a private law children's case to be completed. In 2020 this was 32.3 weeks, but in 2021 this had risen to 40.5 weeks. The latest statistics available from September 2022 suggests that it

[3] Family Court Statistics Quarterly: July to September 2022 - GOV.UK (www.gov.uk)

[4] Civil justice statistics quarterly: January to March 2022 - GOV.UK (www.gov.uk)

currently takes an average of 45 weeks.[5] We have taken several steps so that courts could address this. We introduced new technology to allow hearings to be conducted remotely and had more judges working in family courts than ever before. We also introduced new, more efficient, digital systems for financial remedy cases.

This means that, despite record investment, on average children are having to wait longer for their court cases to be resolved. This prolonged uncertainty has the potential to be harmful to children, and the adults trying to agree arrangements have to live with uncertainty for longer.

Court is the right option for some families. For example, where there are issues with domestic abuse or an urgent application[6] is needed, or where families have tried but been unable to reach an agreement in

[5] Family Court Statistics Quarterly: July to September 2022 - GOV.UK (www.gov.uk) https://www.gov.uk/government/statistics/family-court-statistics-quarterly-july-to-september-2022

[6] CB2 - Urgent and without notice hearings in relation to child arrangements (publishing.service.gov.uk)

other ways. In these cases, asking a judge[7] to decide the arrangements, made in the best interests of any children in the case, is the right approach.

For these families, this Government has designed and is piloting a less adversarial approach to private law applications by launching the pathfinder pilots in Dorset and North Wales in February 2022.[8]

The primary aims of the pilot are to prevent the re-traumatisation of domestic abuse survivors, enhance the voice of the child and to support appropriate engagement and participation in proceedings. It moves away from the current adversarial approach and towards a more investigative, problem-solving approach based on the features of a case. This will involve earlier gatekeeping and information gathering to enable earlier allocation and to encourage engagement with parties rather than having multiple hearings.

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[7] Supported by qualified social workers advising the court.

[8] Ministry of Justice (2022) Pioneering approach in family courts to support domestic abuse victims better - GOV.UK (www.gov.uk)

Initial responses from local areas have been encouraging – the courts involved continue to develop positive working relationships with court users and key local partners such as mediators, local authorities and local domestic abuse support services.

The Government remains committed to ensuring effective access to the family courts. However, we also believe a balance can be found which supports families, where appropriate, to resolve child arrangements and financial matters out of court. This will allow the resources of the courts to be focused on families and children who are most in need of the court's involvement and protection. Ultimately, we want to ensure that all families can resolve their issues more quickly than they currently do.

We also want survivors of domestic abuse to feel confident that the court has the time and resources to focus on reaching a fair arrangement, which is in the best interests of any children involved.

There is clear evidence[9] that prolonged conflict between separating parents is harmful to children's wellbeing and life chances. Research shows that exposure to inter-parental conflict is associated with higher rates of anxiety, depression, aggression, hostility, anti-social behaviour/criminality, reduced academic performance and substance misuse.[10] Using the family courts to resolve private disputes involving children can often lead to lengthy conflict between parents/carers and could result in children experiencing significant periods of time where settled or suitable arrangements are not in place.

There is also evidence that getting an order from the court often does not provide a long-term solution for families. Approximately one quarter of private law

[9] What works to enhance interparental relationships and improve outcomes for children? | Early Intervention Foundation (eif.org.uk) What works to enhance interparental relationships and improve outcomes for children? | Early Intervention Foundation (eif.org.uk)

[10] Page 20 What works to enhance interparental relationships and improve outcomes for children? | Early Intervention Foundation (eif.org.uk)

children cases return to the family courts.[11] This suggests that asking a judge to decide what is in the best interests of the child without trying other options first may not always be the best way of helping parents/carers to resolve their issues and find a way of successfully co-parenting after they have separated.

We want to support those families to find ways of reaching long-lasting agreements between themselves more quickly, and without the need to apply to court sometimes on multiple occasions.

We want to focus on earlier support for families before conflict between them becomes entrenched. There should be a single place for families to turn to that provides detailed and trusted information. We want to have more parents attending co-parenting programmes, and we want to introduce compulsory mediation in appropriate cases to ensure family members actively try to resolve their issues. We believe this will deliver better outcomes for families.

[11] Page 35, Nuffield Family Justice Observatory. Uncovering Private Family Law: Who's Coming to Court in England (nfjo_whos_coming_to_court_England_full_report_FINAL-1-.pdf (nuffieldfjo.org.uk))

For certain families, reaching an agreement themselves, either independently or with the support of a suitable, trained professional, such as a family mediator, is often the best way of arriving at an agreeable and long-term solution, and in the best interests of any children.

Since its launch in March 2021, the Mediation Voucher Scheme has supported nearly 13,500 families to undertake mediation, as of 4 January 2023. The scheme gives eligible parents/carers a £500 voucher towards the cost of mediation. We have increased funding in 2022/23 so that an extra 10,200 families can benefit from the scheme.

We want to ensure that separating couples, parents or other carers of children who are seeking to agree arrangements for their children make reasonable attempts to mediate and therefore resolve their dispute without court involvement, where it is safe and appropriate for them to do so. To do this we intend to make mediation compulsory before an application can be made to court for most private law children cases and contested financial remedy cases (those for which a Mediation Information and Assessment Meeting or MIAM is currently a requirement). For appropriate

children cases, we intend to fully fund compulsory mediation. For appropriate financial remedy cases, we are seeking views on the right funding solution in the best interests of the parties themselves and the taxpayer. More information on this can be found in Chapter 3.

We also want to ensure that those families who do need the support and intervention of the family court are quickly identified and the adults involved, particularly those who are victims of domestic abuse or are facing other issues (such as certain child protection circumstances or where urgency is required to avoid risk of harm to the child), are not unnecessarily delayed in seeking a resolution from the court. To do this we intend to have exemptions in place from this requirement to attempt mediation.

The court should not be used as a tool for those looking to prolong or escalate conflict. To support this, the proposed system of compulsory mediation must be effectively enforced and supported by the family courts, with those who do not make a reasonable attempt to resolve the dispute themselves through mediation held to account.

We want to robustly maintain and enforce the requirement to make a reasonable attempt to mediate before applying to court by ensuring the right evidence for an exemption from the requirement to attempt mediation is provided. We want to ensure the court is empowered early in the court process to direct parties to make a reasonable attempt at mediation (for example if circumstances have changed or an exemption is found to have been invalidly claimed).

We want parties who do not make a reasonable attempt to mediate, or act in a way that unnecessarily prolongs court proceedings to be held accountable by paying costs orders (see chapter 4).

In this consultation we are seeking your views on how we can achieve these aims most effectively.

In Chapter 1, we provide information on how the family courts are used in private family law disputes, and how this has changed over time. We also provide information on the Government's approach to domestic abuse and our recent actions to improve the court process for those who need it most.

In Chapter 2, we discuss the sources of support available to families seeking to make child and

financial arrangements, in particular online resources and co-parenting programmes. We are seeking views on how these resources can be improved and made more easily accessible. We are also seeking views on whether we should make attendance at a co-parenting programme offered by Cafcass and Cafcass Cymru compulsory for suitable parents/carers before an application can be made to court regarding child arrangements.

In Chapter 3, we outline our proposal for a system of compulsory mediation before an application can be submitted for a private family law dispute concerning children or financial remedy. We also set out the funding proposals for compulsory mediation in both children and financial remedy cases, as well as the proposed exemptions to the requirement to mediate, and how this process could work in practice. We discuss regulation and accreditation in the mediation provider market and seek views on how we can support the market to meet growing demand.

Finally, in Chapter 4 we outline how these measures could be enforced and how people will be held accountable for not making reasonable attempts to resolve their disputes via mediation or otherwise

outside of court. This includes seeking views on the use of costs orders. We also discuss the current court fee structure for private law cases, and our intention to consider the role that fees play in maintaining access to justice, raising income and ensuring the best outcomes for children (including outside of court).

Chapter 1 – How the family courts are used

Background and where we are now

Over the past ten years the way in which family courts are used, and the issues that families come to court for, has changed. Data shows that:

- **There were 2.3 million separated families in Great Britain and 3.6 million children in those separated families in 2021.**[12]
- **Most separating parents resolve their child arrangements without coming to court.** Fewer than 0.75% of all families with dependent children in England (including separated and non-separated families) make a private law application each year, marginally lower than in Wales (less than 1%).[13]

[12] Separated families statistics: April 2014 to March 2021 (experimental) - GOV.UK (www.gov.uk)

[13] Nuffield Family Justice Observatory. Uncovering Private Family Law: Who's Coming to Court in England (nfjo_whos_coming_to_court_England_full_report_FINAL-1-.pdf (nuffieldfjo.org.uk))

- **Over time, the volume of child arrangements applications coming into the family courts has increased. In 2021 there were 56,754 new applications, compared to 52,944 in 2011.** This is an increase of 7%.[14]
- **For financial remedy cases, the volume of applications to the court has fluctuated over time.** In 2011 there were 46,348 applications (15,602 contested and 30,746 not contested). In 2021, there were 48,666 applications (12,438 contested and 36,228 not contested).[15] This is an increase of 5% of total applications.
- **It now takes longer for cases to reach a conclusion.** It takes 40.5 weeks for the average private law children case to complete. This has increased from 26.1 weeks in 2011.[16]

[14] Family Court Statistics Quarterly: July to September 2022 - GOV.UK (www.gov.uk)

[15] Family Court Statistics Quarterly: July to September 2022 - GOV.UK (www.gov.uk)

[16] Family Court Statistics Quarterly: July to September 2022 - GOV.UK (www.gov.uk)

- The number of outstanding private law cases has stabilised at around 53,000.[17]
- **Many families who come to court to make child arrangements return to court.** Estimates from 2016/17 suggest that approximately one quarter of families with a child arrangements order returned to the family courts.[18] 63% of returning applications were made within just two years of the previous case being closed.[19]
- **The number of sitting days (the amount of time judges spend hearing cases in court) for family courts has steadily increased.** In 2015, 54,569 days were sat in private law proceedings. This rose to 82,991 in 2021.[20]

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[17] HMCTS Management Information - December 2022 - GOV.UK (www.gov.uk)

[18] Of the 40,599 private law cases that Cafcass worked on in 2016-17, 12,376 were returns to court

[19] Halliday et al. (2017) Page 8, *Private law cases that return to court: a Cafcass study* private_law_cases_that_return_to_court_-_cafcass_research_november_2017.pdf. Specific focus looking at the oldest child on a child's case.

