**Response to: Supporting earlier resolution of private family law arrangements - a consultation on resolving private family disputes earlier through family mediation**

**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.

## Introduction

We strongly oppose the proposals to make mediation and separated parenting programmes compulsory before an application can be made to court regarding child arrangements and the measures proposed to enforce compulsory mediation. The proposals if enacted are unlikely to achieve the benefits set out in the consultation document, and risk causing even greater harm to survivors of domestic abuse.

### Lack of evidence to support proposals

We have not seen any evidence indicating that there are large or even modest numbers of cases in court that are suitable for mediation but no mediation was attempted.

The consultation sites concerns that only 33% of cases that end up in court attended a MIAM. We disagree that this is a matter of concern. Firstly, this figure does not take into account the number of cases that settled through mediation and did not make it to court, so the figure is not an indication of all the cases that attend MIAMs. Secondly, given that the majority of private law children cases that reach court feature allegations of domestic abuse[1], the figures show that the number of cases that end up in court without having attended a MIAM are broadly what is to be expected. The percentage of cases claiming MIAM exemptions are similar to the percentages of cases featuring domestic abuse.

Most people who end up in court are there because they have to be, not because they want to be there. 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. Laws making mediation compulsory are therefore unnecessary. In fact, the accounts we hear indicate that there are too many cases in mediation featuring domestic abuse.

For the very few cases where mediation is suitable but has not been attempted, the court already has the power to adjourn proceedings to allow parties to mediate and to encourage parties to mediate.

It should also be noted that for women on low incomes, the professional mantra that dispute resolution is cost-effective is simply not reflective of reality. We sometimes speak to women who have ended up in lengthy attempts to resolve disputes through mediation and have accrued significant debt through credit cards and borrowing money from family members to continue to pay for mediation which is not going to resolve the issue because the other party refuses to co-operate or communicate openly. They accrue this debt because they are told that mediation is more cost-effective than going to court. For these women, this is not true. Their legal problem would have been resolved quicker and with less debt by making an application to the court and representing themselves – something which they end up having to do in any event.

> *Nina mediated with a volatile abuser for several years in relation to contact arrangements without a final or lasting agreement and this took its toll on Nina and the children. Eventually mediation broke down and the matter went to court. The matter progressed all the way to a final hearing when the court ordered no direct contact with one of the children and supervised contact with the other child.*
>
> *Mediation only delayed decision making for Nina and the children and the mediator failed to identify the fact that mediation was unlikely to ever be successful. Nina and her*

[1] 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

*children could have had a much earlier and more final conclusion had she avoided mediation altogether.*[2]

We suggest that efforts to improve the family justice system should be directed towards exploring how to assess and respond to the needs of individual families rather than attempting to apply a blanket approach.

**Voluntary participation**

Voluntary participation is a key principle of mediation. The consultation paper fails to explore the impact that compulsory mediation will have on the dynamics of the mediation process.

MIAMs are currently compulsory. The FMC data[3] referenced in the consultation cites "*ability to fund mediation, trust between mediator and client, willingness to listen, engage and provide information*" as features for successful MIAMs. A 'tick-box' approach is listed as one of the reasons why MIAMs do not convert to mediation (as well as others such as fear of their ex-partner). It is reasonable to assume that the same will be true of mediation were it made compulsory, namely that ability to fund, trust, willingness to engage will be essential for successful for mediation, for everyone else it will be an expensive, time-wasting and potentially harmful 'tick-box' exercise.

The experiences we hear on our advice lines from women who have mediated where one or both parties do not want to mediate indicate that not only does mediation not lead to agreement, it increases hostility between the parties and adds to trauma they are already experiencing. We are of the view that unless both parties want to mediate, it is unlikely that mediation will lead to an agreement. Forcing parties into mediation will have little impact on the number of cases in court and will increase costs, trauma and potentially increase hostility between the parties.

Far from supporting earlier resolution, the consultation proposals if enacted will delay inevitable court action and run contrary to the general principle in section 1(2) of the Children Act 1989 is that any delay in determining the issue before the court is likely to prejudice the welfare of the child.

**Pressuring survivors of domestic abuse to mediate**

"*We went to mediation even though I know it was not suitable due to domestic violence"*[4]*.*

Discriminatory attitudes embedded in the family justice system mean that even with the current regime, survivors feel pressured into mediating. **Compulsory mediation and the proposed enforcement measures are likely to increase expectations and pressure on survivors to mediate.**

[2] Case study based on call to Rights of Women's advice line

[3] https://www.familymediationcouncil.org.uk/wp-content/uploads/2020/01/Family-Mediation-Survey-Autumn-2019-Results.pdf

[4] Quote from caller to RoW advice line

In 2020 the Ministry of Justice published a report assessing the risk of harm to children and parents in private law children cases (the Harm Panel report)[5]. The Panel found that reducing dependency on the courts was a theme in the courts' approach: "*The fourth theme in the courts' approach is the longstanding emphasis on encouraging parents to make their own decisions about parenting post-separation. This has encompassed attempting to divert cases from court through the encouragement of alternative dispute resolution and encouraging settlement for those cases that do reach court, rather than the imposition of a decision by the court. Whilst promoting private agreement and supporting parental responsibility may be entirely appropriate in some cases, many submissions raised concerns that it could be entirely inappropriate in domestic abuse cases where victims and children need the protection of the court to counteract the abuser's power and control*."[6]

The Harm Panel received evidence that survivors are being pressurised into taking part in mediation and conciliation and agreeing consent orders:

