Ministry of Justice

FAMILY PROCEDURE RULE COMMITTEE

CONSULTATION ON STRENGTHENING EXISTING RULES AND PRACTICE DIRECTIONS TO ENCOURAGE EARLIER RESOLUTION OF PRIVATE FAMILY LAW CHILDREN AND FINANCIAL REMEDY ARRANGEMENTS

Introduction

1. The Committee presents a consultation on proposals to strengthen the existing provisions in the Rules and PDs in relation to attendance at MIAMs and in relation to NCDR.

2. MoJ Policy worked closely alongside the Committee and the Group to develop this consultation, and it links with the Government's wider programme of work to encourage the earlier resolution of private family law children and financial remedy arrangements.

3. The Committee are of the view that it is not appropriate to provide drafts of proposed amendments to the Rules or PDs at present, as the details of the proposals are subject to the responses of consultees to the questions outlined in this document. In some areas the Committee have made specific proposals, and in others the Committee is seeking views on prospective options for how to progress. Therefore, at this stage the Committee is **consulting on the principle of the proposed changes to the Rules and PDs.**

Glossary

4. *Below is a glossary for all defined terms included in this consultation document.*

   i. "the Committee" - the Family Procedure Rule Committee, which is responsible for making the Rules and which is the body carrying out this consultation,

   ii. "the Group" - the Private Family Law Early Resolution Working Group, which is an advisory Group set up by the Committee (see paragraphs 5 to 8 below),

iii. “MoJ” - the Ministry of Justice,

iv. “the FMC” - the Family Mediation Council, which is a non-profit organisation that maintains a professional register of family mediators. The FMC provides the public with information on mediation and support for how to access it,

v. “MIAM” - a Family Mediation Information and Assessment Meeting. These meetings must be attended by prospective applicants in private family law children and financial remedy cases, unless an exemption applies; and a court can require one or both parties to attend such a meeting after such court proceedings have begun,

vi. “NCDR” - non-court dispute resolution, which refers to methods of resolving a dispute outside of the normal court process, for example by mediation, collaborative law, private financial dispute resolution appointments or family arbitration,

vii. “the Rules” - the Family Procedure Rules 2010, which set out the practice and procedure to be followed in family proceedings in the family court and the High Court,

viii. “PD” - Practice Direction, a document which supplements the Rules and sets out further detail regarding the practice and procedure to be followed in family proceedings,

ix. “financial remedy” - a court order or other arrangement that can be made in relation to money and property in a family law case, for example on the divorce of a married couple or in relation to provision for a child of unmarried/unpartnered parents,

x. “private family law children” - the term used to describe cases where people are trying to resolve issues in relation to a child, for example where separated parents want to work out arrangements about with whom a child is to live, spend time with or otherwise have contact with,

xi. “ENE” - early neutral evaluation is any procedure where a neutral evaluator reviews a case and informs both parties of the most likely outcome were the case to proceed through the family courts,

xii. “single lawyer model” - the term referring to the provision of regulated legal advice by one lawyer on behalf of both parties.

The Group

5. The Group is an advisory group which was established by the Committee in July 2022 and invited to work through measures to strengthen existing Rule and PD

provision around MIAMs and NCDR in private family law children and financial remedy proceedings, in order to promote earlier resolution of such cases. The Group contains several members who also sit on the Committee (judges and solicitors/barristers), as well as other members of the judiciary, and mediators, including an FMC member.

6. The role of the Group was to support MoJ Policy officials to formulate options to put to the Committee for Rule and PD amendments by constructively working through the benefits, challenges and risks of all areas in scope. In doing this, the Group also considered any practical implications of the proposed changes and made recommendations to the Committee in light of their conclusions.

7. The Group focused on the following measures in relation to both private family law children cases and financial remedy cases:

    a. whether certain MIAM exemptions should be removed/amended to ensure more prospective applicants attend MIAMs, where safe and appropriate;
    b. whether it is possible to bring forward the point at which evidence of a claimed MIAM exemption must be provided to the court to the application stage;
    c. whether it is possible to bring forward the point at which the court considers whether a MIAM exemption has been validly claimed to an earlier stage in the proceedings, such as the gatekeeping stage;
    d. whether short adjournments in proceedings should be encouraged to order suitable parties to attend a MIAM and/or for courts to give strong encouragement to attend some form of NCDR;
    e. how the existing court powers to make costs orders might be strengthened if a party fails to "reasonably engage" with NCDR;
    f. whether the Rules could be amended to increase the efficiency of MIAMs; and
    g. whether any changes to the Rules might encourage parties to engage with NCDR before coming to court.

