Women's Aid response to the Ministry of Justice's consultation on supporting earlier resolution of private family law arrangements

This response is submitted by Lucy Hadley (l.hadley@womensaid.org.uk) on behalf of Women's Aid Federation of England (Women's Aid), PO Box 3245, Bristol, BS2 2EH.

Women's Aid is the national charity working to end domestic abuse against women and children. We are a federation of over 170 organisations which provide just under 300 local lifesaving services to women and children across England. For almost 50 years, we have carried out ground-breaking research, campaigned on behalf of our members and survivors to shape policy and practice, and raised awareness of domestic abuse. Our support services, which include our Live Chat, the Survivors' Forum, the No Woman Turned Away Project, the Survivor's Handbook, Love Respect (our dedicated website for young people in their first relationships), the national Women's Aid Directory and our advocacy projects, help thousands of women and children every year.

Women's Aid welcomes the opportunity to feed back on the Ministry of Justice's (MoJ's) proposals on supporting earlier resolution of private family law arrangements. The focus of our response is on the impact of the proposals on survivors of domestic abuse, due to our area of expertise. Whilst recognising that both 'survivor' and 'victim' can be used interchangeably depending on the context, Women's Aid primarily uses the term 'survivor'.

Women's Aid has considerable expertise in the response to domestic abuse within the family justice system and the voices of survivors are central to our work on this issue. We have published a number of research reports, including *19 Child Homicides: What must change so children are put first in child contact arrangements and the family courts, What About My Right Not to Be Abused?: Domestic abuse, human rights and the family courts,* and *Two Years Too Long: Mapping action on the Harm Panel's findings.* Our Child First campaign drew attention to the avoidable deaths resulting from child contact in cases of domestic abuse and led to significant changes in both policy and legislation – including the review of Practice Direction 12J in 2017 and reforms to cross-examination and special measures in the Domestic Abuse Act 2021. The then acting Chief Executive of Women's Aid Nicki Norman sat on the Ministry of Justice's expert panel on assessing risk of harm to children and parents in private law children cases (the 'Harm Panel') and our current Chief Executive Farah Nazeer sits on the Advisory Group of the review of the presumption of parental involvement.

Introduction

We strongly oppose the proposal to make mediation and co-parenting programmes compulsory in the family courts, given the impact this is likely to have on survivors of domestic abuse. Domestic abuse is alleged in 62% of private law children cases[1], yet these proposals treat domestic abuse as the exception rather than the norm by implementing an exemption system for it – a system which we do not believe to be adequate. The proposals fail to acknowledge how compulsory mediation will play into the hands of perpetrators, giving them tools to continue their abuse and coerce survivors.

We recognise the importance of improving the response to domestic abuse within the current Mediation Information and Assessment Meeting (MIAM) system, but we are clear that a legal requirement to mediate before making a court application will cause harm to survivors of domestic abuse and their children. Before responding to the specific questions in the consultation, we therefore wish to set out our reasons for opposing the proposals:

1. **We are not confident that survivors will be able to access the exemptions they need.**

Under the existing system of compulsory MIAMs, many survivors are not able access the domestic abuse exemption because:

[1] Cafcass and Women's Aid. (2017) *Allegations of Domestic Abuse in Child Contact Cases.* Bristol: Women's Aid Federation of England. Available online. P.23.

- They do not have access to an accepted form of evidence.[2]
- They fear repercussions from the perpetrator if they disclose abuse.[3]
- They fear it will harm their case if they disclose abuse or have previous negative experiences of reporting domestic abuse in the family courts.[4]
- They do not realise or identify what they are experiencing to be domestic abuse,[5] particularly in relation to coercive and controlling behaviour.

Even where domestic abuse is evidenced, the Harm Panel report states that there is evidence of survivors attending MIAM meetings despite having disclosed.[6] Recent judgements like the Court of Appeal judgement [2022] EWCA Civ 468, where the judge stated that the parties should have participated in a MIAM before going to court despite the fact that domestic abuse had been disclosed, is symptomatic of issues with the understanding and implementation of Practice Direction 12J (PD 12J).

Where there is no accepted evidence of domestic abuse, the onus falls on the mediator to screen for it. Perpetrators are well practiced at manipulating professionals[7] and survivors may fear disclosing, even when attending a MIAM meeting alone. We are not confident that the current mandatory training for mediators adequately equips them to recognise domestic abuse and respond appropriately to survivors.

