National Family Mediation

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Response to the consultation on the Review of the Child Arrangements Programme

National Family Mediation (NFM) is the largest provider of family mediation in England and Wales. We are also the only non-profit provider. Established over 30 years ago, NFM was the original provider of family mediation and our network of accredited services now delivers in over 500 locations. We have experienced first-hand the impact of the failure of legislation making MIAMs compulsory.

NFM currently delivers 8,400 mediations per year, helping some 16,800 adults, as well as the children in their families. We receive 5,000 telephone calls per month with 14 per cent of these being 'converted' to take part in full mediation.

Overview

As one of the five member organisations of the Family Mediation Council (FMC), NFM endorses the collective consultation response submitted by the FMC, with one significant exception which is explained below.

Therefore, rather than rehearsing the case already put by the FMC in its response, the primary purpose of this submission is to strengthen certain elements of that document with examples from our mediators' experiences, and to highlight certain policy changes that NFM would recommend in order to achieve the strategic objectives of the Child Arrangements Programme Review.

This response is arranged in line with the eight questions provided in the consultation document.

a) SSFA: Do you support the formation of an alliance of services (the 'Supporting Separating Family Alliance')? Should this be overseen by the Local Family Justice Boards, or overseen/managed in some other way? Should the alliances have a local or national identity/organisational structure?

Whilst we support the principle that the paper's recommendations seek to implement, we would point out that there are already in place similar alliances. In 2013, the DWP established Help and Support for Separating Families (HSSF) initiative, bringing together all key services working with families. In this time of straitened resources it would be more cost effective for the Family Justice Council and the legal sector to engage with this resource. All providers listed on the HSSF website have been through an accreditation process to be included on the website.

We also believe that, if the aim is to help ensure separating families avoid court, the Judiciary should work more closely with HSSF, whose focus is entirely at the pre-court stage, rather than setting up something which would be aimed at a post-application stage.

We would also urge that if the SSFA concept is taken forward, there be a very close alignment with the DWP's Reducing Parental conflict agenda.

A further observation from our mediators is that The Family Justice Board does not meet as frequently as in the past, and when it does meet it does not invite the active involvement of family mediators. We believe agendas for these meetings should have a greater focus on out-of-court dispute resolution if the Board is to meet its stated aim of "bringing together more effectively the resources and knowledge of organisations and agencies in both the public and the private sectors." (Terms of Reference)

In relation to the pilot we have already written to HHJ Dancy offering to assist with the Dorset pilot project (Para 53) since we deliver mediation and SPIP in Dorset, and we have well-established connections with relationship support organisations in the area. To be an effective pilot it would make sense for the court to engage with the providers of SPIP, mediation, DAPP and CCCI as a core cluster as these are recognised court activities.

b) MIAM: What more could be done to refresh or revitalise the MIAM to encourage separating parents to non-court dispute resolution?

We are always open to suggestions about changing the way we operate as mediators, however we do not support a proposal to end the joint MIAM.

There is a view that a joint MIAM puts domestic abuse victims at risk: however, a well-managed joint MIAM always allows for this essential screening to take place and this is standard practice for experienced family mediators. Our experience is that in the large majority of cases of clients attending a joint MIAM do not fall into a risk category, and that by attending together they are much better able to begin the process of making joint decisions and agreements.

Moreover, our experience is that joint MIAMs convert into full mediation in significantly higher proportions than do single MIAMs.

In relation to managing risk, we use Women's Aid professional expertise for guidance in our practice and their advice for supporting victims of domestic abuse. That sets out that the best way to assess risk is to listen and take the client's advice, as the client is best placed to advise how to work with them. We cannot know best about an individual person's experiences and needs, and we should not claim we can: instead we should trust the client. As in other areas of our professional practice, family mediation works with all manner of families, and one size does not fit all. As such we must remain client-led, not system-led, in order to help families reach agreements that suit their unique and specific needs.

We would also add that we strongly agree that the quality of MIAMs should be rigorously monitored: we constantly strive to improve our practice, and enhance our offering to the general public. We believe this is best left for the FMC and Family Mediation Standards Board (FMSB), although feedback from this consultation is very useful.