8. The Group put various proposals to the Committee over the course of several months in 2022. The Committee agreed that the proposed measures and options for reform should be consulted on. This consultation paper sets out the areas the Committee has discussed and asks consultees a series of questions. The Committee will consider all responses to help inform their decisions on any prospective Rule and PD changes.

The Committee

9. Under section 75 of the Courts Act 2003, the Committee has a statutory role to make Rules of court governing practice and procedure in family proceedings.

That power is to be exercised to secure fairness, accessibility and efficiency in the family justice system. Rules are also required to be both simple and simply expressed.

10. Owing to the statutory remit of the Committee, this consultation does not raise matters outside the scope of the Rules and PDs, such as the consideration to reform other legislation. As such, Consultees are reminded to bear the Committee's remit in mind when responding to the questions raised in this consultation document.

Proposed Changes to the Family Procedure Rules

Section 1 – MIAMs

Proposed Amendments to rule 3.8 of the Rules - Circumstances in which the MIAM requirement does apply (MIAM exemptions and mediator's exemptions)

11. Section 10 of the Children and Families Act 2014 states that, before making certain types of applications in family law cases, a person must attend a MIAM. This requirement is subject to any exemptions set out in the Rules (at rule 3.8).

12. The Committee has considered whether existing exemptions from the statutory requirement to attend a MIAM could be removed or amended with a view to ensuring that the MIAM requirement is only set aside in the cases where it is appropriate or necessary.

13. Consultees are referred to the below table which details the current MIAM exemptions/evidence requirements the Committee are considering amending or removing (column 1), the detail of the current provision (column 2) and the reasoning for, and scope of, the proposed amendment (column 3). (NB: column 3 sets out the principles of the proposed changes, rather than setting out exact proposed wording of amendments to the Rules at this stage).

Below is a table outlining the current provision in the Rules and the proposed amendment(s).

MIAM Exemption/ Evidence Requirements	Current Provision	Proposed Amendment
Urgency r3.8(1)(c)(ii)(ad)	*Urgency* *(c) the application must be made urgently because –* *(ii) any delay caused by attending a MIAM would cause -* *(ad) unreasonable hardship to the prospective applicant*;	**Amend r3.8(1)(c)(ad) to remove "unreasonable hardship" and replace with "significant financial hardship"** Reasoning To make clear that this exemption relates to financial

		hardship and therefore is likely to only be relevant in financial remedy cases (rather than private family law children cases)
Previous MIAM attendance or previous MIAM exemption – NCDR attempted r3.8(1)(d)(ii)	*Previous MIAM attendance or MIAM exemption* *(d) –* *(i) in the 4 months prior to making the application, the person attended a MIAM or participated in another form of non-court dispute resolution relating to the same or substantially the same dispute; or* *(ii) at the time of making the application, the person is participating in another form of non-court dispute resolution relating to the same or substantially the same dispute;*	**(1) Amend to include a non-exhaustive list of examples of types of NCDR being available to applicants** **AND** **(2) Remove subparagraph r3.8(1)(d)(ii)** **AND** **(3) Amend to ensure that exemptions based on NCDR attendance are supported by evidence from the NCDR provider** Reasoning For proposal (1) – to ensure there are examples of common NCDR types available as a suggestion to parties. For proposal (2) – to ensure that parties still attend MIAMs even if they are already participating in NCDR, as MIAMs can still be helpful to refer to potentially more suitable forms of NCDR and provide other services. For proposal (3) – to ensure that the court has information about the type of NCDR that has taken place, to help inform its decision as to whether parties should still be required to attend a MIAM.
Previous MIAM attendance or previous MIAM exemption – NCDR attempted –	*The MIAM requirement does not apply if –* *(e) –* *(i) in the 4 months prior to making the application, the person filed a relevant family*	**Remove sub-paragraphs (e) and (g).** Reasoning Circumstances can change, and therefore even where a

r3.8(1)(e), (f) and (g)	*application confirming that a MIAM exemption applied; and* *(ii) that application related to the same or substantially the same dispute; or* *(f) –* *(i) the application would be made in existing proceedings which are continuing; and* *(ii) the prospective applicant attended a MIAM before initiating those proceedings; or* *(g) –* *(i) the application would be made in existing proceedings which are continuing; and* *(ii) a MIAM exemption applied to the application for those proceedings; -*	MIAM exemption applied previously, it should still be necessary to attend a MIAM before making a court application (unless a different exemption applies currently).
Accessibility – r3.8(1)(k)	*Other* *(k) –* *(i) the prospective applicant is or all of the prospective respondents are subject to a disability or other inability that would prevent attendance at a MIAM unless appropriate facilities can be offered by an authorised mediator;* *(ii) the prospective applicant has contacted as many authorised family mediators as have an office within fifteen miles of his or home (or three of them if there are three or more), and all have stated that they are unable to provide such facilities; and* *(iii) the names, postal addresses and telephone numbers or e-mail addresses for such authorised family mediators, and the dates of contact, can be provided to the court if requested; -*	**Amend the wording so the exemption would not apply where the prospective applicant or all of the prospective respondents can access a MIAM online/ by video, even if they are not able to attend in person.** Reasoning To account for MIAMs held online and through video which now take place frequently.