[20] Civil justice statistics quarterly: January to March 2022 - GOV.UK (www.gov.uk)

- **When parents/carers attend a Mediation Information and Assessment Meeting (MIAM),[21] mediation is pursued in most cases, but not enough parents/carers are attending.** In 2020/21, only 35% of applicants for relevant case types attended a MIAM before coming to court. Only 6% of those who did not attend a MIAM had a certificate from a qualified family mediator stating that they were unsuitable for mediation. 60% of applicants declared MIAM exemptions[22] as a reason for their non-attendance. When both parents/carers see a family mediator for a MIAM, 73% of them go onto mediation.[23]

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[21] Mediation Information and Assessment Meetings (MIAMs) means a meeting held for the purpose of enabling information to be provided about mediation of family disputes which an application to the court could be made about, ways in which these disputes may be resolved by the court and the suitability of mediation, or of any other such way of resolving disputes, for trying to resolve the dispute. (Section 10(3) of the Children and Families Act 2014).

[22] Family Court Statistics Quarterly: October to December 2021 - GOV.UK (www.gov.uk)

[23] Family-Mediation-Survey-Autumn-2019-Results.pdf (familymediationcouncil.org.uk)

- **Mediating child arrangements disputes can work even for families who may not have previously been aware of it.** 65% of families who have so far attended mediation sessions through the Mediation Voucher Scheme reached a full or partial agreement away from the family courts, while a further 3% only proceeded to court to secure a consent order to formalise their agreement.[24] This is broadly in line with agreement rates seen under legally aided mediation.[25]
- **Although many families can resolve issues through mediation and without the support of court, there is also a core of families with more complex needs, often involving vulnerable individuals.** In June 2020 the MoJ published the expert panel report "Assessing the Risk of Harm to children and parents in private law cases".[26] This

[24] Ministry of Justice (2022) Mediation to help thousands more families avoid costly legal battles - GOV.UK (www.gov.uk)

[25] Legal aid statistics England and Wales bulletin Apr to Jun 2022 - GOV.UK (www.gov.uk)

[26] Ministry of Justice (2020) Assessing Risk of Harm to Children and Parents in Private Law Children Cases 2020 (justice.gov.uk)

group (“the Harm Panel”) reported that 50%–60% of families coming to court will have allegations and/or other evidence of domestic abuse.

The data shows that many families where these allegations do not arise, who are currently attending the family courts, could benefit from trying to reach an agreement through mediation. The family justice system needs to focus more on those families who need its protection the most – vulnerable people, including child and adult victims of abuse, and families with child protection concerns. The Government is determined to make sure that the family courts work effectively for, and continue to protect, these people.

Domestic Abuse

Improving our response to domestic abuse remains a Government priority. Within the family courts, the Government is committed to better protecting survivors of domestic abuse and other forms of abuse. We know that around half of the families coming to the family courts to resolve child arrangements have experienced domestic abuse; that is why it is so important to improve the way survivors are treated by the family courts. The proposals presented in this

consultation should have a positive impact on how survivors of domestic abuse are treated because there will be more court time available to review and resolve their applications at a greater rate.

In 2021 this Government passed the landmark Domestic Abuse Act 2021[27] which changed the way domestic abuse is considered and how victims and survivors participate in court proceedings. The Act creates, for the first time, a statutory definition of domestic abuse, to ensure that domestic abuse is properly understood, considered unacceptable and actively challenged across statutory agencies and in public attitudes. The definition of domestic abuse now includes all forms of abusive behaviour including controlling or coercive behaviour, economic abuse, psychological and emotional abuse, physical or sexual abuse and violent or threatening behaviour.

Cases featuring domestic abuse can be considerably more complex than other private law disputes. Cases involving domestic abuse or where there is otherwise a risk of harm to the child may also require the involvement of other agencies, such as Cafcass and Cafcass Cymru, and require further evidence

[27] Domestic Abuse Act 2021 (legislation.gov.uk)

gathering and reporting to the court, which may increase the length of time a case takes to progress.

The 2020 report “Assessing the Risk of Harm to children and parents in private law cases”[27] found that families who have experienced domestic abuse are often in high conflict and that power imbalances in the relationship mean they are unlikely to be suitable for mediation or other non-court dispute resolution. They may also require additional hearings to help understand all of the facts of what has taken place within the family, and to know whether alleged domestic abuse, or other harms, occurred.[28]

Impact of the coronavirus pandemic on the Family Courts

Like many other public services, the family courts have felt the impact of the coronavirus pandemic. During the pandemic, the average time for a private family law children case to complete increased from

[28] Assessing Risk of Harm to Children and Parents in Private Law Children Cases Para 7.4.1 Mediation and Conciliation

32.3 weeks in 2020 to 40.5 weeks in 2021.[29] As of September 2022 it now takes an average of 45 weeks.[30] This impact was made worse by the continued high demand on the family courts, with 55,642 private law cases starting in 2020, and 54,649 in 2021.[31]

The number of private law children cases reaching a final disposal was 43,778 in 2021, compared to 37,321 in 2020[32] – the outstanding caseload (cases in the system that have not yet been concluded) is around 53,000.[33] The Government has committed significant resources to the family courts to help manage the changing and more complex caseload. In the financial year 2020/21, we invested £250 million to support recovery in the courts which included £76

[29] Family Court Statistics Quarterly: July to September 2022 - GOV.UK (www.gov.uk)

[30] Family Court Statistics Quarterly: July to September 2022 - GOV.UK (www.gov.uk)

[31] Family Court Statistics Quarterly: July to September 2022 - GOV.UK (www.gov.uk)

[32] Family Court Statistics Quarterly: July to September 2022 - GOV.UK (www.gov.uk)

[33] HMCTS Management Information - December 2022 - GOV.UK (www.gov.uk)

million to increase our capacity to hear cases in the civil and family courts, and tribunals. Between 2021 and 2024 we are investing a further £324 million to increase capacity in the civil, family and tribunal jurisdictions to continue tackling backlogs and improve timeliness.[34]

The evidence is clear that action is needed to support families to reach an agreement on their child arrangements earlier and without court intervention where this is safe and appropriate. In doing this, we will enable the family courts to better focus on those families who most need their support and intervention.

[34] Largest funding increase in more than a decade for justice system - GOV.UK (www.gov.uk)

Chapter 2 – Supporting Families to Resolve Issues Earlier

In this chapter, we seek views on:

a. **Working together to support separating families**
   What resources, guidance or support the government and the sector can provide to help separating families agree on child and financial arrangements without resorting to the court, and how we can create an easier way for families to access these resources.
b. **Co-parenting programmes**
   Whether to introduce a mandatory requirement for parents/carers in disputes relating to child arrangements or other private family law children matters to attend a co-parenting programme, where considered suitable. This could happen after someone has been referred by a mediator at an introductory meeting but before attending mandatory mediation sessions (as discussed in chapter 3).

Background and where we are now

The Government is committed to supporting families and helping them navigate challenges and resolve disputes as early as possible. When relationships come to an end, hostility and ongoing conflict can often be harmful to the welfare of individual family members, particularly children. When parents have taken the often-difficult decision to separate, children's best interests are usually best served by minimising conflict and their parents being supported to act cooperatively. In suitable cases, attempting dispute resolution early may help parents to reach agreements earlier, because conflict between them has not yet become entrenched.[35]

Research suggests that parents lack information about their options before they come to court. The President of the Family Division's Family Solutions Group Report from November 2020 found that parents lack a reliable source of clear information about their options and noted that both the Creating Paths to Family Justice report and Varying Paths to Justice

[35] (Thomas et al. 2016) and Qu (2019) who found that 'late' use of dispute resolution was associated with worse inter-parental relationships and lower chance of settlement.