NFM has made a number of recommendations to improve various elements of the MIAM in other documents, for example responses to previous consultations. Rather than repeating these here, we would draw attention to the following links:

NFM submission to a consultation on divorce reform, December 2018

NFM submission to the Family Justice Minister, July 2018

With regard to recommendation 12, using parenting agreements made in mediation as open documents, we welcome this suggestion. It is possible to do this now if both parents agree that their outcome statements can be shared with the court. We have, however, encountered resistance by the court to accept agreements reached in mediation of any type, covering child arrangements, the memorandum of understanding, and open financial statements. The reasons for rejecting mediated

agreements are not clear, but it should be a simple action to allow an agreement reached between two parents to form the basis of any court order, and we look forward to working together to achieve this.

c) GATEKEEPING AND TRIAGE: Do you support the changed arrangements for gatekeeping? And for triaging cases?

We firmly believe that if one change from this consultation paper had to be selected for implementation, stronger gatekeeping would make the most difference.
In our submission to the LASPO Post-Implementation Review we set out some ideas for enforcement of existing court powers. The full consultation can be read in the link above. The extract on potential changes to improve enforcement is set out below:

• Family courts have a vital role to play in signposting people to mediation. So the government needs to ensure the stronger hands-on enforcement of current court powers. We believe that boosting mediation numbers would not be difficult since court powers already exist which would help meet this aim. For example courts should always properly check the respondent has been approached, rather than allowing a situation where forms have simply been signed to smooth the applicant's route to court.
• There needs to be a court focus on promoting and supporting mediation, and ensuring that all applicants and respondents to court have at the very least attended a MIAM before they have an appointment with court. The Family Court Procedure Rules and the Child Arrangements Programme (Practice Direction 12b) expressly states that (6.1) "The judge is obliged to consider, at every stage of court proceedings, whether non-court dispute resolution is appropriate."
• Our experience shows that magistrates, judges, and court officials are bypassing the necessary process of getting the C100 and Form A paperwork signed by a mediator at a MIAM and anecdotally we hear judges say: "you are here now so let's get on with it." And in the next breath they lament that courts are not the place to solve contact issues or determine whether children should be collected at 3 or 3.30pm. Stronger monitoring and a more proactive government approach to enforcement would, we believe, 4 transform the situation and avoid the embarrassment for Ministers of their current policy dying on its feet.
• There is no evidence that courts have altered their practice and embraced the revised procedure rules or child arrangements programme that would prove pivotal in transforming the culture of litigation in divorce in this country. Had this been the case legally aided mediation figures would have recovered substantially to at least the pre-LASPO numbers.
• Member feedback indicates that communication between court and mediation services is not currently working very well. One of our affiliated member services has cited that it works with only one family court and has well-established links with them. However, the member service finds the court seems reluctant to promote mediation directly, on the basis it might be seen to be giving preferential treatment to one mediation service above another. Consequently, they appear not to be promoting mediation at all, simply in order to avoid being seen as offering favouritism. This is not helpful to either the court or any mediation services. In fact, all that is required is for all court officials to have information on all mediation services in the court area and to pass them to court users who can then make an informed choice. Services across England and Wales continue to report a significant decrease in the number of legally aided clients attending their service, despite continuing profile-raising at libraries, CABS, job centres and other public places which have traditionally been ideal marketing outlets for mediators.
• Simplification of the C100 and Form A is urgently needed, so these key items of paperwork are understandable to the lay person.

We think that proposed gatekeeping and triage arrangements need to apply to respondents as well as applicants.

For the last ten years we have heard how the courts and CAFCASS identify around 30% of their cases as having no risk and safety concerns, and the view is that these cases should not be in court. The recent "Manchester Pilot" illustrated that with some training CAFCASS officers became more confident about referring to mediation and had a better understanding of how mediation works. The rise in

number of agreements reached was notable and clearly effective. In addition to other pilots we would recommend that the judiciary and CAFCASS work together through the gatekeeping process to find a way to offer this alternative to the court process.

