Response to: Family Procedure Rules Committee (FPRC) consultation on early resolution of family private law arrangements

About Rights of Women

Rights of Women is a legal rights organisation which specialises in supporting women who are experiencing – or at risk of experiencing – all forms of Violence Against Women and Girls (VAWG), including domestic and sexual violence. In our approach, we recognise the additional barriers posed by the intersection of gender-based abuse, racism, structural inequality and other forms of discrimination and oppression that impact on women's vulnerability, exclusion and marginalisation.

By offering a range of services – including specialist telephone legal advice lines, legal information and training for professionals – we aim to increase women's understanding of their legal rights and improve their access to justice. We empower women to make informed choices where they come into contact with the criminal, family, employment or immigration and asylum legal systems so they can live free from violence.

Rights of Women is a registered charity 1147913 and Company Limited by Guarantee.

Rights of Women's consultation response

Before answering the specific questions asked in the consultation we would point out that as a women's legal organisation we will confine our responses to law and legal policy issues within our skills and experience.

Comments on consultation process

This consultation was published on 30 March 2023, however Rights of Women was not made aware of it until just over a week before the deadline by another organisation that intends to respond to the consultation. We are aware that an email was sent from the FPRC to a small group of organisations at the time it was published. Rights of Women was not included in that group and as far as we are aware there were no VAWG sector organisations included in the email. Given the tight deadline, we are concerned that the FPRC will not receive responses from organisations that represent the wide range of communities that will be affected by the proposed amendments, including survivors of domestic abuse.

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We encourage the FPRC to widen the list of organisations that are alerted to all FPRC consultations beyond bodies and representatives for lawyers, judges and mediators to include, amongst others, VAWG sector organisations. This approach should not be limited to rules relating directly to domestic abuse legislation. All changes to family procedure rules will impact individuals to some extent, especially litigants in person and survivors of VAWG.

We have done our best to respond to this consultation with limited time and resources. However, we hope the FPRC will consider responses to the Ministry of Justice (MoJ) consultation on supporting earlier resolution of private family law arrangements in conjunction with responses directly to this proposal to gain an understanding of the potential impact of the proposals from a wider range of organisations.

Mediation and survivors of domestic abuse

We are concerned that these proposals will lead to increased numbers of survivors being forced to attend MIAMs and feeling pressure to attempt mediation or other forms of NCDR. The amendments risk creating a perception that all litigants including survivors will be punished if they do not attend a MIAM or attempt NCDR. Discriminatory attitudes embedded in the family justice system mean that survivors feel pressured into mediating. The Harm Report[1] revealed instances of survivors being forced into mediation despite the exemptions and protections that are currently in place. The proposed amendments are likely to increase expectations and pressure on survivors to mediate.

We are concerned that push towards mandatory mediation and tightening MIAM attendance rules is primarily geared towards decreasing demand on the courts. This is a misguided approach. Given that the majority of private law children cases in the family courts involve domestic abuse[2], it is unsurprising that MIAM exemptions are claimed for a large proportion of cases. We will suggest better ways to use resources that will alleviate the burden on courts in our response to the wider MoJ consultation, for example introducing Early Legal Help.

There may be lessons to learn from the Pathfinder pilots which were specially designed with survivors, litigants and children in mind. This includes domestic abuse assessments, early identification of the issues, and signposting. We urge the MoJ and FPRC to assess the results of those pilots before introducing anything that potentially undermines them.

[1] https://www.gov.uk/government/consultations/assessing-risk-of-harm-to-children-and-parents-in-private-law-children-cases

[2] Sources include: 62% *Allegations of domestic abuse in child arrangements cases*, CAFCASS and Women's Aid, Allegations-of-domestic-abuse-in-child-contact-cases-2017.pdf (cafcass.gov.uk);
60-70% Home affairs committee, 2008; 70-90% HMICA, 2005 and 63% Aris and Harrison 2007, https://www2.warwick.ac.uk/study/cll/research/swell/ourwork/final-safe-not-sorry-for-web-jan-2016.pdf;
49% Harding and Newnham 2015
http://www.nuffieldfoundation.org/sites/default/files/files/Full%20report.pdf; 50% Hunt and Macleod 2008
http://dera.ioe.ac.uk/9145/1/outcomes-applications-contact-orders.pdf

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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?