Report found that parents turn to the internet for information. The Family Solutions Group reported that this will only have increased since COVID-19.[36]

> "very often [when parents separate] it's just been, "oh I'm sorry to hear that"... We have never really been able to say, "have you considered mediation? …Here's a leaflet that might be of some use to you". We have not had that tool in our toolkit."[37] The Family Solutions Group Report (Barlow, A. and Ewing, J. 2020)

In the MoJ's August 2021 Dispute Resolution Call for Evidence,[38] the better use of technology and online processes was identified as a way to increase accessibility of dispute resolution, provide a safe space for those in abusive relationships, respond to the needs of those who only want to be engaged

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[36] Para 157 - https://www.judiciary.uk/publications/what-about-me-reframing-support-for-families-following-parental-separation/

[37] Barlow, A. and Ewing, J. (2020). *An Evaluation of 'Mediation in Mind': Final Report – June 2020*. (Exeter: University of Exeter) – Family Solutions Group Report

[38] Dispute Resolution in England and Wales - Call for Evidence (justice.gov.uk)

digitally and help achieve fairer outcomes. However, the call for evidence also identified the importance of dispute resolution providers offering a range of communication channels, including traditional methods such as telephone and face-to-face to give everyone access to their services. We are interested in understanding how we can improve the information available to separating families to help them address the conflict earlier.

We are also seeking views on how we can reach families who do not choose to use or do not have access to online resources, through location-based services.

Government action to date

There are several schemes and resources already available to support parents/carers and couples without children who separate:

Co-parenting programmes

Two main programmes in England and Wales already support separating parents to focus on the best interests of their children and co-parent more effectively. The Separated Parents Information

Programme (SPIP)[39] is available in England and Working Together for Children (WT4C)[40] is available in Wales. These programmes are delivered by Cafcass (Children and Family Court Advisory and Support Service) and Cafcass Cymru respectively and provide support and information on coparenting after separation. They specifically aim to help parents understand the impact separation and parental conflict have on children. The courses encourage parents to take steps for themselves, which may include developing agreements without court intervention. The courses also signpost ways in which parents can get assistance outside of court.

The Separated Parents Information Programme (SPIP) is due to be replaced by a new Planning Together for Children course, launching in April 2023. The new course for parents in Private Law court proceedings has been co-designed with children and parents following a research and evidence review. Cafcass have thought creatively about different ways of delivering this service more effectively, moving to a

[39] Separated Parents Information Programme - Cafcass - Children and Family Court Advisory and Support Service

[40] Working Together for Children (WT4C) (gov.wales)

hybrid model where parents complete an online course followed by a facilitated group workshop. Planning Together for Children gives parents more time to engage with a range of relevant information and materials and provides a space for parents to reflect on the impact separation and conflict can have on children.

SPIPs and WT4Cs are already used by a substantial number of parents/carers. In 2020/21, at the beginning of the COVID pandemic, 16,160 parents/carers completed a SPIP, rising to 20,405 in 2021/22.[41] Nearly half of all SPIPs are ordered by the court at the final hearing. We believe that this is too late in the dispute, as the benefit of attending the programme is, in these cases, only felt at the end of the legal process.

We are aware that SPIPs can help parents/carers to understand that the court does not have to be the default option for resolving their child arrangements. The Support with Making Child Arrangements (SwMCA) programme conducted a six-month pilot

[41] Cafcass publishes Annual Report and Accounts for 2021-22 - Cafcass - Children and Family Court Advisory and Support Service

evaluation to work with this group of parents to understand whether the offer of dispute resolution services would help them agree arrangements without needing to attend a court hearing. This report showed that parents/carers who attended a combination of a SPIP and mediation were more likely to reach a full agreement, and to make a consent order or withdraw their application from court. 78% of parents/carers who attended both a SPIP and mediation then applied for either a consent order or made an application to withdraw their court case.

Case Study 4 from Support with Making Child Arrangements Pilot:

Both parties attended mediation and a SPIP which helped them come to a full agreement and their application was withdrawn. The respondent found the experience of the pilot positive. They stated that the pilot helped them speak to the other parent in a different way; they said they now give each other time when one requests something, instead of responding aggressively straight away. “The hurt factor or angry factor isn't there anymore, it is about giving things a bit of time”. The arrangements have also worked since the agreement. “If something comes up, we have a plan A and a plan B".

The Family Court Adviser [Cafcass social worker] was very positive about the impact of the pilot on these parents and their children. They made their agreement at mediation. The FHDRA (First Hearing) was not required so court time was saved.

Family Hubs are a way of joining up locally to improve access to services, the connections between families, professionals, services, and providers, and prioritise strengthening the relationships that carry us

all through life. They bring together services for children of all ages, with a great Start for Life offer at their core. The Government is investing around £300 million to transform 'Start for Life' and family support services in 75 upper tier local authorities across England. This will fund a network of family hubs and builds on the £12 million transformation fund to open family hubs in 12 further local authorities in England. The Department for Education and the Department of Health and Social Care have published guidance for local authorities on the services family hubs are expected to offer access to, which includes helping families to access existing support for reducing parental conflict and separating or separated parents. This could include for example, connecting parents to mediation where available.

Reducing Parental Conflict Programme[42] is a programme operated by the Department for Work and Pensions (DWP) which aims to support parents who have not experienced domestic abuse to reduce conflict in their families. It also aims to improve outcomes for children and focuses on disadvantaged

[42] Reducing Parental Conflict programme and resources - GOV.UK (www.gov.uk)

families. DWP continues to test the effectiveness of different types of interventions in 31 local authorities across England, and through this work, the government has supported over 4,400 parents since 2019, with over 2,200 parents completing a Reducing Parental Conflict intervention as of March 2022.

The most recent implementation report for the programme (published in April 2022),[43] found that most parents, regardless of the impact on themselves, felt they had seen positive change in their children and their children's behaviour. DWP is committing up to £33 million over 2022–25, with up to £11 million in 2022/3, to build on this progress.

The Ministry of Justice also supports other services which provide different forms of early legal support and advice for people needing to agree child arrangements and other children matters following separation:

- Since 2014, the Ministry of Justice (MoJ) has invested more than £25 million in support for

[43] https://www.gov.uk/government/publications/reducing-parental-conflict-programme-evaluation-third-report-on-implementation/reducing-parental-conflict-programme-evaluation-third-report-on-implementation

litigants in person in both the civil and family courts. This includes over £7m in funding from 2020–2022 which supported organisations providing specialist legal advice services following the onset of the COVID-19 pandemic. This funding enabled organisations to remain operational and recognised the impact of the pandemic on the sector.

- **FLOWS (Finding Legal Options for Women Survivors):**[44] Since 2020/21, MoJ has been providing £800k funding a year to FLOWS for provision of free legal support to victims of domestic abuse who wish to apply for an emergency protective order from the courts. The funding is used to provide a helpline and email service for domestic abuse victims, where they can be referred to a legal aid solicitor to assist them with making their application or can receive free advice directly from FLOWS legal team if they are ineligible for legal aid. The funding is also used by FLOWS to further develop their digital offer, including the CourtNav tool, which aims to make it easier for unrepresented victims to apply for a non-molestation order. There are also several third sector, charitable and not-for-profit organisations

[44] https://www.flows.org.uk/

which support specific groups of family courts users, such as victims of domestic abuse, mothers, fathers and migrant or refugee families.

What government action might address

We want to improve the support and information we provide to parents/carers upfront and throughout the court process.

First, we want to improve and streamline the information and support available to those involved in private family law issues. We recognise that parents/carers often face a challenge in knowing where to go for information when they are separating. We want to improve the information that is available to parents/carers at the earliest stage possible, to help them to make well informed decisions about the options available to them, before making an application to the court.

To do this, we are committed to researching and developing better tools to support families on their journey following separation, including an online tool to improve access to impartial, readily available information. This online tool would aim to provide information and guide parents and carers to other

non-court dispute resolution options and provide tools and resources about how to reach agreements in appropriate cases which are in the best interests of any child involved. A separate tool for children to help them understand the process their parents or carers are going through may also be appropriate.

Through the Family Hubs and Start for Life programme, family hubs will be expected to help parents and carers to access appropriate existing support and services available when separated or separating, including for example mediation and co-parenting programmes depending on the existing provision available. We will work with the Department for Education and National Centre for Family Hubs to develop and share good practice in reaching parents and carers earlier to help them explore ways of coming to an agreement with minimal conflict between them. For example, how family hubs could develop strong links with local family courts and mediation providers to locate mediators on site in family hubs where existing provision facilitates this and where appropriate.

We are working with Cafcass and Cafcass Cymru on interim measures to extend the use of existing co-

parenting programmes ahead of the introduction of any requirement to attend one before court:

- **Before an application is made to the court:** We are considering trialling the offer of a funded co-parenting programme before court, for suitable parents/carers. The suitability of parents/carers to attend the programme would be determined at the current MIAM (Mediation Information and Assessment Meeting – the first meeting with a mediator to provide information and assess whether the parties' case would be suitable for mediation). The mediator would then make the referral to existing SPIP/Planning Together for Children/WT4C providers. The service is funded by MoJ/Welsh Government. This will help parents/carers to focus on the best interests of their children as early as possible.
- **After a court application has been made but before the first hearing:** We will seek to increase the number of referrals to SPIP/Planning Together for Children and WT4C made by Cafcass and Cafcass Cymru before the first hearing. This would aim to increase the number of parents/carers reaching an agreement early by helping parents/carers to learn how to co-parent more

effectively and focus on reaching an agreement in the best interests of their child(ren).

- **During court proceedings:** We will empower Cafcass and Cafcass Cymru to refer parents/carers to a SPIP/Planning Together for Children or a WT4C at all stages in the court process – for example if there are long running cases where families may not have initially been suitable but have become so. We will also work with the judiciary to encourage judges to order attendance at a SPIP/Planning Together for Children or WT4C earlier in the court process.