Detention, bail conditions, license terms – r3.8(1)(l)	*Other* *(l) the prospective applicant or all of the prospective respondents cannot attend a MIAM because he or she is, or they are, as the case may be –* *(i) in prison or any other institution in which he or she is or they are required to be detained;* *(ii) subject to conditions of bail that prevent contact with the other person; or* *(iii) subject to a licence with a prohibited contact requirement in relation to the other person; or*	**As above, amend the wording of (l)(i) so that the exemption would not apply if the prospective applicant or all of the prospective respondents could access online or video MIAMs.** Reasoning To ensure that prison Governors consider whether a prisoner can attend an online or video MIAM which may be more suitable than producing the prisoner in person. *(Consultees should note that victims of domestic abuse where the respondent is in prison shall still be able to claim the domestic violence exemption)*
Habitual residence – r3.8(1)(m)	*Other* *(m) the prospective applicant or all the prospective respondents are not habitually resident in England and Wales*	**Remove this provision r3.8(1)(m)** Reasoning This relates to geographical location, and therefore is no longer relevant given the availability of online and video MIAMs.
Mediator availability r3.8(1)(o)	*Other* *(o) –* *(i) the prospective applicant has contacted as many authorised family mediators as have an office within fifteen miles of his or her home (or three of them if there are three or more), and all of them have stated that they are not available to conduct a MIAM within fifteen business days of the date of contact; and* *(ii) the names, postal addresses and telephone numbers or e-mail addresses for such authorised family*	**(1) Amend to specify that this exemption should only apply if the applicant is unable to access a MIAM online/ by video.** **(2) Amend so that the details of contacted mediators must be provided to the court (rather than can be provided if requested).** Reasoning To account for MIAMs held online and through video which now take place frequently.

	mediators, and the dates of contact, can be provided to the court if requested; -	
Distance from mediators – r 3.8(1)(p)	*Other* *(p) there is no authorised family mediator with an office within fifteen miles of the prospective applicant's home; or*	**As above, amend the wording to account for the prospective applicant or all of the prospective respondents not being able to access a MIAM online/ by video.**
Mediator exemptions – r 3.8(2)	*Other* *(2) an authorised family mediator confirms in the relevant form (a 'mediator's exemption') that he or she is satisfied that –* *(a) mediation is not suitable as a means of resolving the dispute because none of the respondents is willing to attend a MIAM; or* *(b) mediation is not suitable as a means of resolving the dispute because all of the respondents failed without good reason to attend a MIAM appointment; or* *(c) mediation is otherwise not suitable as a means of resolving the dispute.*	**Remove sub paragraph (c) –** Reasoning From our engagement with the FMC and mediators, we have been made aware that mediators would not use this exemption, as all scenarios are covered by other exemptions above, and subparagraphs (a) and (b).

Standalone MIAMs

14. Rules 3.8(1)(i), (2)(a) and (b) of the Rules set out MIAMs exemptions which apply where the prospective respondent is not contactable due to no details being held for them, and/or where the respondent is not willing to engage with a MIAM.

15. In relation to these exemptions, the Committee has discussed the benefits of the applicant attending a 'standalone MIAM' (by which is meant a MIAM attended by solely the applicant, with the respondent neither attending jointly with the applicant, nor attending their own MIAM). The Committee has discussed how the MIAM requirement could apply to prospective applicants even if respondents cannot be located or will not engage with a MIAM, given the wider triage role that can be undertaken in a MIAM (such as signposting parties to support services), such that the Committee considered whether MIAMs have value in being attended by an applicant, even where the respondent will not engage or cannot be contacted.

16. The Committee discussed that an applicant attending a standalone MIAM without being able to contact the respondent is unlikely to be able to arrange mediation or other forms of NCDR afterwards. The Committee has considered the fact that, despite there being benefits to an applicant attending a standalone MIAM, particularly the opportunity to refer parties to NCDR rather than pursuing court proceedings, even if this occurs after the application has reached the court.

17. Taking all of these factors into account, the Committee would welcome views on whether the exemptions relating to the respondent being uncontactable or unwilling to engage with a MIAM ought to be removed, meaning applicants would need to attend a standalone MIAM before they could make an application to court. The alternative would be to retain those exemptions, noting that the court already has the power to direct *both* parties to attend a MIAM, after the case reaches court (rule 3.4(1)(a) of the Rules).