"*Many mothers responding to the call for evidence reported being advised and, they felt, required or directed to engage in conciliation by Cafcass/Cymru at court or to attend mediation, and being criticised for not attempting mediation, despite having provided information about domestic abuse. This appears to be contrary to para 9 of the Practice Direction… The panel received evidence from domestic abuse charities about unsafe mediation and community dispute resolution practices, and the importance of the formal legal system for protecting the human rights of vulnerable survivors of abuse.*"[7]

*"Professional respondents likewise reported that victims are frequently pressured by both judges and opposing lawyers into consent orders that do not address their concerns about domestic abuse. They noted that victims often do not have the money or emotional energy to resist this pressure. Alternatively, if they do wish to pursue litigation, it is made clear to them by their own or the opposing lawyer or the court that if they do not agree to contact the court will order it anyway, possibly with fewer safeguards. Some respondents observed that the victim's agreement to a consent order could then be taken to indicate either a failure to protect their children or a tacit admission that their allegations had been exaggerated or an attempt at 'alienation', and that contact is in fact safe."*[8]

*"Southall Black Sisters noted, in particular, that BAME women are often under tremendous social and cultural pressure to reconcile and agree contact, and recommended that greater effort is needed to safeguard victims and children prior to granting consent orders."*[9]

All of the points that we have highlighted from the Harm Panel report resonate with the experiences we hear on our advice lines. The reasons survivors have given for engaging in mediation include one or more of the following:

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[5] MoJ, Assessing Risk of Harm to Children and Parents in Private Law Children Cases, June 2020 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895173/assessing-risk-harm-children-parents-pl-childrens-cases-report_.pdf

[6] Ibid., 9.5

[7] Ibid., 7.4.1

[8] Ibid., 9.4.1

[9] Ibid., 9.5.1

- They feel their manipulative ex-partner will turn the judge against them, and label her as being “alienating” or “unreasonable”, and she will have even less control over the safety of herself and her children.
- They are not eligible for legal aid and cannot afford a solicitor. One survivor recently told us: “*Even though I passed the legal aid test for income, I cannot get legal aid because of equity in the home. We have only just started the mediation process. It wasn’t something I wanted to do. I felt pushed into it. I know I don’t have to go but otherwise I would have to spend a fortune on solicitors fees”.*
- They fear the adversarial court system will have a further negative impact on their physical and mental health.
- Their ex-partner has initiated mediation and they are not aware, even after attending a MIAM, that they do not have to mediate.
- They may not have recognised the behaviour they have experienced from their ex-partner as domestic abuse, and this has not been picked up or identified as domestic abuse by the mediator.

The experiences we hear on our advice lines indicate that some mediators fail to understand that at the root of domestic abuse is the need for the perpetrator to control. A study which looked at “Mapping Paths to Family Justice”[10] found “*that dominant characters, usually professional men, deliberately chose mediation as they believed that they would be able to control their partners best in this process. It was the mediator's role to screen out such cases as unsuitable*.” Until mediators understand domestic abuse they will not be able to identify whether a case is suitable for mediation.

Para 68 of a Private law Working Group Report found that ‘*there are differences of opinion within the mediation community as to the appropriateness of mediating where there is or may be domestic abuse in the couple relationship*’[11]. We believe this is partly due to mediators not fully understanding domestic abuse, the dynamics of abuse and its impact. It may also be because mediators have a financial incentive in promoting mediation and therefore we are not confident that all mediators are fully impartial or are prioritising safety when assessing whether a case is suitable for mediation.

The overall picture that we are left with from speaking to survivors is that despite the fact that out of court dispute resolution is not a safe option to resolve their family law disputes, many survivors feel bullied and coerced into mediation for fear of appearing difficult.

Organisations such as Southall Black Sisters[12] and One Law for All[13] have been leading campaigns to highlight the dangers of religious laws and arbitration processes in the U.K. which are often discriminatory to women and lead to poorer outcomes for Black and minoritised women compared to their white counterparts. Processes which make it harder to litigate and policies which strongly push towards non-court dispute resolution means Black

[10] *Mapping Paths to Family Justice,* Barlow et al, June 2014
[11] https://www.judiciary.uk/wp-content/uploads/2020/04/PRIVATE-LAW-WORKING- GROUP-REPORT-1.pdf
[12] https://southallblacksisters.org.uk/campaigns/religious-fundamentalism/
[13] https://onelawforall.org.uk/

and minoritised women are more likely to be compelled to take part in discriminatory religious dispute resolution processes.

**Abuse during mediation**

Survivors have reported being abused and traumatised during the mediation process and that mediators are not always equipped to handle these situations. We have heard of cases where:

- the mediator has allowed or recommended that mediation continue despite abusive partner shouting at the survivor and slamming his hands on the table when he is frustrated
- the survivor felt pressured into an agreement because the perpetrator will not back down and the mediator, keen to reach an agreement and recognising that the survivor is more likely to bend than the perpetrator, conducts mediation in a way that makes the survivor feel the mediator agrees with the perpetrator and that she must agree to the perpetrator's demands
- parties attending shuttle mediation have been left to wait in the same waiting room, and no arrangements have been made for staggered departure

We have included below examples of comments from our advice line callers:

"*In mediation he screams at me all the time that I am being greedy. Mediation was his choice*."

"*We had our first mediation appointment. It went dreadful – I found it difficult to speak and was anxious*."

"*We went to mediation. It was very expensive. The mediator allowed him to harass me for 50 minutes. He charmed the mediator. This is how he operates*."

"*We did shuttle mediation – it was very distressing, she (the mediator) seemed to be on his side*."

*"I instigated mediation at one point, but the mediator shut it down because there was too much shouting and we were not agreeing*."