In addition, we plan (subject to this consultation) to introduce a requirement for parents/carers to attend a funded SPIP/Planning Together for Children or WT4C before mandatory mediation (see Chapter 3), and therefore before an application to court can be made, if they and their circumstances are suitable. We propose that suitability for attendance at a co-parenting programme would be assessed at an initial meeting with a mediator to discuss alternatives to court, akin to the existing MIAM. Parents/carers who are exempt from the requirement to make a reasonable attempt at mediation (see chapter 3) would also be exempt from this co-parenting

programme requirement. We are seeking views on this requirement, and whether completion of the co-parenting programme should be required before mediation starts. The focus of the programme is intended to support parents to work together to agree arrangements and may therefore support the mediation process if it is completed before mediation. However, we recognise that this could prolong the time it will take to reach agreements or to make a court application, particularly if one parent is reluctant to complete the programme or if there is a waiting list for the course. We will bear these considerations and input from this consultation in mind as we determine the right balance between individuals' speed of access to court and the benefits of attending parenting programmes.

Questions

Question 1: Are you in favour of a mandatory requirement for separating parents (and others such

as grandparents)[45] 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
- No
- Don’t know

Please provide reasons for your answer

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

- Yes

[45] Whilst 90% of applications for child arrangements are made by parents, others (such as grandparents, aunts/uncles and extended family and carers) are also entitled to apply or can seek the court’s permission to do so. The categories of people who can automatically apply for, or can seek the court’s permission to apply for, other private law children applications, can also vary. For the purposes of this document, we have used the term ‘parents/carers’ to refer to every adult who makes (the applicant) or responds to (the respondent) a private law application regarding arrangements for children.

- No
- Don’t know

Please provide reasons for your answer

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)

Please provide reasons for your answer

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?

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

- Yes
- No
- Don’t know

Please provide reasons for your answer

Chapter 3 – Agreeing private family law disputes through mediation

In this chapter, we seek views on:

a. **Compulsory pre-court mediation**
   What this might look like for separating couples, parents or others seeking to agree children or financial arrangements and in what circumstances this requirement should not apply.
b. **Funding compulsory pre-court mediation**
   Should mediation for both children and finance arrangements be fully funded or should we look to fund mediation for finance cases in line with legal aid thresholds.
c. **How to get the mediation sector ready**
   What changes are needed to ready the mediation sector (including training and accreditation) before compulsory mediation is introduced.

Background and where we are now

Most families who separate can agree who the child lives with and sees, and specific issues such as what

school a child will attend, without involving anyone else.[46] For those parents/carers who cannot agree between themselves and need support, and for divorcing couples or others seeking to agree financial arrangements for them and/or their children, there are several non-court options available to help people reach agreements. The most popular of these is family mediation.

Family mediation is a process where a trained independent mediator helps people work out arrangements with another participant (for example an ex-partner) about their children, finance or property. The mediator is there to help people work through any disagreements and find solutions that work for their family, tailored specifically to their circumstances. The mediator does not judge or decide on what the final agreement should be, but instead works with the family to help them come to a shared agreement on some or all parts of their disagreement. Although the mediator may have been "found" by one participant,

[46] There were 2.3 million separated families in Great Britain and 3.6 million children in those separated families in 2021 - Separated families statistics: April 2014 to March 2021 (experimental) - GOV.UK (www.gov.uk)

they do not act on behalf of one or other of the participants. Their job is to help both participants reach an agreement and a practical way forward. Importantly, mediation allows the people involved to stay in control of the outcome and this means that neither side will be forced to do anything against their wishes.

Mediation is not marriage counselling. Mediators do not try to get couples back together or ask them to live together for the sake of their children. It is about how to best handle looking after the children if the parents have separated, how to divide finances fairly, or to agree with other family members (for example grandparents) how and when they can see the children.

Family mediation aims to improve communication between both parties. Unlike court, all participants must agree to the final arrangement; a mediator does not decide for them, as a judge does. Mediators can work with the adults and children, either together or separately, and aim to help find a solution which

works for everyone and is in the best interests of the children.[47]

Mediation can be conducted with both participants jointly in the same room, or in separate rooms ('shuttle mediation'), which can be used when one of the individuals is uncomfortable being in the same room as the other. Many mediators offer 'child inclusive' mediation, where a trained mediator will speak with the child as part of the process to consider their wishes and feelings.

These features mean that mediation is often seen as a less adversarial and less stressful approach to resolving disputes than going to court. Research on the benefits associated with mediation show positive outcomes for parents, many of whom report being satisfied with their agreement.[48]

Whilst not all situations are suitable for mediation (explored in more detail below), when both people are engaged in the process it has been shown to have

[47] Family Mediation Council Aims and Objectives (https://www.familymediationcouncil.org.uk/us/code-practice/aims-objectives/)

[48] Family-Mediation-Survey-Autumn-2019-Results.pdf (familymediationcouncil.org.uk)

high success rates.[49] It can also give parents and other adults the understanding and tools to develop solutions together, so when circumstances change (for example if a child moves to secondary school or one of the parents/carers is moving house) they may be able to reach an agreement without seeking the support of a professional.

We want to build on the success of the mediation voucher scheme by introducing a requirement to mediate before making a court application, in appropriate cases. We have reviewed how this has been introduced in other countries and what safeguards have been put in place to make sure people are not required to attend where it is not suitable for them.

Learning from other countries

Several other countries have introduced compulsory attendance at mediation before a court application for child arrangements cases. Sometimes these can be

[49] Family-Mediation-Survey-Autumn-2019-Results.pdf (familymediationcouncil.org.uk)

coupled with compulsory attendance at a shared parenting programme.

In **Australia,** alternative dispute resolution was made compulsory for private family law in 2006, with the aim of bringing about "generational change in family law" and a "cultural shift […] away from litigation and towards co-operative parenting."[50] The reforms required parents to attempt to reach an agreement through dispute resolution before coming to court. Exemptions were created for cases concerning violence, child abuse and urgency.

Research from 2009 suggested that the reforms in Australia resulted in about two-thirds of separating parents contacting family relationship services.[51] However, problems were observed with cases of domestic abuse. In an evaluation commissioned by the Australian Government,[52] it was noted that screening for domestic abuse was inadequate, and for

[50] Page 20, Evaluation of the 2006 family law reforms | Australian Institute of Family Studies (aifs.gov.au)

[51] Page 21, Evaluation of the 2006 family law reforms | Australian Institute of Family Studies (aifs.gov.au)

[52] Page 22, Evaluation of the 2006 family law reforms | Australian Institute of Family Studies (aifs.gov.au)

these families there were also increased costs as they did not reach an agreement at mediation and still needed to attend court.

In 2011, Australia then introduced the *Family Law Amendment (Family Violence and Other Matters) Act 2011*.[53] This broadened the definition of family violence and abuse and placed obligations on professionals to inform parents that arrangements should maintain child safety. This led to the introduction of Coordinated Family Dispute Resolution: a specialist, multi-disciplinary and lawyer assisted approach involving rigorous screening in cases with reported histories of domestic abuse.

New Zealand mandated mediation for child arrangement disputes in 2014,[54] aiming to shift focus away from the family courts and towards out-of-court dispute resolution services. The changes prioritised children's interests, but it provided exemptions for domestic abuse or urgent applications. Where parents

[53] Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 – Parliament of Australia (aph.gov.au)

[54] Family Dispute Resolution Act 2013 No 79 (as at 28 October 2021), Public Act – New Zealand Legislation

want a court resolution, they must have attempted family dispute resolution within 12 months of starting court proceedings which must be certified by an approved family dispute resolution mediator and must have completed a 'Parenting Through Separation' course within last two years.[55]

Norway's system for resolving child arrangement disputes also requires all separating parents (with children under the age of 16) to attend mediation.[56] There are varying levels of requirements placed on families depending on which stage the separation is at. At the lowest level parents are required to attend a Family Counselling Service, or similar, for a minimum of one hour. The overall aim of this mediation is to achieve a written agreement for childcare arrangements. Parents will then be granted a mediation license for six months which allows them to go through litigation. Pre-action mediation is

[55] Parenting Through Separation course | New Zealand Ministry of Justice

[56] Tjersland, O., Gulbrandsen, W., & Haavind, H. (2015); Mandatory Mediation outside the Court: A Process and Effect Study. *Conflict Resolution Quarterly*, *33*(1), 19–34

mandatory for parents/carers making the court application.

Government action to date

Introduction of the Mediation Information and Assessment Meeting requirement

In 2014, to encourage more families to consider the potential benefits of alternatives to court in private family law cases, the Government introduced a requirement through the Children and Families Act that individuals attend a Mediation Information and Assessment Meeting (MIAM) before making certain applications to the family court.[57] According to Family Procedure Rules made under this legislation, the requirement currently applies to most private law children disputes and most financial remedy applications.[58]

The person who wants to make an application to court is required to attend a MIAM, unless exempt (see below). At that meeting a mediator will assess whether the dispute is suitable for mediation, share

[57] Section 10 of the Children and Families Act 2014

[58] Rule 3.6, Family Procedure Rules Part 3, together with paragraphs 12 and 13 of Practice Direction 3A.

information about the mediation process and other alternatives to court, and participants can decide whether to proceed with mediation sessions or to explore another option. MIAMs can only be carried out by authorised family mediators, i.e. mediators identified by the Family Mediation Council (FMC) as qualified to do so.[59] The FMC requires that, as part of their accreditation process, mediators must attend training on domestic abuse and its identification.