Ordering Parties to Attend a MIAM when Circumstances Change

18. The Committee is keen to ensure that where parties meet the MIAM requirement that they attend one, even if that requirement is met not before application, but is met after court proceedings have been started. The Committee notes that circumstances in a case may change, and therefore mean that MIAM exemptions that may have applied before application, may often no longer apply later, after court proceedings have started.

19. **The Committee considers that the court should have the power (post-application) to direct a MIAM if the claimed exemption (which was valid when first claimed) is no longer applicable.** The Committee considers that this could apply where *any* claimed exemption is no longer applicable, but to provide consultees with some examples:

    i. the urgency exemption at r3.8(1)(c) – if the case is deemed no longer urgent or the urgent issue has been dealt with, parties may be ordered to attend a MIAM post-application (where safe to do so); and
    ii. the exemption based on the lack of contact details for the respondent at r3.8(1)(i) – the court may take steps, post-application, to establish the whereabouts of the respondent (for example by requesting contact details from the Department for Work and Pensions). If the court is able to establish such details, it may consider it appropriate to then order both parties to attend a MIAM.

Conduct of MIAMs

20. The Committee wishes to ensure that people attending MIAMs are provided with information which enables them to consider multiple forms of NCDR, not just

mediation. This requirement is already set out in legislation at section 10(3) of the Children and Families Act 2014.[1]

21. Rule 3.9 of the Rules makes provision about the conduct of MIAMs. In particular, rule 3.9(2)(a) stipulates that the authorised family mediator conducting the MIAM must provide information about the principles, process and different models of mediation, and information about other methods of NCDR. Rule 3.9(2)(b) stipulates that the authorised family mediator conducting the MIAM must assess the suitability of mediation as a means of resolving the dispute.

22. The Committee has considered whether rule 3.9 should be more prescriptive about how a MIAM is conducted and what it involves. **The Committee proposes that the Rules be amended to ensure the person conducting the MIAM is required to assess the suitability of all forms of NCDR and suggest to the participants which form(s) of NCDR could be most suitable and why. As part of this, the Committee proposes that the person conducting the MIAM provides the participants with information on how to proceed with the different types of NCDR, should they be suitable and of interest to the parties.**

<u>The Timing of When MIAM Exemption Evidence Should be Provided to the Court</u>

23. The Rules and PD3A require evidence of certain MIAMs exemptions to be provided. The current exemptions which require evidence to be provided are:

    a) the domestic violence exemption – for example, evidence of an arrest, police caution, criminal proceedings, or a conviction in relation domestic violence offence (r3.8(1)(a) of the Rules and PD3A, paragraph 20)
    b) the bankruptcy exemption – for example, evidence of an application/petition in relation to bankruptcy or a bankruptcy order (r3.8(1)(h) of the Rules and PD3A paragraph 21)
    c) the disability exemption – for example, to provide details of the mediator(s) contacted that could not provide the facilities to conduct a MIAM (r3.8(1)(k) of the Rules); and/or
    d) the mediator location/availability related exemptions – for example, to provide details of the mediator(s) contacted (r3.8(1)(o) of the Rules).

24. The rest of the MIAM exemptions require the applicant to assert certain things, but they do not require additional evidence to be provided verifying that assertion.

25. The current provision states that where evidence of a claimed exemption is

[1] S10(3) Children and Families Act 1984 definition of "family mediation information and assessment meeting" - sub-paragraph (c):
"*family mediation information and assessment meeting", in relation to a relevant family application, means a meeting held for the purpose of enabling information to be provided about—*
(a) mediation of disputes of the kinds to which relevant family applications relate,
(b) ways in which disputes of those kinds may be resolved otherwise than by the court, and
(c) the suitability of ***mediation, or of any such other way of resolving disputes****, for trying to resolve any dispute to which the particular application relates;"*

required, the applicant "is not required to attach any supporting evidence with their application, but should bring any supporting evidence to the first hearing" (paragraph 6 of PD3A). However, the Committee notes that first hearings can be weeks, sometimes months, after the application has been received. Furthermore, anecdotal evidence suggests that judges are unlikely to return the parties to a MIAM once they reach a first hearing, owing to waiting times in courts at present, particularly if the proceedings relate to arrangements for children, where it is important to minimise delay in resolving the issues.

26. The Committee has therefore considered that having evidence to support MIAM exemptions provided earlier in the proceedings than is currently the case would be beneficial to ensure exemptions which have not been validly claimed can be identified at the earliest opportunity (this links to the next proposal in this consultation paper).