The impact of mediation on survivors ranges from harm to their physical and mental wellbeing, financial instability and debt, and impacting upon work and parenting. Some survivors have found that mediation triggers flashbacks and the power imbalance present in abusive relationships places survivors at a significant disadvantage.

As part of their evidence to the Harm Panel Southall Black Sisters expressed their view that *"a continuing pervasive culture of disbelief, indifference and hostility towards victims of abuse'. BAME women highlighted a number of factors which were particular to their experience, including being socialised into enduring domestic abuse and not telling outsiders and being isolated in the family (with abuse being colluded and participated in by multiple family members) and fear of deportation. The barriers can be magnified when a BAME victim*

*is in an abusive relationship with a perpetrator who is white."*[14] In the context of mediation, this means that Black and minoritised women are less likely to disclose domestic abuse to mediators, less likely to be believed if they do raise domestic abuse, and more likely face pressure to reach an agreement that is not in their best interests.

A common misconception is that shuttle mediation or online mediation will provide the safety survivors need to enable mediation. Safety and equality will not be achieved simply by putting the parties in separate rooms because the power imbalance will still be present. The dynamics of an abusive relationship can make mediation of any type inappropriate.

The availability of online mediation is raised in the consultation as a reason why there should be greater numbers of cases going through mediation. We draw attention to research led by Anne Barlow and Jan Ewing which considers online family dispute resolution (OFDR) and screening for domestic abuse[15]. The research lists a number of advantages, disadvantages, opportunities and barriers. One observation which Rights of Women believes requires particular attention is the following: "*OFDR raises issues over the ability to ensure that the process is freely entered into. An online offering cannot prompt in the same nuanced way as face-to-face screening when DVA is disclosed initially*."

**One survivor's views on compulsory mediation**

The decision to make mediation compulsory will affect people's lives and we must take their voices into account. A survivor who had to resolve financial and child arrangements disputes with her ex-husband shared her experiences and views on compulsory mediation with us:

*I told my solicitor and the mediator about the abuse before the mediation sessions started. My solicitor told me that I had no choice but to go to mediation first before going to court. They said to ask for mediation where we sat in separate rooms, but I decided to just confront the issue head on and hope for the best.*

*I liked that there was a trained professional in the room. It was helpful to have the structure and areas that would need to be discussed and agreed. The locations weren't convenient. I felt extremely intimidated sitting in a room with someone I was terrified of at the time because of the emotional abuse he was constantly sending me via text message.*

*It was clear from the beginning that mediation wasn't going to work. My ex-husband was emotionally abusive in front of the mediator at several points during the sessions. I used to leave the sessions in an absolute emotional wreck and had to take a lot of time off work. But because we were told we had to complete 6 sessions before I could apply for court I felt like I had no choice but to stick with it.*

[14] MoJ, Assessing Risk of Harm to Children and Parents in Private Law Children Cases, June 2020, 5.8.1 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895173/assessing-risk-harm-children-parents-pl-childrens-cases-report_.pdf

[15] *Creating paths to family justice: online dispute resolution processes and the access to justice gap*, Anne Barlow and Jan Ewing, February 2018

*There was a violent outburst with physical abuse during one of our sessions and my ex-husband walked out of the room. It was only at this point that the mediator agreed that mediation sessions weren't right for us (after several sessions). The situation shouldn't have needed to turn physically violent in order for this to occur.*

*I think it would be a bad decision to make this mandatory. Mediation is a long, drawn out process before another long drawn out court process. As a single mum trying to raise a toddler and hold down a full time job, the added mental stress and emotion that arose as a result of these mediation sessions meant I had to take time off of work and wasn't doing my job to the best of my ability as I was so emotionally drained.*

*It's extremely costly. For a single mum in debt it was difficult to justify financially. Oftentimes I think the emotional effect these have on either party is not taken into enough consideration. Many divorce situations include heated discussions that are traumatic for one or both parties, and mediation is not right for everybody.*

This survivor's account raises questions around the ability of solicitors and mediators to assess risk and respond to abuse. The advice she was given, or at the very least the impression she got from the advice she was given, was that she had to mediate despite being a survivor of abuse. Mediation harmed her health, wellbeing, financial stability and her ability to work. This is happening now, even with voluntary mediation and MIAM exemptions for survivors. Compulsory mediation will exacerbate the issues survivors are already experiencing in relation to mediation and family justice generally.

**Alternative approaches**

The Harm Panel Report[16] recommends that for the Family Court to better protect adult and child victims of domestic abuse, private children law proceedings should be designed based on the following principles:

- A culture of safety and protection from harm
- An approach which is investigative and problem solving
- Resources which are sufficient and used more productively
- A more coordinated approach between different parts of the system
- Procedures need to be designed with the needs of children, litigants in person and domestic abuse and other serious safeguarding concerns as central considerations

In response to the recommendations of the Harm Panel, the Government set up Pathfinder Pilots which are currently underway. 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. 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

[16] Hunter, Burton, Trinder (2020) Assessing risk of harm to children and parents in private children proceedings

cases. We urge the Ministry of Justice (MoJ) and FPRC to assess the results of those pilots before introducing anything that potentially undermines them.

**Pressures on the court system**

One of the driving forces behind the Government's proposals is reducing pressures on the court system. We have set out throughout this consultation response why the consultation proposals will not meet these aims. Making mediation compulsory does not address the root causes of the problems the courts currently face.

The demand in terms of numbers of cases at the Family Court has risen steadily broadly in line with population growth. This increase in demand could have been planned and resourced for accordingly, but we haven't seen any evidence that this has been done.