There are currently 16 types of MIAM exemptions which can be claimed directly by a potential applicant (e.g., urgency, evidence of domestic abuse), and 3 types of exemptions which need to be certified by a mediator[60] (e.g., case unsuitability for mediation). These exemptions, and in some circumstances the details of the evidence that needs to be provided to support them, are set out in Part 3 of the Family Procedure Rules together with Practice Direction 3A. Mediators conducting a MIAM are also required[61] to

[59] Family Procedure Rules 3.1 and 3.7.

[60] PART 3 - NON-COURT DISPUTE RESOLUTION (justice.gov.uk), FPR 3.8

[61] PART 3 - NON-COURT DISPUTE RESOLUTION (justice.gov.uk), FPR 3.9

assess the suitability of mediation as a way of resolving the dispute, and to assess whether there has been, or is a risk of, both domestic abuse and harm by a prospective party to a child that would be a subject of the court application.

The MIAM requirement is not working as intended. Data suggests that only 33% of applicants to the family courts for a private law matter concerning children attended a MIAM in 2020/21 when their application type would have ordinarily required MIAM attendance.[62] The remainder indicated that they were eligible for one of the exemptions specified in the Family Procedure Rules. Although most of these exemptions are validly claimed, the reasons given for the exemptions are not always properly scrutinised when an application is submitted and the evidence supporting the exemption may not be considered until the first court hearing. One example of this was in KvK,[63] a Court of Appeal case in April 2022, in which the court found an inappropriate use of the “urgency”

[62] Family Court Statistics Quarterly Family Court Statistics Quarterly: October to December 2021 - GOV.UK (www.gov.uk)

[63] K v K, [2022] EWCA Civ 468.

exemption which was not identified by the court in the first instance.

Mediation voucher scheme

In March 2021, the Government launched and funded a time-limited family mediation voucher scheme to help parents/carers agree arrangements through mediation and help them avoid going through often lengthy and potentially costly court proceedings which we know can have a damaging impact on children. The scheme has proven popular, with 13,500 vouchers issued by January 2023. A further £5.4m has been allocated for the 2022–2023 financial year, which is expected to help at least 10,200 more families and brings our total investment to £8.7m. 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, while a further 3% only proceeded to secure a consent order to formalise their agreement. This success rate is broadly consistent with what we

know about the settlement rate under legally aided mediation.[64]

Anonymous case study from an individual who received a voucher through the Family Mediation Voucher Scheme, 2022:

> "Each participant had a MIAM in early November 2021. After both MIAMs had taken place and I had assessed that the participants were suitable for mediation, the solicitors were in correspondence with one another, and the mediation was near to not taking place because of a breakdown in communication. I persuaded the participants to go ahead with the first mediation meeting because I was able to use the fact that they were eligible for a voucher under the MoJ/FMC scheme and that this offered a ray of light in an otherwise grim situation. They agreed to go ahead but only on the basis that they sat in separate virtual breakout rooms…
>
> The results have been that the parents are working together to co-parent the children and financial disclosure forms have been completed and

[64] Legal aid statistics England and Wales bulletin Apr to Jun 2022 - GOV.UK (www.gov.uk)

exchanged before Christmas (which is a very quick turnaround time from the start at the end of November 2021). The parents have worked in mediation to move from being opponents (with such a breakdown in communication that the issue of court proceedings was in the offing), to being cooperative problem solvers with no intention of darkening the court's doors! Without the hook of the Voucher Scheme this mediation would have fallen at the first post."

What government action might address

The Government is acutely aware of the importance of protecting people's access to court and rights to family life, but we think that a balance can be found which assures these rights but also maximises the opportunity for disputes to be resolved earlier and without the intervention of the court.

We are working with the Family Procedure Rule Committee to tighten up exemptions. We believe that the current list of MIAM exemptions needs shortening and that exemptions should be more rigorously tested by the courts; for example, an exemption exists if there is no authorised mediator within 15 miles of the

applicant's home despite many mediators now offering online MIAMs. The Family Procedure Rule Committee will also consider the timing and enforcement of the evidence requirement for exemptions from the MIAM requirement (see Chapter 4). The Committee is also contemplating rule changes to encourage parents to consider dispute resolution, including the use of costs orders. The Committee will consult on these changes in early 2023.

The potential changes to the Family Procedure Rules above are intended to make sure that the current MIAM requirement is applied and enforced as effectively as possible, including once an application has been made to the court. We hope that amendments to the Family Procedure Rules on MIAMs can be made as quickly as possible. However, the Government's ambition is to go further, and we want to introduce a new system whereby we make mediation compulsory before a court application is made.

Requirement to mediate before a court application is made: We want all people who are seeking to resolve disputes and make arrangements for their children or finances, including on separation or

divorce/dissolution, to make a reasonable attempt to mediate before an application is submitted for a court order, unless they are eligible for an exemption. This requirement would apply to the same case types to which the current MIAM requirement applies. This means, for example, if you have separated from your partner and want to decide who your child lives with or sees, or how finances are arranged following separation or divorce/dissolution, we expect that you will have made a reasonable attempt at mediation before turning to the family courts to make arrangements for you. Equally, the person not making the application but who would need to respond to it if one were made will also be expected to make a reasonable attempt at mediation when they are contacted to do so.

Under a new system of compulsory mediation pre-application, the people involved would attend an information meeting, similar to the current MIAM, before attending mediation. This meeting would provide them with information about the court process and the benefits of mediation and other forms of dispute resolution. This meeting would also provide the mediator with an opportunity to assess the suitability of the parties for mediation and completion

of a parenting programme, and whether certain exemptions apply (for example exemptions that cannot be self-certified by the applicant).

Based on the findings of the mediation voucher scheme, we expect that for the majority of people, attending compulsory mediation will result in a full or partial agreement. For those who cannot agree, the case would then proceed to court.

Exemptions to compulsory mediation: We have reviewed the current MIAM exemptions as well as international examples of how other countries have developed policies to make pre-court mediation compulsory. A common feature of these systems and our current MIAM requirement, is that cases where domestic abuse[65] concerns are identified, or are otherwise not suitable, are identified early and not

[65] We use the term ‘domestic abuse’ here. The term ‘domestic violence’ is used in the relevant practice direction. The practice direction defines this as meaning 'any incident, or pattern of incidents, of controlling, coercive or threatening behaviour, violence or abuse (whether psychological, physical, sexual, financial or emotional) between the prospective applicant and another prospective party

required to proceed with mediation before a court application can be made.

We recognise that mediation is not suitable for these and other circumstances (such as certain urgent and/or child protection circumstances as specified in current MIAM exemptions). We want to ensure there are appropriate exemptions to a mediation requirement in order to achieve a balance between access to court and maximising opportunities for agreements to be reached privately. In this consultation we are seeking views on appropriate exemptions, but we will also take into account the views of the Family Procedure Rule Committee following its review of the MIAM exemptions list.

Assessment of an exemption: We propose that both people involved in the dispute will be able to “self-certify” certain exemptions. This means that a person can apply directly to court and will not need a mediator or the court to assess them before the application is sent. These exemptions would include urgent circumstances, evidence of domestic abuse, and certain child protection circumstances, such as

those that currently qualify for a MIAM exemption.[66] Evidence supporting an exemption would still have to be supplied and this would be scrutinised by the court when it receives the application. There would also be a new power for the court to order the parties to make a reasonable attempt at mediation, after an application has been received, if an exemption has been invalidly claimed or if it was validly claimed but the circumstances no longer apply (e.g., the urgent issue has been addressed and the issue has become suitable for mediation (as outlined in chapter 4)). For other exemptions, a mediator would need to confirm, following the initial meeting, that the case is not suitable for mediation.

If a person makes an application to court and cannot provide the evidence that they have attempted mediation or do not have a valid exemption, the court will have a power (see chapter 4) to pause the application, either so the person can collect and provide the necessary evidence or to order the parties

[66] Defined as if the child is the subject of enquiries by a local authority under section 47 of the Children Act 1989 Act; or is the subject of a child protection plan put in place by a local authority.

to make a reasonable attempt to mediate. If either party does not then make a reasonable attempt at mediation, the application would proceed but the court would be able to take account of this lack of engagement in deciding whether any costs should be awarded (as discussed in Chapter 4). If the responding party cannot be located by the applicant or mediator, this would need to be confirmed by the mediator and the case could also continue to court – although again, the court would have a new power to direct the parties to make a reasonable attempt at mediation if the other party were successfully contacted during proceedings and the court decided that the case was suitable for mediation.

“Reasonable attempt to mediate”: If the people involved have made a reasonable attempt to mediate but this has not been successful, their application will proceed and be reviewed as part of the court gatekeeping process (see Chapter 4). As set out in Chapter 4, we are however concerned to guard against parties dragging out the mediation process or acting unreasonably. We welcome views on how to achieve this. Below we are also seeking input on what would constitute a ‘reasonable attempt’.

In the event of a failed dispute resolution, a further question is whether the court should have a new power to make the parties make a statement to the court explaining their approach to pre-court dispute resolution and their position on the material issues at stake.

The Family Procedure Rule Committee are shortly due to consult on a proposal to require people to confirm in writing to the court whether they have attempted dispute resolution, and if not why.

We are also seeking views on how the court might best approach cases where either or both parties account of pre-court mediation is disputed. Ascertaining the facts will allow the court to correctly apply any cost order in these cases. We could, for example, ask parties to consider waiving their right to confidentiality of the mediation process and ask their mediator for their view on what took place, should they be willing to provide it.