Yes.

We are concerned about the amendments empowering courts to order parties to attend a MIAM when circumstances change. The two examples provided relate to urgency and a respondent being located after proceedings are issued. However, the proposal is that the power could be used when *any* claimed exemption is no longer applicable.

We have concerns about how this might impact on survivors who have claimed the domestic abuse exemption. We cannot think of a circumstance where it would be appropriate to deem that a domestic abuse exemption is no longer applicable.

There is potential for judges who do not fully understand domestic abuse and its impact to require survivors to attend MIAMs inappropriately. A survivor who is being forced to attend a MIAM because a judge does not believe her may perceive the MIAM as a punishment for having raised domestic abuse. This is unlikely to lead to a productive MIAM for the survivor, the mediator or the courts.

The reassurance that many survivors may feel knowing they will not be required to mediate directly with perpetrators will be negated by the proposed amendment, and this may lead to survivors remaining in harmful situations rather than proceeding to court.

Some perpetrators, especially those who are unrepresented, may well make arguments demanding that the survivor attend a MIAM because her domestic abuse claim is invalid. Whilst this might not have much sway with judges, it is likely to add to the trauma survivors already experience when trying to resolve their legal disputes with perpetrators and we know from speaking to survivors that the anguish they go through every time perpetrators use the system to berate them.

This type of amendment is likely to increase demand on our services. We expect that we will receive calls to our advice line asking us whether it is true that they can be forced to attend a MIAM even with a domestic abuse exemption, whether the perpetrator is right to criticise her for not attending one, whether the judge will form a negative opinion of her and side with the perpetrator, whether she would be better off capitulating to the perpetrator's demands to avoid having to go through the trauma of court only for the perpetrator to get what they wanted anyway.

The domestic abuse exemption is different to the examples provided in the consultation paper, it's not a circumstance that will change. We are of the view that the power to order a party to attend a MIAM should not apply to cases where the domestic abuse exemption is claimed.

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)?

No.

We also oppose any amendments that will increase the number of survivors of domestic abuse forced to attend MIAMs or mediation.

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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?

No.

This is adding extra delay, and potentially cost, for litigants and does not seem to be a litigant focused amendment to the rules. If the respondent is located or starts cooperating after proceedings are issued and it is felt that mediation is appropriate, the applicant will have to attend a MIAM for a second time which causes further delay and wasted costs.

Survivors of domestic abuse who either do not qualify for an exemption or have not identified that they are a survivor of domestic abuse who will have to attend a MIAM twice. The added obstacle of arranging and attending a standalone MIAM knowing that they will have to attend court anyway is likely to add to the stress they will already be under. Perpetrators may deliberately refuse to cooperate knowing the extra hurdles they will be creating for survivors.

We have concerns about the suitability of mediators to conduct screening and triaging for domestic abuse which we will address in our response to the wider MoJ consultation

The provision of Early Legal Help for all litigants will have a far more beneficial impact on litigants and the courts. As well as providing the information it is proposed that mediators can provide at a MIAM (for example signposting to services), lawyers can provide tailored advice to help litigants decide whether to pursue court proceedings and, if so, what the courts will require from them.

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?

No.

We support the idea of mediators providing parties with information on other forms of NCDR where appropriate. However, domestic abuse assessments and screening should be conducted by domestic abuse experts and the results of those assessments should inform whether the party attends a MIAM and the way discussions around NCDR are approached.

Question 5: Do you agree that the person conducting the MIAM should "assess" the suitability of different forms of NCDR at the MIAM?

No. The provider of the NCDR is probably best placed to assess suitability. Domestic abuse assessments and screening should be conducted by domestic abuse experts and the results of those assessments should inform whether the party attends a MIAM or other forms of NCDR.

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?

Yes.

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Obtaining the evidence of domestic abuse is a challenge for survivors. Requiring survivors to provide evidence with the application will cause a significant delay to survivors being able to submit the application, and for some survivors may result in no application at all.