The Covid pandemic is one factor that has led to backlogs and is mentioned in the consultation, but it is not the only reason. The consultation fails to consider the impact that the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) had on the decline of referrals for MIAMs, the number of litigants in person in court, and the time it takes to complete a case.

Legal aid funded MIAMs have fallen by 60% since LASPO was implemented and fewer people are deciding to start mediation[17].

If a party is not financially eligible for legal aid, they may still be on a very low or even no income and be unable to afford legal advice or dispute resolution. When a party cannot afford either of these options, the only solution to their legal problem is to do nothing or to start court proceedings. In light of this, it is unsurprising that research published by the Nuffield Family Justice Observatory found that the majority of families in private law children proceedings were from lower socio-economic backgrounds[18].

Introducing Early Legal Help for all parties (not just those who can evidence domestic abuse) is likely to increase the time it takes to settle cases either through non-court dispute resolution or as part of court proceedings, and is likely to reduce pressure on courts as well as increasing access to justice.

It is also our experience that solicitor negotiation is overlooked as a valid method of dispute resolution. This is often the only safe form of dispute resolution available to survivors of domestic abuse as they do not have to communicate directly with the abusive partner and they feel they are less likely to be pressurised into a detrimental agreement. However survivors who cannot afford to pay solicitors and are not eligible for legal aid either because they do not have the necessary evidence of domestic abuse or because they do not satisfy the stringent means assessment are denied this option. The importance to survivors of

[17] JUSTICE, Improving Access to Justice for Separating Families (2022) https://files.justice.org.uk/wp-content/uploads/2022/10/12154403/JUSTICE-Improving-Access-to-Justice-for-Separating-Families-October-2022.pdf

[18] Cusworth, L. et al. (2020) *Uncovering private family law: Who's coming to court in Wales?* London: Nuffield Family Justice Observatory; Cusworth, L. et al. (2021) *Uncovering private family law: Who's coming to court in England?* London: Nuffield Family Justice Observatory

abuse of having legal representation is fundamental to redressing the power imbalance that exists in an abusive relationship.

This view is supported by research:

*Government has tended to attribute public coolness to mediation to a lack of awareness or understanding. Yet Anne Barlow and her colleagues, reporting on research conducted in 2011 and 2012, showed that both among the public generally and people who underwent divorce or separation, there was higher awareness of mediation than of solicitor negotiation as a means for resolving disputes. Despite that awareness, people were much more likely to take up lawyer negotiation than mediation, although of course one reason for not taking up mediation could be that both parties must be willing to do it. But there was other reasons for rejecting it, such as believe that communication was so poor it would serve no purpose, feelings of pressure, lack of emotional readiness and concerns over violence.*

*While mediation remains an important element in the legal system's, and the community's response to people experiencing family problems, it is only one part of it, and one which does not suit everyone. For example, in their survey population, Barlow et al found higher rates of satisfaction both of the process and the outcome among those who used solicitors than those who resorted to mediation. In 1988 Gwynn Davis, reporting on interviews with divorced parties, referred to solicitors as being 'more than just partisan' but as providing advice, counselling and emotional support to clients in conflicted cases. We have remarked on that as well and drawn attention to the fact that, in its promotion of mediation, government documents frequently contrast mediation with 'going to court', ignoring the fact that consulting a solicitor rarely leads to court action.*[19]

For survivors of domestic abuse and those from lower socio-economic backgrounds, the provision of legal aid to enable this method of resolving disputes is crucial. In order to achieve this, the following is required:

- The scope of legal aid needs to be expanded to ensure all those who need it are able to access it
- Financial eligibility requirements must be improved to ensure those who cannot afford to pay for legal advice are able to access legal aid
- Fees and fee structures for legal aid solicitors must be reviewed to ensure the profession is able to continue to do the work. In particular, it is increasingly difficult to find a solicitor who will take on a case even for those who are currently eligible for legal aid to provide early legal advice (currently under legal help). Early legal advice must be provided by a qualified legal professional and the funding scheme should incentivise solicitors to take on cases at this stage.

Whilst increasing resources allocated to the courts and legal aid will significantly improve outcomes for parties and the courts, it is also important to consider and address the wider

[19] MacLean, M. and Eekelaar, J., (2019) *After the Act: Access to Family Justice After LASPO*, Oxford, Hart Publishing

socio-economic drivers which lead people to the courts. Investments that can be made that result in better outcomes and savings across Government departments.

Given the large proportion of cases in the Family Court which involve domestic abuse, investment in the prevention of domestic abuse is likely to reduce the complexity and numbers of cases in the courts. Of significant importance is ensuring sufficient funding for both domestic abuse and perpetrator services which must include specific and sufficient funding for by and for organisations.

In addition, the Nuffield Family Justice Observatory[20] found "*a clear link between deprivation and private law applications, which indicates that the economic vulnerability of private law parents requires closer policy attention*".

Initiatives which prevent both deprivation and domestic abuse are a more efficient use of resources and will have a greater impact on reducing pressures on the courts than investing in compulsory mediation.

**Question 1: Are you in favour of a mandatory requirement for separating parents (and others such as grandparents) to attend a shared parenting programme, if they and their circumstances are considered suitable and subject to the same exemptions as for the mediation requirement (see chapter 3), before they can make an application to the court for a child arrangement or other children's order?**

No.

Any model, the intention of which is to divert some families away from the family justice system, must be cautious to avoid putting up additional barriers to justice for those who do need to access the courts. We believe this is the large majority of cases already in the family court.

We are also concerned that attendance at the separated parenting programme will be perceived either by the parties involved or professionals as something that reduces the risks of harm from domestic abuse, and a step towards increased contact or living arrangements. Attendance at a separated parenting programme may provide a false sense of security to parties and professionals. It is important to make clear that these programmes do not address domestic abuse, and cannot address the child arrangement and parenting issues that stem from domestic abuse.