Funding support for attending mediation: It is important to us that parents and their children are not left financially worse off by the requirement to attend mandatory mediation. As such, we intend to fund mediation for all children cases, up to a value of £500,

which are not subject to a mediation exemption. This would act as a long-term replacement for the temporary Mediation Voucher Scheme.

For financial remedy cases, we are seeking views on whether to match the funding proposed for children cases or to apply legal aid thresholds to applicants pursuing financial remedy cases. Legal aid is currently available to fund mediation in certain circumstances, subject to people satisfying a means test. At present, where only one of the parties satisfies the means test, that party will receive legal aid and the non-eligible party will also be offered the MIAM and first mediation session funded under legal aid. Where both parties satisfy the test, all sessions are funded. Our consultation on the Means Test Review closed on 7 June 2022 and we will publish the Government's response in due course. We will continue to consider the position on funding for mediation in light of the responses to this consultation.

Accreditation of mediators: We are seeking views on whether more regulation is required to put in place standards for mediators providing family mediation, beyond those that the Family Mediation Council (FMC) already has in place. We are also seeking

views on whether such regulation could help ensure that the mediation market remains competitive and accessible to those who would now need to attempt mediation to be able to access the family courts – including whether any regulation of fees is needed. Currently, the FMC accredits mediators. According to the relevant Family Procedure Rules, only mediators authorised by the FMC to conduct a MIAM may do so and may certify exemptions from a MIAM. The FMC in turn authorises only those mediators which it has accredited, or those working towards accreditation to certify exemptions to the MIAM requirement. We propose a similar approach for compulsory pre-court mediation and mediation ordered by a court after an application has been made, i.e., it would be up to the FMC to authorise mediators to conduct the mediations, and for mediators to certify exemptions and certify when parties have made a reasonable attempt to mediate. We will work with the FMC to ensure that the existing system of accreditation meets the needs of the new scheme.

A stronger, more flexible mediation sector: The family mediation market is a mix of small businesses/self-employed mediators, some established mediation providers, and mediators

working in law firms of various sizes. We have seen during the COVID-19 pandemic that the market can change to respond to need; with mediation sessions moving online and being offered in the evenings and weekends to fit around people's needs. Where you live is no longer a barrier to finding and using a family mediator. We are seeking views on how we can support the market to meet growing demand.

Other forms of family non-court dispute resolution: There are other forms of dispute resolution available for families. We are not proposing to require people to attempt one of these forms of non-court dispute resolution rather than mediation, however, we are seeking views on whether making an attempt to reach agreement through another form of dispute resolution should leave people exempt from the requirement to mediate, on whether any of these services, or any others, should play any further role in the proposed system:

- **Arbitration:** Those involved in a dispute can jointly agree to appoint an arbitrator to consider the arguments and decide on their case. As with any mediated settlement, however, the arbitrator's decision would still need to be made a court order to be enforceable, and the court would therefore

apply the legal principles applicable to children matters, such as the paramount importance of the welfare of the child.

- **‘Collaborative lawyers’:** Individuals can appoint a lawyer to sign an agreement to seek to resolve the case without taking it to court, and then negotiate with and on behalf of the parties. As with mediated settlements and arbitrator decisions, any agreement reached would require a court order in order to be enforceable.
- **Lawyer negotiation:** Lawyers will attempt to gain agreement without the case going to court. In this instance the lawyers can be hired to negotiate on behalf of their clients, so that the parties to the dispute do not have to deal directly with each other. As with the other types of dispute resolution discussed, any agreement is not legally binding and would require a court order.

Questions

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

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

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?

Question 9:

a) Do you agree that urgent applications, child protection circumstances (as set out in the current MIAM exemption), and cases where there is specified evidence of domestic abuse, should be exempt from attempting mediation before going to court?

- Yes
- No
- Don’t know

Please provide reasons for your answer

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

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

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?

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

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

- Yes
- No – additional regulation required
- Don't know

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

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?
   - Mediation only

- Other forms of non-court dispute resolution (NCDR)
- Don't know

Please explain your answer

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

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

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?

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?

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

(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?

Chapter 4 – Accountability, Enforcement and Fees

In this chapter, we seek views on:

a. **Gatekeeping and enforcement**
   How and when the evidence supporting a claim for an exemption is considered, and whether the court can order parties back to attend mediation.
b. **Cost orders**
   How costs orders could be used to support requirements to mediate and to discourage people from unnecessarily entering into court proceedings following mediation or prolonging court proceedings once they are in court.
c. **Fee structure**
   How the court fees payable to apply to the court affect peoples' incentive to attempt mediation.

Background and where we are now

At present, there is no requirement to mediate, but there is a requirement to attend a MIAM before

applying to court[67] and there are various ways in which families are encouraged to attempt mediation or other forms of non-court dispute resolution. The court also has ways to hold parties accountable for not attending a MIAM or, in some circumstances, for unreasonably refusing to participate in non-court dispute resolution.

As discussed in chapter 3, the court has an existing duty to consider, at every stage of proceedings, whether non-court resolution is appropriate. The court must consider three specific issues – whether a MIAM has taken place, whether a valid MIAM exemption was claimed or mediator's exemption was confirmed and whether the parties attempted mediation or another form of non-court dispute resolution and what the outcome of that process was.[68] Where the court considers that non-court dispute resolution is

[67] Section 10 of the Children and Families Act 2014, together with Part 3 of the Family Procedure Rules and Practice Direction 3A.

[68] Family Procedure Rule 3.3. FPR 2010 - PART 3 - NON-COURT DISPUTE RESOLUTION (justice.gov.uk) and PRACTICE DIRECTION 3A – FAMILY MEDIATION INFORMATION AND ASSESSMENT MEETINGS (MIAMS) (justice.gov.uk)

appropriate, it has the power to adjourn the proceedings for a specified period to allow the parties to obtain information and advice about, and to consider, non-court dispute resolution. The court's power to adjourn proceedings (i.e., to halt the court proceedings for a period) can also enable non-court dispute resolution to take place where the parties agree.[69]

The court also considers whether a MIAM exemption has been claimed correctly. Once an application has been submitted, the court can ask for evidence to support a claim for an exemption from the MIAM requirement either when the application is first received or at the first hearing – but first hearings can be weeks, sometimes months, after the application has been received. Anecdotal feedback has suggested that cases can go ahead without exemptions being considered or challenged, often on the basis that courts are keen to reach a resolution for

[69] Rule 3.4(1) FPR 2010 - PART 3 - NON-COURT DISPUTE RESOLUTION (justice.gov.uk)

the children involved.[70] We also gather that courts are often reluctant to adjourn proceedings where arrangements could be settled as part of attendance at a first or second hearing (and made into a court order at that point). A recent Court of Appeal case also noted that an exemption had not been correctly claimed and had not been checked by the court, and that it was "unfortunate" that the parties had not engaged with the MIAM because certain issues might have been "speedily resolved".[71]

The court also has a wide discretion to order one party to pay the other party's 'costs' i.e., the costs of the proceedings incurred by the other party, such as costs of legal representation and court fees, as well as costs incidental to the proceedings (a costs order).[72]

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[70] For example, see https://www.judiciary.uk/wp-content/uploads/2020/04/PRIVATE-LAW-WORKING-GROUP-REPORT-1.pdf

[71] K v K, [2022] EWCA Civ 468

[72] Section 51 of the Senior Courts Act 1981 (legislation.gov.uk), and PART 28 - COSTS (justice.gov.uk) Rule 28.1 provides that the court "may at any time make such order as to costs as it thinks just". Rule 28.3 contains rules specific to financial remedy proceedings.

Such costs can also include the costs of non-court dispute resolution in certain circumstances, and therefore this power is available in principle to help encourage people to try to agree arrangements outside of court. The power to order costs is rarely used in children cases. The court has generally been reluctant to make an order for costs in children cases as it could risk increasing tensions and discourage parents/carers from seeking what they consider to be in the best interests of the child.[73]

The starting position in financial remedy proceedings is that the court will not make a costs order. However, they can be made if the court thinks that it is appropriate to do so, at any stage of the proceedings, because of the conduct of a party in the case (whether before or during proceedings). In making this decision the court must take into account a number of factors, including any open offer to settle the case which has been made, and the financial impact of any costs order on the parties. Costs orders are more common in financial remedy cases than children cases.

[73] See for example *R v R (Costs: Child case)* [1997] 2 FLR 95 (CA).

What government action might address

Costs orders: We are keen to see courts using costs 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. We are proposing to increase the use of costs orders in appropriate cases, both in the short term and after the introduction of the requirement to mediate outlined in Chapter 3.

The Lord Chancellor has asked the Family Procedure Rule Committee to review the Family Procedure Rules on use of costs orders. The Committee has decided to launch their own consultation on these issues which will be published in early 2023.

We also intend 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. This could include legal costs, the application fee, and the costs of any attempted non-court dispute resolution such as mediation. This could also include a separate order for the costs to the state

to be recovered, for example the costs of state funded mediation.

We want costs orders to be available to, and used by, the court in several situations. Firstly, courts should consider making costs orders against the person responding to the application (the respondent) where they have not made a reasonable attempt at mediation before court without a valid exemption. In such cases, the other party will have been able to make their application to court (as set out in Chapter 3), but the respondent will risk costs orders against them at the end of the proceedings if they have not made a reasonable attempt to mediate and particularly if they do not make a reasonable attempt to mediate after the proceedings have started.