We can draw upon the experiences of survivors applying for family law legal aid, which involves similar types of evidence for domestic abuse and requires evidence with the application. A common reason why survivors find it difficult to obtain the evidence of domestic abuse is because some professionals, such as police, are unresponsive or do not have the resources to respond within the timescales required for court proceedings.

A survivor litigant in person is expected to:

- learn and understand the MIAM requirements and which exemptions might apply
- ascertain what evidence they can obtain
- ascertain who to contact to obtain the evidence
- find the contact details for the professional that will provide the evidence
- contact the relevant professional with all the required information to help them provide the evidence
- chase the relevant professional if they do not receive a response
- assess the evidence received from the professional to ensure it complies with the exemption requirements.

This can be overwhelming for many survivors, especially those from deprived backgrounds (who make up a large proportion of court users for private law children matters[3]). Black and minoritised women face disbelief and discrimination from institutions such as the police and courts[4], and migrant women are often less familiar with the systems in England and Wales and experience language barriers and will be disproportionately impacted by amendments to the rules which tighten up evidence requirements.

We are not aware of any evidence that suggests that survivors are lying about their evidence of domestic abuse, and therefore the proposed amendment will not improve the administration of justice in any significant way. It may drive down applications to the courts, but we object to the notion that court backlogs should be reduced by creating barriers for survivors of domestic abuse from accessing the courts.

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?

Yes.

It might not be possible for survivors of domestic abuse to provide evidence of domestic abuse in time for the gatekeeping stage for the reasons set out in response to Question 6. If a survivor happens to have provided the evidence in time for the gatekeeping stage then we

[3] https://www.nuffieldfjo.org.uk/resource/private-family-law-whos-coming-to-court-england

[4] https://www.endviolenceagainstwomen.org.uk/wp-content/uploads/Imkaan-Reclaiming-Voice-CJS-briefing-June-2020.pdf

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so no issue with it being reviewed by the gatekeeper, but this should not be required in all cases.

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?

Yes. This will have a disproportionately negative and harmful impact on survivors of domestic abuse for the same reasons as those set out in our response to Question 1.

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?

No.

The current rules which allow the court the power to adjourn proceedings for NCDR where the parties agree to it are sufficient. Adjourning cases where the parties do not agree to it is a waste of time if the parties do not wish to attempt NCDR. Even if they attempt NCDR, it's less likely to be successful if one or none of the parties is willing to negotiate.

We are concerned about the impact on survivors of domestic abuse feeling pressurised to attempt NCDR even if it is not mandated. We already hear from survivors who are reluctant to mediate but feel pressure to do so for fear of appearing unreasonable to the family courts which they perceive as being unsympathetic to survivors of domestic abuse.

We see no issues with the court encouraging parties to attempt NCDR during the time between hearings, but this should not apply if one of the parties is or may be a survivor of domestic abuse.

We hear from women who struggle to decide whether a proposal is fair and safe because years of coercive and controlling behaviour leads to a lack of trust in both their own judgement and the perpetrator. These survivors would benefit from independent advice from their own lawyer, but as this is not available they feel their only option is to wait for a judge to make a decision. Providing legal aid to all survivors who cannot afford to pay for legal services will make a greater difference to the length of cases than pressuring parties into NCDR against their will.

We have additional concerns that this proposal includes financial proceedings as judges are less likely to know whether there was abuse in the parties' relationship as survivors are told that this behaviour is irrelevant to the courts decision, and are less likely to raise it. Many judges may be dealing with abusive relationships in financial proceedings without realising this is the dynamic between the parties.

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)?

Cases should only be adjourned when both parties agree to NCDR, and it is safe.

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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?

Yes.

The courts already have sufficient powers to deal with conduct when considering costs orders for both private children law and financial remedy proceedings and no further provisions are required.

Costs orders are unlikely to be appropriate or affordable for the majority of people who are going to court to resolve family law disputes.

It is our view based on what we hear from women who call our advice lines that when mediation is suitable, they are willing to attend a MIAM. Most people who end up in court are there because they have to be, not because they want to be there. The threat of costs orders will add to the stress that litigants already face. It will also increase the chances that they will agree to arrangements that are not fair or that do not meet their needs in order to avoid costs orders.

Even if survivors of domestic abuse are exempt, there is a risk that the proposed amendment to the rules will create a perception that all litigants will face costs orders if they do not attend a MIAM and pressurise survivors into mediation.