We are also concerned that, too often, domestic abuse is misidentified or reframed as 'parental conflict' or 'high conflict'. This was reflected in the Harm Report:

> "*despite the very clear difference between 'high conflict' relationships and domestic abuse, victims and professionals told the panel that they had experiences of*

[20] *Uncovering private family law: Who's coming to court in England?* Nuffield Family Justice Observatory, 2021

*domestic abuse being reframed into evidence of a 'high conflict' or mutually abusive relationship, for which the solution was considered to be mutual reduction of conflict and encouragement of cooperation rather than protection of the child and adult victim from the other parent's abuse*."

There is a risk that survivors and perpetrators will not be screened from referrals to parenting programmes as result of misidentifying domestic abuse as parental conflict, and that the courses themselves will perpetuate the abuse by approaching the family dynamic as mutual conflict as opposed to abuse.

We know from survivors who call our advice line that perpetrators can use the expectations family courts put upon mothers to agree contact as means to control and coerce them. We are concerned that some perpetrators may use similar tactics after attending a separated parenting programme. A safer approach would be for there to be an assessment by an accredited domestic abuse expert at the start of the case, and this will inform what type of programme if any the parties should be referred on to.

As is the case with mediation, survivors who have never reported domestic abuse to a professional are more at risk of being inappropriately forced into a parenting programme because they will not have the evidence for an automatic exemption. Survivors who have not yet identified that they have experienced domestic abuse are at even greater risk of being forced to attend parenting programs, and there is no evidence that the programs will be able to identify the abuse or respond to it safely.

Whilst we are not in favour of mandatory separated parenting programmes, we are of the view that parenting programmes should be available where safe on a voluntary basis for parents, and others such as grandparents. These should be funded in a way that makes them accessible.

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

No. See our response to Question 1.

**Question 3: Should information on the court process (non-tailored legal information) be provided to those with a private family law dispute:**

- **at the mediation information and assessment meeting (MIAM)**
- **at the parenting programme**
- **via an online resource**
- **by any other means**

**(please specify) Please provide reasons for your answer**

Information on court processes is helpful, but we know from the demand on our advice line that this is not enough and people need independent and tailored advice. The provision of Early Legal Help (advice and support from lawyers at the start of the legal problem) in

addition to generic advice on court processes will help people make more confident and informed decisions about whether to go to court, mediate, or enter into a parenting agreement.

**Question 4: Based on current online resources, what are your views on an online tool being provided by the government to help parents, carers and possibly children involved in child arrangement cases? What information and resources should any such tool prioritise to support families to resolve their issues earlier?**

We are aware that parents and survivors search for information online, and it would be helpful to have information that they can be confident is accurate and trauma-informed. It is important that the information is impartial and does not reinforce the pro-contact culture and minimisation of abuse that was identified in the Harm Report[21].

The tools and resources should be designed to help people identify domestic abuse and explain measures that might assist them such as special measures, Practice Direction 12J, and MIAM exemptions. They should also signpost to VAWG support services, including local and by and for services. The tools should also assist survivors to ascertain whether they are eligible for legal aid.

We suggest that parents including survivors and children are consulted on the design and content of the resources to ensure that they meet their needs.

**Question 5: Do you think it is appropriate for mediators to determine suitability for a co-parenting programme at an information meeting?**
No.

- We doubt that mediators have sufficient knowledge of the parenting programmes to be able to determine suitability.
- Parties will need to be screened for domestic abuse as part of the suitability assessment. Mediators, even those who have received some training on domestic abuse, do not have sufficient expertise to screen for domestic abuse. One study found that the average time spent on screening for domestic abuse is less than 3 minutes[22]. Assessments of this nature should be conducted by, or in conjunction with, a domestic abuse expert and funding will need to be allocated for this to happen.
- Some survivors have expressed to us feeling pressured into mediation because they mediator was keen for them to mediate. This may be because the mediator does not fully understand the impact of domestic abuse, or because they have a vested

21 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895173/assessing-risk-harm-children-parents-pl-childrens-cases-report_.pdf

22 Paulette Morris (2013) Mediation, the Legal Aid, Sentencing and Punishment of Offenders Act of 2012 and the Mediation Information Assessment Meeting, Journal of Social Welfare and Family Law, 35:4, 445-457, DOI: 10.1080/09649069.2013.851206

interest in encouraging mediation. We are concerned that similarly, mediators will signpost survivors to parenting programmes as a step towards mediation rather than prioritising safety.

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

We are not aware of any evidence from other countries that support the proposals put forward in the consultation. The evidence that we are aware of points in favour of voluntary and not mandatory mediation. The consultation cites three countries where compulsory mediation has already been introduced. We will address each in turn.

Australia
Compulsory mediation with exemptions for domestic abuse was introduced in 2006. An evaluation revealed problems for cases of domestic abuse (inadequate screening, increased costs as less likely to reach mediation and still had to go to court). **The model currently being proposed in the consultation is based on this model that has already been found to be flawed for survivors of domestic abuse in Australia, and is evidence that the current proposals should not be taken forward**.

In response to the flawed model, Australia introduced Coordinated Family Dispute Resolution (CFDR): a specialist, multi-disciplinary and lawyer assisted approach involving rigorous screening in cases with reported histories of domestic abuse. The MoJ has not provided any information on why this model is not being explored in the consultation.
The evaluation for the Australian CFDR[23] had many more positives for survivors than normal dispute resolution but "*even in CFDR, purposely developed with these circumstances in mind, some parents experience considerable emotional difficulty, even trauma, in mediation. The extent to which this happens in non-CFDR mediation processes, and the consequences of this, merit further examination*".