However, we would ask that due consideration be given to the very strong likelihood that in view of the work of HMCTS in digitising processes such as the C100, currently at pilot stage, the gatekeeping role of courts is likely to be superseded in the very near future.

We support and applaud the work of HMCTS. The C100 is easy to use and understand for the lay person. There is however a fundamental flaw in that it requires court fees to be paid on submission and *then* tells people to attend a MIAM. Our experience is that having paid the court fee these clients then want access to the court and consider attending a meeting with a mediator unnecessary, an additional cost, and an obstacle. This mindset does not lead to the consideration of other options.

As with the FMC we would suggest consideration needs to be given to introducing stepped fees so that reduced court fees are offered to applicants who have attended a MIAM or SPIP. Alternatively the digital C100 needs to be changed to prevent people from submitting and paying their court fees until after a MIAM has been attended.

We urge this working party to include in the application early triage. Attention is again drawn to the Manchester Pilot, and we know that the training of Cafcass officers is key to the success of its early recommendations, which should always include referral to MIAM and SPIP before court.

As in many other areas of the recommendations in the paper, there are financial implications that HM Treasury and the Ministry of Justice will need to address: in this case the rise in numbers of SPIP attendees will require more investment to succeed. In our experience where an over-budget Cafcass needs to cut funding, this has led to ceasing referrals to SPIP to save money. As we all know, big plans call for big money, and this paper contains big plans.

d) TRACKS: What are your views about placing cases on 'tracks' once in the court system? Do you agree with the distribution of work between tracks 1 and 2 based on complexity?

We endorse the FMC response and add that, as in the point directly above, since the goal is directing cases away from court, resources will need to be invested in Track One to assess risk.

e) SPIPs: Could/should we encourage more parents to attend SPIPs? If so, when and how?

Again, we endorse the FMC response. We would add that a common refrain from SPIP attendees is that they wish they had known about the course sooner and most participants feel it is too late for them and there is too much water under the bridge. For SPIP to be most effective, all the research states it should be offered early on in the court process to have maximum impact on long-term outcomes.

To achieve this, consideration will need to be given to consistency of approach by courts and Cafcass areas. As a provider of SPIP over several geographical areas, we are very aware that local custom and practice within courts varies significantly. Most SPIP referrals are made at a court hearing. We believe referrals to SPIP should be made at the gatekeeping process and before parents have attended a first hearing. The same applies to the MIAM. To be most effective it would be best if, when issuing a date for first court appearance, the court issued instructions that the parents should have attended both a SPIP and a MIAM before their first hearing. This will require a change in CAFCASS practice where SPIP are only provided once the directions from court have been issued.

It will also require the MOJ to lift the budget restrictions on CAFCASS for providing SPIP as a contact activity. At the end of the last financial year CAFCASS halted all referrals to SPIP because it was over budget. This is contrary to the current aims and policy objectives of the MOJ, which is also responsible for setting the CAFCASS budget to enable it to promote initiatives that divert people away from court proceedings.

One court that we know of only orders SPIP at the final hearing, whilst others take a more proactive approach to ensuring separating parents are well-informed. The approach should not be determined by the chance of one's location. There must be a consistent approach, and with SPIP ordered at application stage, along with MIAM for both applicant and respondent. Early SPIP referral completely changes the trajectory of a separation and, therefore, of children's futures.

f) RETURNERS: What are your views on the arrangements for 'returner' cases, specifically, their early re-allocation to the original tribunal for triage?

This should apply to returner cases so that judges ask themselves first and foremost: can they find an alternative dispute settlement means? Practice Directions were written in such a way that judges were expected to consider alternative dispute resolution at every opportunity. Our experience tells us that in reality this direction is not being followed.