27. **The Committee wishes to bring forward the timing so that, where evidence to support a claimed MIAM exemption is required, it is provided alongside the application to the court (for both private family law children and financial remedy proceedings).**

The Timing of When the Court Reviews Claimed MIAM Exemptions

(For private family law children proceedings only)

28. The Rules provide that if a MIAM exemption has been claimed then "the court will, if appropriate, when making a decision on allocation, and in any event at the first hearing, inquire into whether an exemption was validly claimed" (r3.10(1)). It is the Committee's understanding that generally the court first considers whether an exemption is validly claimed at the first hearing of the proceedings.

29. **For private family law children proceedings, the Committee proposes to bring forward the point at which the court must review a claimed MIAM exemption, and any supporting evidence, to the gatekeeping stage.** The gatekeeping stage is where the "gatekeeper" (a judge or a justices' legal adviser) will review the application and decide which tier of judge is most suitable to deal with the case (for example, be a lay magistrate, a District Judge, a Circuit Judge or a High Court Judge).

30. Consultees should note that the Committee considered whether to introduce the same or similar provision about the timing of a review of claimed MIAM exemptions for financial remedy proceedings. The majority of the Financial Remedy Courts only have an allocation or 'gatekeeping' stage undertaken by a judge for complex cases. The Committee understands that only two Financial Remedy Court areas gatekeep all cases. In other areas, the allocation function in non-complex cases is not carried out as these are listed for standard first appointments. The Committee determined that building an allocation or 'gatekeeping' stage for judges or justices' legal advisers into all FR proceedings now, so that they could also consider MIAMs compliance at that stage, would be very resource intensive for the judiciary and court staff. Therefore, the Committee

agreed that should the measure outlined in paragraph 29 have a noticeable impact in private family law children proceedings on the number of cases diverted back to MIAMs, the same provision for financial remedy proceedings could be considered in the future.

Section 2 – Dispute Resolution

Encouraging Engagement with NCDR

31. Rule 3.4(1)(b) of the Rules currently allows for a case to be adjourned for NCDR where "the parties agree" to it. The Committee considered how to amend the Rules to encourage the court to make greater use of adjournments, or natural gaps between stages in proceedings, to allow parties the time to attempt NCDR for both private family law children cases and financial remedy cases.

32. **The Committee proposes that the Rules be amended to provide that the court may adjourn proceedings when *the court* considers that the parties would benefit from an attempt at NCDR.** This addition would give the court greater powers to strongly encourage (but not order) parties to attempt NCDR when it considers that they may be able to reach an agreement outside of court, but it would not amount to mandating NCDR.

33. MoJ Policy would like Consultees to be aware that as part of the Government's wider programme of work on encouraging families to resolve their disputes earlier, we are working to publish a Government consultation shortly to seek views on how to encourage mediation and other forms of NCDR where safe and appropriate. Therefore, this Committee consultation will not include proposals to mandate NCDR.

34. Consultees should note that the Committee have considered several clarifications and restraints which would be in place for the proposed amendment to the Rules to be taken forward. These are as follows:

    a. **An option for the court.** The Rules would not *require* the court to adjourn to encourage the parties to engage with NCDR, but instead it would be an option the court could consider. The Rules would acknowledge the need for judicial discretion and for the court to consider if an adjournment is appropriate in a particular case.

    b. **Implications for not attending NCDR.** It must be clear that when parties return after any period of adjournment, proceedings would continue as normal, irrespective of whether NCDR was attempted or not. Any substantive decision made in the proceedings would not be affected by the refusal of one or both parties to engage in NCDR, and ultimately parties would not be *required* to attend NCDR. (But see below for proposals about possible costs consequences.)

c. **Using the time between hearings.** In addition to the proposed rule amendment for adjournments, the Committee is conscious that there will already be extended time between hearings, and appreciates the need to ensure that any new power to adjourn should not delay cases if parties could instead be encouraged to engage with NCDR in the already existing time between hearings.

d. **Judicial discretion on length of any adjournment.** Further to this, and in the context of existing backlogs, the Committee does not propose that there should be any specific maximum or minimum length of an adjournment for parties to be encouraged to undertake NCDR, and judicial discretion should be used in determining the appropriate length of time on a case-by-case basis.

e. **Timing for ordering an adjournment.** The Committee discussed the point in the course of proceedings at which an adjournment could or should be ordered for both private family law children and financial remedy cases:

   i. **For private family law children cases**, it is proposed that an adjournment could be ordered any time after the first hearing. The Committee considers that an adjournment to encourage engagement with NCDR would not be appropriate before the first hearing, given that so many parties are litigants in person and that the court may wish to hear from the parties before deciding on whether an adjournment is appropriate or not.

   ii. **With regards to financial remedy cases**, the Committee is conscious of the volume of work that will be already done before the first hearing, either by solicitors or by the parties themselves, and that parties may, by the time of the first hearing, be committed to proceed through the court process and may have already tried and failed to resolve issues outside of court. However, the Committee is also conscious that NCDR might be appropriate even when the court proceedings are quite far advanced, especially as disclosure of financial circumstances would be necessary for NCDR in any event, such that the work undertaken by parties ahead of the first hearing would not be wasted even if the case then moved to NCDR. The Committee would welcome the views of Consultees in regards on the timing of the court's consideration of whether to adjourn cases for NCDR in financial remedy proceedings.