Norway
GRIEVO's assessment[24] of the Norway model found that:

- *"The decision-making process which is based on mandatory mediation does not allow for sufficient assessment of the risk of domestic violence nor does it sufficiently recognise the power imbalance in abusive relationships which may impair the ability to negotiate fairly."*
- "*although child custody mediation is mandatory in Norway for all separating couples with children, the number of child custody disputes in courts is similar to the other Nordic countries with voluntary mediation schemes only*"

This supports our assertions that the model proposed in the consultation will place survivors of domestic abuse at risk of further harm, and that the proposals will not achieve the MoJ's aim to reduce the number of cases at court.

[23] https://aifs.gov.au/sites/default/files/2022-03/4310-evaluation-pilot-legally-assisted-family-dispute-resolution-family-violence-cases.pdf
[24] https://rm.coe.int/grevio-inf-2022-30-report-norway-eng-pour-publication/1680a923f8

New Zealand
We do not know whether there were any evaluations of the models in these jurisdictions. Without a thorough evaluation of the impact of the models on survivors of domestic abuse, we cannot comment further.

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

We oppose the proposed model and the 'MIAM' pre-mediation meeting that goes along with it. It should not exist. See our introductory comments for reasons.

We disagree that data which shows that 33% of applicants in the family courts attended a MIAM is in indication that the MIAM requirement is not working as intended. It just means that the courts are dealing mostly with cases that are not suitable for mediation. See our comments in our introduction under 'Lack of evidence to support proposals'.

The case of K v K[25] is cited as an example of inappropriate use of the 'urgency' exemption which was not identified by the courts in the first instance. Our views are:

- This is just one example of inappropriate use of an exemption and not sufficient to trigger changes to the law and procedure rules.
- Given the findings of rape and domestic abuse, mediation would not in fact have been appropriate in this case. The fact that the mother did not raise the abuse at the start of the case does not negate the fact that the domestic abuse had happened.
- The issues identified in this case can be addressed under existing laws and rules, amendments are not necessary for the courts to review whether the urgency exemption still applies after the application is issued.

We are not aware of any evidence to suggest that domestic abuse exemptions are being invalidly claimed and so any tightening of the rules will negatively and disproportionately impact upon survivors of domestic abuse. See our response to the Family Procedure Rules Consultation on early resolution of family private law arrangements for a more detailed explanation[26].

If the MoJ is minded to review the operation of the current MIAMs, we draw attention to our introductory comments on the suitability of mediators to assess whether cases are suitable for mediation. We suggest that assessments are conducted by domestic abuse experts at the start of the case which can inform whether a case is suitable for a MIAM / mediation and if not, may inform how the court approaches the case. The MoJ can use the work being undertaken in the Pathfinders pilots to assist with developing this approach.

**Question 8: What should "a reasonable attempt to mediate" look like? Should this focus on the number of mediation sessions, time taken, a person's approach to**

[25] K v K, [2022] EWCA Civ 468
[26] https://rightsofwomen.org.uk/wp-content/uploads/2023/05/ROW-response-to-FPRC-Early-Resolution-consultation.pdf

**mediation or other possibilities?**

We oppose the proposals for courts to investigate whether parties have made "a reasonable attempt to mediate". This further chips away at the voluntary nature of mediation and places survivors of domestic abuse at risk of further harm.

We have also opposed the FPRC proposal to require people to confirm in writing whether they attempted dispute resolution and why not[27].

Currently, survivors of domestic abuse who are responding to the other party's application can refuse to attend a MIAM and mediation. The "reasonable attempt to mediate" will significantly increase pressure on applicant and respondent survivors to mediate for fear of costs orders and/or being viewed unfavourably by the courts.

Perpetrators who are already using the legal system to perpetrate abuse are likely to use this expectation as a tool to prolong cases (for example by refusing to mediate and requiring the applicant to go to court and then then return back and forth from court and mediation whilst the judge expects the perpetrator to make a reasonable attempt at mediation, or by repeatedly alleging that the survivor is not making reasonable attempts at mediation) and threaten survivors who express reluctance to reach out of court agreements.

**Question 9:**

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

Yes, however this question is prefaced on there being compulsory mediation which we oppose. We are of the view that all the circumstances listed in the question should continue to be exempt from the MIAM requirement and compulsory mediation should not be introduced.

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

The current circumstances that constitute urgency for the MIAM requirement seem sufficient.

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

Compulsory mediation should not be introduced, and therefore the question of exemptions falls away.

[27] Ibid.

**Question 11: How should exemptions to the compulsory mediation requirement be assessed and by whom (i.e., judges/justices' legal advisers or mediators)? Does your answer differ depending on what the exemption is?**

We oppose the introduction of compulsory mediation, and therefore the question on who should assess exemptions falls away.

If the MoJ is minded to review how exemptions are assessed for the current MIAM scheme, we believe survivors relying on the domestic abuse exemption should self-certify **without the need to produce evidence** for the following reasons:

- There is no evidence that large numbers of survivors are lying when claiming the domestic abuse exemption. The views we hear from women on the advice line indicate that where mediation is possible and suitable that is the preferred route.
- Obtaining the evidence of domestic abuse is a challenge for survivors – see our response to question 6 of the FPRC consultation[28].
- Many survivors never report the abuse to a professional, which means they will not have one of the forms of evidence that is currently accepted for the MIAM requirement.
- Assessing evidence of domestic abuse for MIAM exemptions would be an extra burden on court staff and resources for little benefit.

