



Mediation and Early Resolution of Family Disputes

As part of The International Family Law Group (iFLG)'s proactive support and promotion of developments in family dispute resolution, iFLG has provided detailed responses to government consultations on supporting earlier resolution of private family law arrangements.

Firstly, on 25 May 2023 responses were provided to the Family Practice Rule Committee (FPRC)'s consultation in relation to strengthening the rules and Practice Directions to encourage earlier resolution of private family children and financial remedy arrangements, and secondly on 15 June 2023 to the Government's consultation on supporting earlier resolution of private family law arrangements. The latter consultation arose from proposals originally made by Dominic Raab MP when he was Justice Secretary, with particular emphasis on the role of mediation.

It is instructive, by way of background, to '*go back to basics*' regarding the aim of mediation, which is to assist the participants to reach decisions or make proposals they consider to be appropriate to their own individual circumstances. A fundamental objective is also to facilitate communication, both during the mediation sessions, and to provide tools to improve communication between ex-spouses and parents in the future to reduce scope for dispute.

Enshrined in the Family mediators' Codes of Practice are the principles that voluntary participation is a fundamental ethos of mediation, and that participation should be a free choice of each participant to mediation. A mediator must raise a concern if he or she considers that either party is unable, or unwilling, to take part in the process freely, and fully. Mediation Information and Assessment Meetings (MIAMS) enable mediators to explore with a party whether mediation would be appropriate to their circumstances. The assessment at the MIAM must be focused on suitability for each individual.



The status of the mediator as a '*neutral*' is crucial to maintain good integrity of mediation. Although mediations can, and frequently are, conducted remotely (including for shuttle mediation, with the use of '*waiting rooms*' if participants do not want to '*meet*' directly), this process is not available or appropriate for all.

It has been argued that reliance by parties on exemptions from the MIAM process, prior to issuing court proceedings is overused, if not abused. However, if mediation was mandatory, it could be pre-empting the role of the Judges for non-legally trained court '*gatekeepers*' to determine if exemptions meet evidential requirements. Furthermore, as an international practice iFLG is aware that language can be a legitimate barrier to mediation but is not currently an exemption.

Integral to the training of a mediator is acquiring the skill to address imbalances between the parties during discussions. This may be because one participant is a financially stronger party, is more vocal, or may attempt to dominate discussions and drive the agenda. No matter how experienced the mediator is however, optimistically mediation is approached and it may never be possible for some participants to redress imbalances.

A party may have experienced manipulative unreasonable behaviours on the part of their spouse or partner for many years, which may not be apparent to even the most astute of mediators; particularly in a relatively short MIAM meeting, or initial confidential intake meeting. The distress to a participant obligated to converse with such an individual should not be underestimated.

Although safeguards provided by flexible processes, including '*shuttle*' or on-direct mediation and the welcome development of solicitor inclusive mediation (referred to as hybrid mediation), compulsory mediation could in some cases offer significant, and unintended severe consequences for a participant. The prospect of being forced to mediate with a manipulative former partner, or even one who has behaved unreasonably when emotions are still highly charged, is not conducive to making proposals reaching fair outcomes. The collaborative process, whereby the participants meet with specially trained solicitors, can provide greater support for each party, and this process should be viewed as an alternative option, if obligatory mediation was introduced.

The proposal for separating parents to attend a mandatory shared parenting programme, subject to exemptions, may be more welcome but the emphasis should be on encouragement to attend, not compulsion. Joint participation in a course with the other parent may not be suitable, for the reasons stated above in relation to mediation, and should not be pre-requisite to parents making an application to the court. Access to justice should continue to be unfettered, and not delayed by



requirements to attend a course prior to issue of an application to court, in the interests of welfare of a child, although attendance during the course of the proceedings may be a reasonable expectation.

The Government's consultation on supporting earlier resolution of private family law arrangements was introduced as a means to address the severe backlogs in the family courts. However, timely legal advice is essential for all participants or potential participants in mediation, or other forms of dispute resolution. In recent years, there has been a significant increase in litigants in person in family court proceedings. This frequently happens because those parties cannot afford legal advice, which, if provided on a timely basis, could assist in resolving disputes or a signpost to other processes thereby reducing the burden on the court system. Legal aid has long ceased to be available for early family legal advice.

The government introduced a service called '*Help with Family Mediation*' but the total financial assistance to each couple was very limited and insufficient to enable work to be completed to Memorandum of Understanding (MoU) which sets out proposals for settlements made in mediation. The MoU usually forms the basis of legal advice with a financial consent order on divorce. There could be scope for a voucher scheme for initial fixed fee legal advice prior to mediation, or other dispute resolution options such as arbitration or collaborative.

Any move towards compulsion in mediation, or any form of mandatory dispute resolution prior to issue in the court must have a central focus of protecting victims of domestic violence or abuse. Some vulnerable parties have been subjected to coercive, controlling and/or economic abuse, but do not categorize themselves as victims of domestic abuse, and the evidence is not immediately apparent. Individuals involved in the family law process are frequently vulnerable as a result of their situation. Although some amendments to the mediation process as proposed are welcome and necessary to keep up with the needs of the families, the non-court dispute resolutions, including mediation, should remain flexible, and not mandatory, to accommodate need, as well as to ensure justice and fair outcomes.

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