In 2015, NFM ran a DWP-funded pilot at-court mediation programme in family courts in three geographical areas. It helped parents who had been separated for more than two years, and who were locked in family court wrangles, to work with mediators to negotiate agreements. 64 per cent said the level or quality of contact with their children improved following the project, with a reduction in the level of conflict of one third. All cases had been in court on numerous occasions, and in some cases they had appeared over 50 times. In the programme the mediators were able to help these parents achieve full agreement and the research commended NFM for its work. However the DWP has now set out on another track for reducing parental conflict and the funding is no longer available to provide this valuable service. The success of this project showed that with the right support, returner cases families can find a way out and move on positively.

The FMCA network could have easily been (and could easily be) trained to deliver a roll-out of the approach, addressing the issues in the family justice mapping report regarding emotional readinesss for non-confrontational dispute resolution. However, the fact this pilot has not been progressed at a national level reinforces the sense that unless the government allocates financial resource to implement successfully proven strategies, it could find itself in five years' time or less issuing more consultations in increasingly-desperate bids to reduce the family court logjam.

g) RECOMMENDATIONS: These are set out in Annex 3. Do you have any comments on any of these recommendations not covered elsewhere in your response?

We fully agree that "it would be far better for children and families in a significant proportion of cases if the consequences of relationship breakdown could be better supported, and disputes resolved, away from the Family Court." (Para 9)

The issue is of course how to we achieve this, and how it can be funded. This paper does not outline how this would happen. In the current financial context, it appears most unlikely that government funding would be available to establish a brand new initiative such as a 'Family Solutions' non-court dispute resolutions service, which whilst being recommended in this report, is not explained.

So in this context we believe more cost-efficient measures could be taken by Ministers to achieve similar aims by supporting and enhancing existing dispute resolution providers: such as those we have outlined in responses to previous consultations referenced above.

It appears to us that a number of different agencies and services associated with family courts could and should be working more consistently together. In particular things that would in our view provide most benefit and help with the problems experienced by the court would be:

- Judiciary and family courts consistently applying the requirement for attendance at a MIAM. Especially using their power to direct attendance at a MIAM as a contact activity to the respondent
- At gatekeeping making an order for attendance at MIAM and SPIP before proceedings commence
- The judicial college working with the FMC to develop a regular and consistent training programme for judges and magistrates about mediation and non-court support services. Mediation should form part of the annual cycle of judicial training and should be managed centrally to avoid ad hoc and irregular training delivery. This would improve the consistency of information and will help to provide a basis upon which to collect data about local practice
- CAFCASS in its early intervention in family cases always considering mediation and SPIP and, in the majority of cases, recommending attendance.
- Training for CAFCASS officers in line with the Manchester pilot to raise the Cafcass workforce understanding of the work of family mediators
- The MOJ reconsidering budgetary and financial constraints it imposes on Cafcass and ensure the cost of this activity is not capped as is the current case.
- HMCTS addressing the disincentives created by the online application process of payment for court fees before a MIAM has even been attended and as a longer piece of work address the court fee structure and consider staging the fees
- The LAA and MOJ considering making all MIAMs free of charge to all people regardless of eligibility. A cost benefit analysis could be undertaken, and it would remove one obstacle and disincentive for parents who become even more reluctant to try alternatives once the court fee has been paid.

h) GENERAL: Do you have views on any other aspect of the report?

With the laudable aim of preventing people going to court, the judicial system should be engaging more with those providing access to out-of-court options in order to prevent applications being made in the first place.

In this connection, whilst we welcome the idea of re-writing the invitation / direction to attend a MIAM (Annex 7) we believe this could be improved with better, simpler writing.

There is an important aspect relating to communication: we believe courts should be much clearer with potential applicants about exactly what will happen in the court process, for example how much time somebody will have to get their case across. For example, we would propose the provision of a template document employing simple, accessible language explaining the implications of becoming a litigant-in-person, and would be pleased to assist in drafting this.

Digitisation and online services are a step forward, but court processes remain mysterious to the vast majority of people, and cloaked in arcane language.

Appendices

We welcome the opportunity to work with the FMC to revise the information currently available, but experience shows that in the main people do not read extensively. At the time of the MIAM being introduced we worked together to produce the attached document which remains current but is not widely used. Also attached is our idea for 10 reasons to mediate not litigate as an offer for information the courts can provide to litigants.

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