Courts should also consider ordering costs against applicants who did not attempt mediation before court on the basis of an exemption which the court finds later was not validly claimed.

If a case has been ordered to mediation by the court – either because an exemption was invalidly claimed or because the case has become suitable (see next section), then costs orders should also be available

where one party has not made a reasonable attempt at mediation at that stage.

Finally, costs orders should also be considered where the court decides that one party dragged out court proceedings by refusing to accept a reasonable offer from the other party to the case.

We are, however, keen to avoid a situation where costs orders are used where a case is not suitable for mediation – such as domestic abuse circumstances. One possible situation is where the application is part of, or indicates the start of, a pattern of court applications which a court finds are aimed at causing or part of a pattern of harm and distress to the other person, including where proceedings could be a form of continuing domestic abuse, and that other party refuses to engage in mediation either before or during court proceedings. Another possible situation is where a financially astute party uses threats or coercion to pressure the other person into agreeing something via mediation.

To ensure costs orders are used in appropriate cases, we think that any strengthening of the approach via legislation must still include judicial discretion, so that a judge can assess all the circumstances of the case,

including the suitability of the dispute for mediation, the relationship between the parties and the history of court applications and proceedings.

We are aware that the use of costs orders in private family law children proceedings has historically been, and remains, limited. This is generally because they risk increasing tensions which can impact on the child(ren), discourage parents/carers from seeking what they consider to be in the best interests of the child, and diminish the available family funds to the detriment of the child.[74] These considerations will remain valid in many cases. However, given the established evidence on the impact of prolonged exposure to conflict on children's wellbeing[75] we think that costs orders have the potential to be a useful tool to encourage parents/carers to attempt to reach an early resolution, by supporting the requirement to mediate, and therefore their increased use could promote the best interests of the child(ren).

Court powers to direct parties back to mediation and gatekeeping: We want to give the court a power to direct parties to make a reasonable attempt at

[74] *R v R (Costs: Child case)* [1997] 2 FLR 95 (CA).

[75] As discussed in the introduction

mediation. The court could use this power in a number of circumstances. Firstly, it could order parties to make a reasonable attempt at mediation where they did not attend mediation before court, either due to the respondent's refusal to do so, due to an exemption being invalidly claimed, or because an exemption was validly claimed but circumstances have changed (for example, if an initially urgent issue has been addressed). As discussed above, if one party does not then make a reasonable attempt to mediate, in breach of the court's order, the court could consider costs orders against them. We are seeking views on this proposal and on how a court would determine if parties had made a reasonable attempt to mediate.

Fees

Background and where we are now

Most private law children applications start with a single fee of £232, paid by the applicant at the beginning of proceedings. The size of the application fee has been changed over time to account for inflation but has not changed in real terms since 2008. Following payment of the fee, the court administers the case and arrives at an outcome, and this process is likely to involve a number of judge-led hearings. Fee reductions and remissions are provided to those with low levels of income and savings (under a scheme called “Help with Fees”).

However, the court fee has never been close to covering the typical cost of a private law case. Based on our most recent estimate of the cost to the state of a private law application, only around 20% of the private law system is recovered by court fees – the remainder is covered by general taxation. This level of cost recovery is far from the standard practice recommended in HM Treasury guidance (*Managing Public Money*) which states that fees and charges should generally aim to achieve 100% cost recovery.

The cost of a court fee may also compare unfavourably to the cost of alternative forms of resolving disputes, such as mediation. This may have the impact of pricing these alternatives out. As set out in earlier chapters, the Government's view is that for many families, these alternative methods of agreeing arrangements would have been more suitable in resolving the issues at hand and reducing the impact of prolonged conflict on any children involved.

The family justice system has also changed substantially since 2008. Some of these changes have been identified in this consultation, such as reforms to legal aid in 2012 and the introduction of the Child Arrangements Programme in 2014. This consultation proposes further far-reaching reforms to the process to encourage take-up of parenting programmes and mediation prior to attendance at court. We have also recently published a consultation on reforming the Help with Fees remission scheme to ensure that fees are affordable for those on low incomes. Given all of these changes, the Government believes that the time is right to consider whether the level of the court fee meets the right balance between maintaining access to justice, minimising the burden on the general taxpayer, and encouraging the use of

alternative methods of reducing conflict other than the court.

What government action might address

The Government is currently reviewing the fees structure in the family court. For private law children cases, this involves considering whether the £232 application fee meets an appropriate balance between maintaining access to justice; ensuring the resourcing of an efficient and effective courts system; and encouraging the use of alternative forms of dispute resolution where it is suitable. We will bring forward proposals in due course, taking into account the outcome of this consultation.

Questions

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?

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?

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?

Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

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
- No
- Don’t know

Please provide reasons for your answer

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

- Yes
- No
- Don’t know

Please provide reasons for your answer

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)

Please provide reasons for your answer

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?

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

- Yes
- No
- Don’t know

Please provide reasons for your answer

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

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

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?

Question 9:

a) Do you agree that urgent applications, child protection circumstances (as set out in the current MIAM exemption), and cases where there is specified evidence of domestic abuse, should be exempt from attempting mediation before going to court?

- Yes
- No
- Don’t know

Please provide reasons for your answer

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

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

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?

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

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

- Yes
- No – additional regulation required
- Don't know

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

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?

- Mediation only
- Other forms of non-court dispute resolution (NCDR)
- Don't know

Please explain your answer

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

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

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?

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?

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

(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?

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?

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?

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?

Thank you for participating in this consultation exercise.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	☐ (please tick box)

Address to which the acknowledgement should be sent, if different from above	

Are you content for the Ministry of Justice to include your affiliated organisation in a public list of respondents to the consultation exercise?

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details/How to respond

Please send your response by 15 June 2023 to:

Family Justice Policy Team
Ministry of Justice
102 Petty France
London SW1H 9AJ

Email: privatefamilylawconsultation@justice.gov.uk

Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at https://consult.justice.gov.uk/.

Alternative format versions of this publication can be requested from privatefamilylawconsultation@justice.gov.uk.

Publication of response

A paper summarising the responses to this consultation will be published following the conclusion of the consultation. The response paper will be available on-line at https://consult.justice.gov.uk/.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 2018 (DPA), the General Data Protection Regulation (UK GDPR) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with

which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

Impact Assessment, Equalities and Welsh Language

Impact assessment

An Impact Assessment has been produced and will be published separately alongside this paper.

Equalities

Policy proposals summary

1. This Private Family Law consultation considers how we can support families to agree both child arrangements and financial arrangements when parents or couples separate.

2. The consultation document is known as a White Paper – these documents are produced by the Government with the aim of allowing people both inside and outside of Parliament to feedback on proposals.

3. The consultation asks questions under three main themes:
   a. **Supporting parents to resolve issues:** We will consult on what resources, guidance or support

the government can provide which will, in appropriate cases, help more separating families to resolve their disputes without resorting to court. We will also consult on introducing a requirement for parents/carers to attend a co-parenting programme, where considered suitable.

b. **Agreeing child and finance arrangements through mediation:** We will consult on introducing compulsory pre-court mediation and what this might look like for separating parents or others who cannot agree child or finance arrangements. We will consult on what circumstances this requirement should apply. We will also consult on how to get the mediation sector ready, seeking views on what steps are needed to increase the sector and whether additional accreditation and training is required.
c. **Accountability and costs in court proceedings:** We will consult on how costs orders could be used to enforce the requirement to mediate and to discourage parents/carers from unnecessarily prolonging court proceedings if they reach court. We will also seek views on how we could improve the fee structure to better reflect costs of coming to court and remove disincentives

to people for attempting to resolve their dispute outside of court.

Equality Duties

4. The Public Sector Equality Duty (PSED) is set out in section 149 of the Equality Act 2010. The PSED requires the Minister to pay due regard to the need to:
   a. Eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct under the Equality Act 2010;
   b. Advance equality of opportunity between different groups of persons who share a protected characteristic and those who do not; and
   c. Foster good relations between different groups of persons who share a relevant protected characteristic and those who do not.

5. The protected characteristics are age, disability, civil partnership, ethnicity, gender reassignment, marriage, pregnancy and maternity, sex, sexual orientation.

6. In the consultation document we have asked respondents for their views and evidence of other equality impacts to ensure that the proposed

changes comply with the PSED considerations (see section titled ‘Equality Considerations’).

Direct discrimination

7. We consider that the proposals in the Private Family Law consultation to support parents to resolve issues outside of court, through mediation, are not directly discriminatory as the proposals would apply equally to those irrespective of their protected characteristics. We do not consider that this change would result in adults, children, employees and mediators being treated less favourably because of their protected characteristics as any future proposals based on the evidence received would aim to strengthen the process and support for families resolving child arrangements, regardless of any protected characteristic.

Indirect discrimination

8. We have considered indirect discrimination and whether proposals in the Private Family Law consultation would be likely to put adults, children, employees and mediators sharing a protected characteristic (including those identified in our Evidence and Analysis section) at a particular

disadvantage when compared to those who do not share that characteristic.

9. Our data in the evidence and analysis sections shows that when compared to the general population adults and children with a) a white Gypsy or Irish Traveller background, b) a mixed or multiple ethnic background and in particular two of the mixed ethnicity backgrounds c) any other mixed or multiple ethnicity background and d) a mixed white and black Caribbean background, and e) those with any other ethnic background are over-represented in private family law. Children with an autistic spectrum diagnosis were also over-represented compared to those in the general population.