A participant in Women's Aid's research with Queen Mary University of London articulated the issues with evidencing domestic abuse:

'*the problem is the courts are saying you really should go to mediation before you launch court proceedings. Well how can you mediate with someone who intimidates and frightens you? If you've got no previous evidence that that person has intimidated and frightened you, 'cause you've never reported it, 'cause you're too frightened and intimidated? […] and the legal system wants you to go and sit in a room with that person and a mediator who is not trained to deal with that level of coercive control*.'[29]

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

We oppose the introduction of compulsory mediation, this should not be introduced or funded.

We support the provision of full funding for **voluntary** mediation. However, we share concerns raised by Women's Aid in their response that this may mean some survivors could

[28] https://rightsofwomen.org.uk/wp-content/uploads/2023/05/ROW-response-to-FPRC-Early-Resolution-consultation.pdf

[29] Birchall, J. & Choudhry, S. (2018). *What about my right not to be abused? Domestic abuse, human rights and the family courts.* Bristol: Women's Aid Federation of England. Available online. P.28.

be pushed into mediation by it being the cheaper option – particularly where they have experienced financial abuse. To avoid finance rather than safety dictating a survivor's decision, the MoJ should implement the recommendation of the Harm Panel to provide legal aid to both parties in all cases where domestic abuse is alleged. This would also help ensure 'equality of arms' and enable allegations of abuse to be properly considered.

In addition, we suggest the MoJ waits and considers the evaluation of its Pathfinder Pilots which may reveal better approaches to centring safety and dispute resolution than those proposed in this consultation.

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

No – additional regulation required.

As we touched upon in our introductory comments, there appears to be inconsistency as to mediators' ability to identify domestic abuse and safeguard survivors by advising against mediation. Research has found that mediators '*routinely ignore, reframe, or reject allegations unless there is an existing external evidence to support the claim'*.[30] We have included case studies from our advice lines to help illustrate these points below:

> *Julie informed her mediator that she had experienced domestic abuse, she had a non-molestation order in place to protect her from the abusive ex-partner and indicated that she did not feel comfortable mediating. Despite this, the mediator went ahead a booked online mediation sessions. The caller told us that the mediator had informed her that she has the option of shuttle mediation, but she was not aware that she could refuse to take part in mediation.*
>
> *Stacey called the advice line seeking help on how to prepare for mediation which was due to start the following week because she was extremely anxious and the very sight of his name was causing her to have flashbacks of the abuse she suffered. The mediator had failed to assess the risk to Stacey in engaging in mediation or recognise that this may negatively impact upon Stacey's health. The mediator had not informed Stacey that she had the option to refuse to mediate, leaving Stacey feeling she had to suffer negative health consequences because of the need to engage in mediation.*
>
> *Nina was assessed as a medium risk victim of domestic abuse and contact handovers were conducted through a third party. Despite this, she was convinced to attend mediation. Through mediation Nina was convinced to take over facilitation of handovers herself, placing her at risk of harm through direct contact with the perpetrator.*
>
> *Diana was advised not to go to mediation by the domestic abuse service that was supporting her, but her lawyer convinced her that the mediators would be able to handle*

[30] Trinder, L., Firth, A. and Jenks, C. (2010) 'So Presumably Things Have Moved on Since Then?' the Management of Risk Allegations in Child Contact Dispute Resolution. In: *International Journal of Law, Policy and the Family*, 24 (1). Available online.

*him. However, the mediators couldn't handle her husband and he dominated the 'negotiations'.*

We have also been hearing concerns about the impartiality of some mediators:

"*The mediator is in activist in men's rights. I didn't realise that when I suggested him - he keeps saying on phone that he was neutral. He let ex-partner talk a lot and I found myself having to defend myself constantly. I feel vulnerable and scared in his presence*."

*"The mediator is a solicitor who campaigns for father's rights. I feel the mediator is on his side".*

Accredited FMC members are required to undertake some form of domestic abuse training as part of their foundation course. From the very limited information available to the public, we gather that the extent to which domestic abuse is covered seems to vary depending upon the training provider, and is sometimes coupled with 'high conflict' cases. Training is provided by a mediator, solicitor, former solicitor or legal academic and not by domestic abuse experts.

The FMC conducted a survey of mediators in 2019[31]. When asked "*Have you had any training about carrying out mediation in cases where has been domestic violence or abuse in the family*?" 79 respondents said they had face to face training but there is no information on the type, extent or provider of that training. Approximately 64 had received written guidance or informal training and approximately 11 received no training either because the training was not accessible or because they did not want the training. Despite the limited training the vast majority (almost 95%) of mediators felt confident about assessing whether mediation is suitable in cases where there has been domestic violence or abuse, and 79% felt comfortable in facilitating mediation where there has been domestic violence or abuse in the family. We are of the view that many mediators overestimate their understanding and expertise on domestic abuse. This is also a mistake made by other professionals involved in the justice system.

Mediator accreditation should require increased training for mediators to identify domestic abuse, recognise the power imbalance inherent in this situation and respond to the abuse if is occurring during mediation. There must be clearer guidelines and duties imposed upon mediators to inform parties that it is acceptable to refuse mediation if it is not right for them, in particular if they feel unsafe or uncomfortable.

One of the recommendations of the Harm Panel report is that "*consideration be given to training being conducted on a multi-disciplinary basis across all professions and agencies within the family justice system, to ensure a consistent approach*". We suggest that this should include mediators and other dispute resolution providers. The training on should be provided by, or in conjunction with, accredited domestic abuse experts from the VAWG sector.