Section 3 – Costs Orders

35. Section 51 of the Senior Courts Act 1981 states that, subject to the provision of (amongst others) rules of court, the question of making costs orders is in the discretion of the court.

36. Part 28 of the Rules makes provision in relation to costs orders in family proceedings, whereby a court may order one party to a case to pay some or all of the costs of another party.

37. In relation to private family law children cases, the starting point in the Rules is that the court may make such order for costs as it thinks just (rule 28.1 of the Rules). The Rules, by applying rule 44.2(4) of the Civil Procedure Rules 1998, provide that, in deciding what order, if any, to make the court will have regard to "*all of the circumstances*" including "*the conduct of all of the parties*".

38. However, the Committee is conscious that various decisions of the courts in private family law children proceedings mean that the reality is that orders for costs are rarely made in these cases.

39. In relation to financial remedy cases, the Rules contain a general rule that the court will not make an order for costs (rule 28.3(5)). However, it may do so where it considers that to be appropriate because of the conduct of a party in relation to the proceedings (rule 28.3(6)). Rule 28.3(7) of the Rules sets out factors the court must have regard to in deciding what costs order (if any) to make.

Costs Orders in Private Family Law Children Proceedings

40. The Committee considered whether to propose to amend the cost order provision in the Rules in respect of private law children proceedings. The Committee agreed that there were already sufficient Rules in place to permit judicial discretion to consider cost orders in private law children proceedings. For this reason, the Committee does not propose any amendments to the Rules as regards costs in these proceedings.

Costs Orders in Financial Remedy Proceedings

41. The Committee considered at length whether changes to cost orders provisions in financial remedy cases could act as a deterrent for not attending a MIAM where this is ordered by the court post-application, or where parties do not attempt to engage with NCDR (without good reason) where the court determines that a case is suitable for NCDR.

42. **The Committee proposes amendments to include express provision in the Rules for the court to factor in as a matter of "conduct" any failure to undertake a MIAM if parties are ordered to attend a MIAM post-application, when considering costs orders against a given party. The Committee notes that any such change would retain judicial discretion, so that costs orders would only be made when the court considers it appropriate in all of the circumstances of the case, rather than being required in every case of non-compliance with an order to attend a MIAM.**

43. **The Committee also proposes amendments so that where the court determines that a case is suitable for NCDR and encourages the parties to attempt it but it is clear that one party has not attempted to engage with NCDR (without good reason), then the court should factor this in as a**

matter of "conduct" when considering costs orders against that party. Again, judicial discretion would be retained under this proposal.

44. However, the Committee has considered that there may be practical concerns with these proposals, including how the court would determine whether a party has attended NCDR, and how it would determine the reason for not attending, and concerns around costs orders in such cases giving rise to satellite litigation.

Practicalities Surrounding the Adjournments and Costs Orders Proposals

45. The Committee appreciates that the court will need information about the parties' views on, and approach to, NCDR in order for the court to be able to make an informed decision about:
    a. whether to adjourn proceedings to encourage parties to engage in NCDR, and/or
    b. whether, at the end of proceedings, to make an order for costs taking into account parties' "conduct" with regards to NCDR.

46. The need for this information raises some practical questions which are explored in paragraphs 47 to 58 below:

Determining Attendance at NCDR

(Factual information from NCDR providers)

47. The Committee has considered various options for how attendance at, or attempts at, NCDR could be determined. The Committee has considered that NCDR providers could be asked to answer factual questions about parties' attendance at NCDR, to assist the court in its decision making around adjournments to encourage NCDR and/or costs orders. However, the Committee notes that any subjective determination of engagement with NCDR by the NCDR provider would be difficult to give, and could cut across the confidentiality and without prejudice nature of the NCDR process. For this reason, the Committee considers that any questions asked of the NCDR provider should focus solely on parties' attendance at, or attempts at arranging, any NCDR, rather than parties' conduct within NCDR.

48. The Committee is attracted to a proposal that that NCDR providers would be asked to provide factual information, not subjective comment, about NCDR attendance through a standard form or certificate. However, the Committee is concerned about the issue facing NCDR providers with providing confirmation to the court where a party has attempted to arrange an appointment and the other side hasn't engaged and therefore no NDCR has been undertaken, particularly given that the NCDR provider is unlikely to have been paid by the client in such a case.