10. Our evidence also shows that men are over-represented as applicants in Private Family Law proceedings, whilst mothers are a higher proportion of respondents.

11. Children in the 5–10-year-old age group are also over-represented (compared to other child age groups) in Private Family Law proceedings.

12. We consider that these groups may be positively impacted by our proposals which aim to strengthen earlier resolution of conflict and support families to resolve child arrangements outside of court where possible. After due consideration, we believe the proposals are a proportionate means of achieving our legitimate aim of supporting families to resolve child arrangement regardless of any protected characteristic.

Discrimination arising from disability and duty to make reasonable adjustment

13. We recognise that it remains important that we continue to make reasonable adjustments for individuals with disabilities who are within a family reaching children and financial arrangements, to ensure appropriate support is given. Our initial view is that the mediation sector and parenting programmes already take steps to ensure accessibility for persons with disabilities, such as the availability of online mediation, and that provided these steps continue and are further tailored to the new proposals, there will be no particular disadvantage to persons with disabilities.

Harassment and victimisation

14. We do not consider that the areas of change consulted in the Private Family Law consultation on will give rise to harassment or victimisation within the meaning of the Equality Act, especially considering we are proposing exemptions to a requirement to mediate for cases where domestic abuse is present.

Advancing equality of opportunity

15. Consideration has been given to how these proposals impact on the duty to advance equality of opportunity by meeting the needs of adults, children and employees who share a particular characteristic, where those needs are different from the need of those who do not share that particular characteristic.

16. We believe the Private Family Law consultation will benefit all families by helping them to reach agreements more quickly and in a less adversarial way, and this means it will benefit groups with certain protected characteristics who are overrepresented in these kinds of proceedings.

Fostering good relations

17. We have considered this objective to foster good relations between people who share certain protected characteristics and those who do not. The Private Family Law consultation proposals will support parents/carers to resolve issues outside of court. Reducing lengthy disputes between parents/carers is likely to have a positive impact on fostering good relations.

Evidence and Analysis

18. We explored available data within Ministry of Justice (MoJ), Children and Family Court Advisory and Support Service (Cafcass) and from wider academic research about the characteristics of the children, adults, and Cafcass employees. This data details characteristics of individuals in private family law, but is not limited to child arrangement cases, although they do make up the majority of cases.[76]

[76] Cusworth, L. et al. (2021). Uncovering private family law: Who's coming to court in England? Summary. London: Nuffield Family Justice Observatory. nfjo_whos-coming-to-court_england_summary.pdf (nuffieldfjo.org.uk)

Adults

19. This data is about adults and children for the two-year period 2017/18 to 2019/20, we only have joint data for adults and children. The section below on children has separate data for the year 2020/21.

20. **Age**: The majority of both mother and father applicants were in their late twenties and thirties, not dissimilar to parents in the general population.[77]

21. **Disability:** There is no available data for private family court users in England. However, in Wales family dispute resolution (FDR) projects, which were mainly mediation have found it difficult to engage with adults who have mental health or addiction issues. Such adults are found to be

[77] nfjo_whos_coming_to_court_England_full_report_FINAL-1-.pdf (nuffieldfjo.org.uk)

statistically overrepresented in court proceedings (Cusworth et al. (2021)[78]

22. **Ethnicity:**
    a. **Gypsy or Irish Traveller background:** Adults and children with this background are over-represented in private law (0.1%, 2017/18 to 2019/20) compared to the general population (<0.1%, 2019 ONS estimates).[79]
    b. **Mixed or multiple ethnic background:** Overall adults and children from these ethnic backgrounds are over-represented in private law cases (6.3%, 2017/18 to 2019/20), which is around three and a half times higher than the

[78] Cusworth, L. et al. (2021); Uncovering private family law: Adult characteristics and vulnerabilities (Wales). London: Nuffield Family Justice Observatory. Uncovering private family law: Adult characteristics and vulnerabilities (Wales) - Nuffield Family Justice Observatory (nuffieldfjo.org.uk)

[79] What do we know about ethnicity in the family justice system in England? - Nuffield Family Justice Observatory (nuffieldfjo.org.uk)

proportion in the general population (1.9%, 2019 ONS estimates).[80]

c. **Any other mixed or multiple ethnicity background:** Adults and children in this sub-group of mixed ethnicities where over-represented in private law cases (2.2%, 2017/18 to 2019/20), compared to the general population (0.5%, 2019 ONS estimates).[81]
d. **A mixed white and black Caribbean:** the proportion of adults and children in this sub-group of mixed ethnicities was almost four times higher in private law cases (1.9%, 2017/18 to 2019/20) than in the general population (0.5%, 2019 ONS estimates).[82]
e. **Any other ethnic background:** Adults and children in this group were also slightly over-

[80] What do we know about ethnicity in the family justice system in England? - Nuffield Family Justice Observatory (nuffieldfjo.org.uk)

[81] What do we know about ethnicity in the family justice system in England? - Nuffield Family Justice Observatory (nuffieldfjo.org.uk)

[82] What do we know about ethnicity in the family justice system in England? - Nuffield Family Justice Observatory (nuffieldfjo.org.uk)

represented in private law (2.2%2017/18 to 2019/20), compared to the general population (1.5%% 2019 ONS estimates).[83]

23. **Religion:** No available data.

24. **Sexual orientation:** No available data.

25. **Sex and gender reassignment:** Private law cases are primarily driven by male applicants, typically non-resident fathers. The proportion of standard parental applications being brought by fathers fluctuates around 65% and 69% across the period 2010/11–2019/20.[84] Mothers are a higher proportion of respondents in Private Family Law. There is no data available about users who have undertaken gender reassignment.

Children

26. We have reviewed data from the Cafcass 2021/22 annual report, which includes data about protected characteristics of children in private family law.

[83] What do we know about ethnicity in the family justice system in England? - Nuffield Family Justice Observatory (nuffieldfjo.org.uk)

[84] nfjo_whos_coming_to_court_England_full_report_FINAL-1-.pdf (nuffieldfjo.org.uk)

This is not limited to only child arrangement cases, although 89.5% of private law cases had a lead application relating to child arrangements.[85]

27. **Age:** In 2021/22, two fifths of children in private law proceedings that Cafcass worked with are aged 5–10 years. This is higher than public law proceedings and the wider population.[86]

28. **Disability:** In the 2021/22 Cafcass report, 10.2% of children had just one condition or disability recorded and 1.3% had multiple conditions or disabilities recorded[87]. In comparison with national data collated by Department for Education on children with an Educational Health Care Plan or Special Educational Need, recorded incidence of disability is much lower among the children

[85] Annual reports - Cafcass - Children and Family Court Advisory and Support Service (Annual Report and Accounts for 2021/22)

[86] Annual reports - Cafcass - Children and Family Court Advisory and Support Service (Annual Report and Accounts for 2021/22)

[87] Annual reports - Cafcass - Children and Family Court Advisory and Support Service (Annual Report and Accounts for 2021/22)

Cafcass worked with (8.1% compared with 15.9% in the DfE data).[88] This difference seems likely to be due to under recording rather than a real difference in incidence.

a. For children with an **autistic spectrum disorder**, 4.4% had been involved with a private family law case working with Cafcass, which is lower than the population as a whole (12.3%).[89]

29. **Ethnicity:** By the end of March 2022, ethnicity was recorded for 86.6% of children in private law proceedings.[90]

b. Any other mixed or multiple ethnicity: In private law, the proportion of children with this ethnic background was 10.2% which is higher than the

[88] Annual reports - Cafcass - Children and Family Court Advisory and Support Service (Annual Report and Accounts for 2021/22)

[89] Annual reports - Cafcass - Children and Family Court Advisory and Support Service (Annual Report and Accounts for 2021/22)

[90] Annual reports - Cafcass - Children and Family Court Advisory and Support Service (Annual Report and Accounts for 2021/22)

national child population as a whole which is 5.2%.[91]

30. **Gender Reassignment:** No available data

31. **Religion:** No available data.

32. **Sexual orientation:** No available data.

33. **Sex:** Children in private law proceedings are slightly more likely to be boys than girls, this is in line with the national population of children where the ratio of boys to girls is greater than 1:1 for ages up to 25.[92]

View from the data

34. Based on the data above, we believe that more adults and children from some ethnic minority and age groups may be affected by the Private Family Law consultation due to their over-representation within the private family law system. We believe that the proposed changes will likely have a

[91] Annual reports - Cafcass - Children and Family Court Advisory and Support Service (Annual Report and Accounts for 2021/22)

[92] Annual reports - Cafcass - Children and Family Court Advisory and Support Service (Annual Report and Accounts for 2021/22)

positive effect on adults and children with these protected characteristics as it seeks to support them to resolve child arrangements through more appropriate routes.

Data limitations

35. While efforts have been made to source information related to these areas covered by the consultation, there are still gaps in our evidence base. Protected characteristics are not recorded at 100% for every Cafcass record, so we may not have a full picture of the characteristics of adults and children in private family law. We do not have access to recorded demographic characteristics relating to religion, for example. We were not able to identify protected characteristics for practitioners in the mediation sector.

Your views are important

36. We would welcome views, experiences and other evidence from and about families resolving child arrangements and practitioners in the mediation sector with protected characteristics as set out in the Equality Act 2010.

Welsh Language Impact Test

The Welsh language impact is addressed in the Impact Assessment published alongside this paper.

Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the Cabinet Office Consultation Principles 2018 that can be found here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691383/Consultation_Principles__1_.pdf

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