In addition, we suggest that mediators and local domestic abuse services are encouraged to foster relationships. We are aware of work that has been done to achieve this by the MADA

[31] Family Mediation Survey 2019 – Results https://www.familymediationcouncil.org.uk/wp-content/uploads/2020/01/Family-Mediation-Survey-Autumn-2019-Results.pdf

(Mediation and Domestic Abuse) Network, but this does not currently have the resources to reach its full potential.

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

We believe that assessment for domestic abuse and suitability for mediation should not be the responsibility of a mediator, but a domestic abuse specialist – see our response to Question 7 and our introductory comments.

We also support the recommendations made in Women's Aid's response to this consultation question including:

- that the FMC introduces clearer standards for domestic abuse awareness and greater regulation of domestic abuse training
- funding to ensure a comprehensive and consistent approach to the provision of specialist training on domestic abuse for all accredited mediators
- consideration be given to making 'mediator' a protected title

**Question 15:**

a) **Should the requirement for pre-court mediation be expanded to include reasonable attempts at other forms of non-court dispute resolution (NCDR), or should it be limited only to mediation?**

NCDR including mediation should not be compulsory at all, for the reasons highlighted throughout this response.

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

NCDR including mediation should not be compulsory at all for the reasons highlighted throughout this response.

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

N/A

d) **If for 15a you answered 'other forms of non-court dispute resolution (NCDR)', what accreditation/regulatory frameworks do other forms of NCDR have that could assist people in settling their family disputes in a way that fits with the legislation that applies to private law children cases and financial remedy cases?**

N/A

e) **If the requirement is limited to mediation, should completion of another form of dispute resolution lead to an exemption from the requirement to attempt mediation?**

NCDR including mediation should not be compulsory at all for the reasons highlighted throughout this response.

**Question 16: What is the best means of guarding against parties abusing the pre-court dispute resolution process:**

**(i) should the court have power to require the parties to explain themselves**

No. The idea that parties who come to court must 'explain themselves' is entirely misguided. 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.**

We oppose the suggestion that confidentiality could be waived so the court can ascertain whether there was a there was a reasonable attempt at mediation, this will stifle the mediation process and decrease the chances of an agreement being reached in those cases where mediation is appropriate. Confidentiality is a key element of mediation and helps couples reach agreement. Setting aside our concerns about survivors of domestic abuse, we believe this measure would decrease the success rates of mediation among separated families generally.

Confidentiality should only be breached for safeguarding related issues, and if evidence is required from the mediator of domestic abuse that occurred during mediation provided the survivor consents to confidentiality being waived for this purpose.

**(ii) what powers should the court have in order to determine whether a party had made a reasonable attempt to mediate, for example when considering possible orders for costs?**

See our response to Question 16(i) above and our responses to Chapter 4.

**Question 17: How could a more robust costs order regime discourage parties in court from avoiding reasonable attempts at pre-court or post-application mediation and lengthening proceedings unnecessarily? Should judges continue to have discretion to decide when to make these orders and what specific costs to include?**

This approach should be abandoned altogether and we strongly oppose it. 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.

We are dismayed that the MoJ is "keen to see courts using costs orders" in this type of situation. There appears to be a lack of understanding of the types of people who are in the Family Court, and how they have ended up there. Threatening and punishing litigants with costs orders is not a reasonable or effective way of alleviating the pressures faced by the court system.

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

We have received calls from survivors asking for advice on whether they should raise domestic abuse and concerns about contact because they fear that they will be accused of parental alienation and have their children removed from their care. Costs orders and reasonable attempt to mediate requirements will further disincentivise survivors from raising domestic abuse or seeking to resolve issues through the courts.

Currently survivor respondents are not required to claim an exemption in order to avoid mediation. The consultation proposal implies that survivors who are responding to a perpetrator's application will have to claim the domestic abuse exemption with evidence of domestic abuse to avoid mediation and to avoid costs orders. This inevitably leads to all of the burden and problems we raised in response to Question 11.

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 mediate and will therefore 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.

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.

**Question 18: Once a case is in the court system, should the court have the power to order parties to make a reasonable attempt at mediation e.g., if circumstances have changed and a previously claimed exemption is no longer relevant? Do you have views on the circumstances in which this should apply?**

No. Mediation should be voluntary, and departing from that principle puts survivors of domestic abuse at risk of harm for the reasons stated throughout this response.

We cannot think of a situation where it would be appropriate to find that a domestic abuse exemption is no longer relevant.

The courts already have the power to adjourn proceedings for mediation or other forms of NCDR where the parties agree to it and we are of the view that this is sufficient. Adjourning cases where the parties do not agree to it is a waste of time if the parties do not wish to attempt mediation. Even if they attempt mediation, it's less likely to be successful if one or none of the parties is willing to negotiate.

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. The power to order parties into mediation may dissuade survivors from seeking to make financial remedy claims and Children Act 1989 applications at all, and for some survivors and their children this can lead to destitution.

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 mediation against their will.

**Question 19: What do consultees believe the role of court fees should be in supporting the overall objectives of the family justice system? Should parties be required to make a greater contribution to the costs of the court service they access?**

Parties should not be required to make a greater contribution to the costs of the court service.

The nature of children law cases is different to other cases, such as those that involve commercial interests. For the welfare and safety of children, it is right that the court fees should not aim for full cost recovery or compete with mediation fees. The fees should be set at a rate which ensures access to the courts.

An increase to court fees will mean that those not eligible for a fee exemption but do not have sufficient funds to pay the court fee will not be able to apply to the court. It will disproportionately impact upon those of lower wealth and incomes, who make up the majority of litigants in the Family Court. Increasing fees will hamper the ability for people in England and Wales to access justice, protect themselves and their children.

**Rights of Women**

**15 June 2023**