49. The Committee is keen to seek views from consultees about how this could be practically managed, and if there are other ways factual information about attendance at NCDR, or attempts to arrange it, could be determined, and confirmed to the court**.**

Determining Parties' Stance on NCDR

50. The Committee considers that, for the purposes of deciding whether to adjourn to encourage NCDR and/or make an order for costs at the conclusion of proceedings, the court would need to know the parties' positions in relation to their willingness to engage with NCDR.

51. The Committee has considered proposals that there could be a pro-forma which asks each party to set out their position in relation to NCDR. This would be required to be provided to the court at the first hearing and at later stages in the proceedings.

52. Consultees should note that the Committee has considered what a pro-forma might look like. The Committee has considered that this could be a tick-box format, for ease of use. There is a concern that an open / 'free text' statement could open up an avenue for the parties to discredit one another and make accusations in relation to their reasons for not engaging in NCDR, potentially increasing conflict, and effectively seeking to plead 'conduct' through other means. This could increase the risk of satellite litigation.

53. One potential idea is that the requirement to file the pro-forma could be akin to the requirement to file the Form H which is used by parties and filed before hearings to set out how much they have spent on costs: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/905266/form-h-eng.pdf

54. Alternatively, the current application and respondent "answer" forms could be amended to add a question about each party's position in relation to NCDR, so that this is covered off at the start of proceedings, with a separate pro-forma being submitted later on in the proceedings to provide the reasoning for any non-attendance at NCDR which has been attempted/ sought to be arranged by the other party, or to set out any change in a party's views about engaging with NCDR.

55. The Committee has also considered the frequency of how and when such a pro-forma is *requested* by the court, or indeed whether it should be *required* by the court via an "Ungley-style" order (albeit here being an order that requires an open statement as to a party's position on NCDR, rather than being without prejudice save as to costs as is the case with a standard "Ungley" order). For example, consideration was given to whether it would be a standard requirement before the first hearing or whether the judge would have to order it at gatekeeping (where there is a gatekeeping stage, in private family law children cases and complex

financial remedy cases), as part of the standard directions order. The Committee is conscious that a party's reasoning for non-attendance at NCDR may change throughout proceedings, and so a balance needs to be struck with how often this information is requested, or is required to be provided.

56. In relation to cases with allegations of domestic abuse and safeguarding concerns, this proposal would not apply, as the Committee considers that the court would not encourage NCDR in those cases. Given this, the Committee would also like to explore how it can be ensured that this information about a party's views on NCDR is not requested from victims of domestic abuse. For example, it could be that where a domestic violence MIAM exemption has been claimed by the applicant, this would be an indicator to the court not to request a pro-forma. However, it is appreciated that this would not assist in cases where the respondent is the victim of domestic abuse, as respondents do not have to claim MIAM exemptions.

57. The Committee also discussed some concerns about how practically this pro-forma would be provided to the court and the need to ensure that HMCTS staff and the judiciary are not over-burdened as a result. For example, through ensuring that HMCTS can get the document to the judge on time before the next hearing and ensuring that considering the pro-forma does not impact greatly on judicial time.

58. The Committee would welcome consultees' views on the question of how and when a pro-forma could be requested by the court, or if it should be required by the court via an "Ungley-style" order.

Section 4 – Single Lawyer Models and Early Neutral Evaluation (ENE)

59. MoJ Policy discussed with the Committee the potential benefits of single lawyer models, whereby one lawyer provides regulated legal advice to both parties in relation to financial remedies. There are a number of different variations of the single lawyer model being used, including, notably, the Resolution Together model developed by Resolution.

60. ENE was also discussed by MoJ Policy and the Committee. ENE is a form of dispute resolution whereby a neutral evaluator reviews a financial remedies case and indicates to both parties (whether in writing or in person, with or without the benefit of legal representation of the parties) the likely outcome should they reach a final hearing in financial remedies proceedings.

61. The Committee is of the view that both single lawyer models and ENE warrant further exploration. The Committee appreciates that some aspects of each of these models would not involve the practice and procedure of the courts so would lie outside of the remit of the Committee. However, a question about these concepts is included in this document and the Committee and MoJ will consider the results of this consultation as part of work to take forward the discussion relating to single

lawyer models and ENE, as it is appreciated that there are a wide range of individuals and stakeholders with an interest in this area.