Domestic abuse is rarely a central issue that is adjudicated upon as part of financial remedy proceedings, and the existence of domestic abuse or the extent of it will not be known to the court without further evidence. This will add to delay, and possibly litigation if the evidence is disputed or if survivors decide to appeal the costs order.

Survivors of domestic abuse are unlikely to trust that judges will use their discretion in a way that protects them from domestic abuse, and the findings of the Harm Report supports this. This may dissuade survivors from seeking to make financial remedy claims at all, and for some survivors and their children this can lead to destitution.

The power imbalance during negotiations and litigation is likely to tilt even further against survivors with the threat of costs orders. We regularly hear from survivors that they have been threatened with costs orders by the perpetrator or the perpetrator's lawyer if they do not agree with the perpetrator. The proposed amendment will further enable perpetrators to weaponise court proceedings.

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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?

Yes.

This proposed amendment is unnecessary and poses risks for survivors of domestic abuse for the reasons set out in our response to Question 11.

Punishing litigants with costs orders is not a reasonable or effective way of alleviating the pressures faced by the court system. The following are more likely to make a difference to attendance at MIAMs and the demands placed on courts:

- There may be lessons to learn from the Pathfinder pilots on domestic abuse assessments and better, early preparation of cases from Cafcass. It is our understanding that the current Pathfinders are seeing positive results in relation to the length of cases, the number of hearings and the parties' ability to reach agreement for all cases.
- Early legal help for all litigants, not just survivors of domestic abuse.
- Legal aid for all survivors of domestic abuse who cannot afford to pay for legal services.
- Funding to make NCDR free or lower cost for those who choose to attempt NCDR and it is safe.

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)?

No.

The proposed amendments in relation to adjourning cases when courts think NCDR is suitable and costs orders should not be introduced (see our responses to Questions 1, 9, 11 and 12). This will negate the need for investigations into attendance at NCDR, which will add delay and administrative burden on either the parties and/or the courts.

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?

Yes.

The proposed amendments in relation to adjourning cases when courts think NCDR is suitable and costs orders should not be introduced (see our responses to Questions 1, 9, 11

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and 12). This will negate the need for investigations into attendance at and positions in relation to NCDR, which will add delay and administrative burden on either the parties and/or the courts.

Creating more forms for litigants in person to complete is adding more stress to the court proceedings for little benefit. Most litigants in person will be unaware they are required to complete the form, they may struggle to understand the purpose of the form, how to complete it or the potential consequences of the information provided.

It is not within the remit of the courts to determine whether a party's reasons for not engaging with NCDR are sufficient, or punish them if the reasons are deemed insufficient. Individuals have the right to go to court to resolve family law disputes under Article 6 of the Human Rights Act 1998, and many of the proposals in this consultation risk interfering with that right.

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?

No.

The proposed amendments in relation to adjourning cases when courts think NCDR is suitable and costs orders should not be introduced (see our responses to Questions 1, 9, 11 and 12). This will negate the need for investigations into attendance at and positions in relation to NCDR, which will add delay and administrative burden on either the parties and/or the courts.

Question 16: Do you have any suggestions for what the pro-forma should look like or should include?

No, the pro-forma should not be introduced at all.

Question 17: Do you consider that there is a way to ensure that this pro- forma is not requested from victims of domestic abuse?

No, the pro-forma should not be introduced at all.

The recommendations in the Harm Report about the design principles of the family court process include that the court process should be designed with litigants in person in mind. The introduction of another pro forma for litigants in person to have to complete, especially in financial proceedings, is not designing processes with litigants in person in mind. This should not be introduced. It is not possible to ensure victims of domestic abuse are not required to complete this because the court is not always identifying victims, especially in 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?

We do not consider single lawyer models and ENE to be safe or suitable for survivors of domestic abuse. The power imbalance that exists between survivors and perpetrators will

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place survivors at a disadvantage, and at risk of being coerced into unsafe arrangements. It also gives rise to significant risks of conflict of interest for the lawyers involved. The complex issues involved in cases involving domestic abuse are another reason why a single lawyer model is unlikely to be appropriate.

Rights of Women

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