Consultation

Section 1 - MIAMs

Proposed Amendments to Rule 3.8 - Circumstances in which the MIAM requirement does not apply (MIAM exemptions and mediator's exemptions)

62. Consultees are referred to Paragraphs 11-13 above in respect of **MIAM exemptions**, which set out the issues to which the questions relate below:

Question 1: Do you consider that there would be any specific issues that may arise as a result of the proposed amendments to Rule 3.8? *Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".*

Question 2: Do you consider there are further amendments which could be made to Rule 3.8 to increase attendance at MIAMs (in the appropriate cases)? *Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".*

Question 3: Do you consider that there are benefits to applicants attending a pre-application standalone MIAM (in instances where the respondent doesn't engage or is not contactable, for example), as opposed to both parties attending post-application when ordered by the court? *Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".*

Conduct of MIAMs r3.9

63. Consultees are referred to Paragraphs 20-22 above in respect of **the conduct of MIAMs (r3.9)**, which set out the issues to which the questions relate below:

Question 4: Do you consider that there would be any specific issues that may arise as a result of the proposals relating to Rule 3.9? *Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".*

Question 5: Do you agree that the person conducting the MIAM should "assess" the suitability of different forms of NCDR at the MIAM? *Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".*

When MIAM Evidence Should be Provided to the Court

64. Consultees are referred to Paragraphs 23-27 above in respect of **when MIAM evidence should be provided to the court**, which set out the issues to which the questions relate below:

Question 6: Do you consider that there would be any specific issues that may arise as a result of the proposal that any required evidence of a MIAM exemption should be provided with the application to court? *Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".*

The Timing of When the Court Reviews MIAM Exemption Evidence (private family law children proceedings only)

65. Consultees are referred to Paragraphs 28-30 above in respect of **the timing of when the court reviews MIAM exemption evidence (in private family law children proceedings only)**, which set out the issues to which the questions relate below:

Question 7: Do you consider that there would be any specific issues that may arise as a result of the proposed amendments to bring forward the point at which the court must review the MIAM exemption and any supporting evidence to the gatekeeping stage for private family law children cases? *Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".*

Question 8: Do you consider that there would be any specific issues that may arise as a result of the proposal that where a claimed exemption is no longer relevant, the court has the power to order both parties to attend a MIAM, where appropriate? *Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".*

Section 2 – Dispute Resolution

Encouraging Engagement with NCDR

66. Consultees are referred to Paragraphs 31-34 above in respect of when **adjournments in proceedings may be ordered by the court where the court believes that parties could benefit from attempting to engage with NCDR**, which set out the issues to which the questions relate below:

Question 9: Do you agree with the proposal to give the court the power to adjourn private family law children proceedings and/or financial remedy

proceedings, when the court believes that NCDR would be beneficial for the parties, to allow them to attempt to resolve their issues outside of court? *Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".*

Question 10: Do you have any views on the appropriate timing for the court to adjourn proceedings in private family law children cases and/or financial remedy cases, in response to the issues raised in Paragraph 34(e)(i) and (ii)? *Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".*

Section 3 – Costs Orders

67. Consultees are referred to Paragraphs 41-58 above in respect of **costs orders in financial remedy proceedings**, which set out the issues to which the questions relate below:

Question 11: Do you consider that there would be any specific issues which would arise from amending the Rules to include an express provision for the court in financial remedy proceedings to factor in as a matter of "conduct" any failure to undertake a MIAM, if parties are ordered to attend a MIAM post-application, when considering costs orders against a given party? *Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".*

Question 12: Do you consider that there would be any specific issues which would arise in respect of the proposal that where the court determines that a financial remedy case is suitable for NCDR and encourages the parties to attempt it, but it is clear that one party has not attempted to engage with NCDR (without good reason), that the court should factor this in as a matter of "conduct" when considering costs orders against that party? *Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".*

Question 13: Do you think that attendance at NCDR should be determined through factual questions asked of the NCDR provider, or should the provider be asked to give subjective views as to whether an individual 'engaged' with NCDR (noting the satellite litigation and subjective determination concerns noted by the Committee)? *Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".*

Question 14: Do you consider that there would be any specific issues which would arise from having a pro-forma provided to the court which asks the parties to:

a) set out their position in relation to NCDR at the first hearing, and;

b) set out their reasoning following any non-attendance at NCDR (where this has been recommended by the court) or at other later stages in proceedings? *Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".*

Question 15: Do you consider that the pro-forma should be required by the court via an "Ungley-style" order, or should it be a request by the judge rather than a standard requirement? If a requirement, at what stage(s) in the proceedings should it be made? *Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".*

Question 16: Do you have any suggestions for what the pro-forma should look like or should include? *Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".*

Question 17: Do you consider that there is a way to ensure that this pro-forma is not requested from victims of domestic abuse? *Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".*

Section 4 – Single Lawyer Models and Early Neutral Evaluation (ENE)

68. Consultees are referred to Paragraphs 59-61 above in respect to the discussion of single lawyer models and **ENE for private family law child arrangement and financial remedy proceedings.**

Question 18: Do you have any views on the advantages or the disadvantages of the single lawyer models and ENE in regards to private family law children proceedings and/or financial remedy proceedings? *Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".*