Survivor Ambassador and spokeswoman for Women's Aid's Child First: Safe Child Contact Saves Lives campaign, Claire Throssell MBE, sums up these issues as follows:

> 'Even if there is an exemption for survivors of domestic abuse the onus is yet again on the victims to apply for exemption. Many women like me struggle to "prove" the abuse they've experienced – especially when it is coercive and controlling behaviour – or are simply too scared to raise it at all.
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> 'These proposals will mean many more survivors are pushed into mediating with the abusive partner they've fled from, and pressured into accepting child contact arrangements which are not safe or in the interests of their children.
>
> 'The culture of fear, trauma and oppression that is embedded into the Family Justice System will also be prevalent within mediation especially if the mediators themselves have no training, understanding or knowledge regarding domestic abuse and especially coercive control.
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> 'Since [my sons] Jack and Paul were killed by their abusive father I have campaigned to put children's voices and safety at the heart of the family justice system. I am deeply concerned that rather than improving the protection of children experiencing domestic abuse, the government is going backwards and urge them to reconsider.'

2. Mediation/co-parenting initiatives are often inappropriate in cases of domestic abuse.

Separation does not mean the end of abuse. In fact, the risk of abuse usually continues or increases after separation and family court proceedings are a key way in which perpetrators continue to harm survivors.[8] Adult and child survivors need the protection of court proceedings to counteract the abuser's strategies of coercion and control[9] – and many other individuals also rely on court; a Manchester pilot of compulsory mediation found that 80-86% of cases could not safely be diverted.[10]

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[2] 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.
[3] 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.
[4] Barnett, A. (2020) *Domestic abuse and private law children cases: A literature review*. London: MoJ. Available online.
[5] MoJ. (2020) *Assessing Risk of Harm to Children and Parents in Private Law Children Cases*. London: MoJ. Available online. P.50.
[6] MoJ. (2020) *Assessing Risk of Harm to Children and Parents in Private Law Children Cases*. London: MoJ. Available online. P.89.
[7] Barnett, A. (2020) *Domestic abuse and private law children cases: A literature review*. London: MoJ. Available online. P.74.
[8] Women's Aid. (2016) *Nineteen Child Homicides: What must change so children are put first in child contact arrangements and the family courts*. Bristol: Women's Aid Federation of England. Available online. P.23.
[9] MoJ. (2020) *Assessing Risk of Harm to Children and Parents in Private Law Children Cases*. London: MoJ. Available online. P.144.
[10] MoJ. (2019) *Support with Making Child Arrangements Programme – Six-month Pilot Evaluation Report.* London: MoJ.

Far from offering protection, mediation and other dispute resolution approaches can actively cause harm in cases which involve abuse. The MoJ's Harm Panel report found that mediation in such cases can cause psychological and emotional harm to survivors and trigger traumatic memories.[11] It can also result in the abuser manipulating mediation to pressure survivors into decisions; research by Barlow et al. 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.[12] This can result in contact arrangements which are not safe for children and do not centre their needs, nor those of the adult survivor.

Families involved in private law proceedings demonstrate much higher levels of vulnerability than comparable groups.[13] Given these complex circumstances and the lack of transparency about mediator training, there may be significant safeguarding concerns in moving to a system where the assessment responsibility of mediators is increased.

3. The proposals are likely to disproportionately impact marginalised women.

The MoJ has not published an equalities impact assessment alongside the consultation proposals, but it is likely that the measures will have a disproportionate impact on survivors facing additional forms of inequality. Organisations led 'by and for' Black and minoritised women and Deaf and disabled survivors have highlighted that the women they support face significant challenges in navigating the existing system and accessing MIAM exemptions, particularly where they do not have legal representation. These challenges include unmet language and communication needs and a lack of understanding of the UK legal system. Marginalised women can also face additional barriers to disclosing abuse, such as fears around immigration control and distrust of the police, which is the first step to accessing a MIAM exemption. As the MoJ is not proposing reforms of the exemption model, these issues would be carried over into the proposed new system of compulsory mediation.

Black and minoritised women, and those with insecure immigration status, may also face specific community expectations and pressure to reconcile or agree to a contact arrangement – for example, for fear of being deported, permanently losing their children or being further isolated. There is evidence that making mediation compulsory exposes mediators to a more diverse set of clients[14] and we are not confident that mediators currently have the cultural understanding or expertise to respond to the weaponisation of these structural forms of inequality by perpetrators.

4. The proposals are contrary to the Harm Panel report's recommendations.

In 2020, the Government accepted the findings of the Harm Panel report, which identified 'unveiled deep-seated and systemic problems with how the family courts identify, assess and manage risk to children and adults'.[15] In the implementation plan, the MoJ announced that it was 'committed to both immediate action and longer-term reform, to ensure the system fully supports those who are victims of domestic abuse or otherwise vulnerable, and delivers the right outcomes for them and their children'.[16] The MoJ reiterated this commitment in its recent Harm Panel progress report.[17]

Given the lack of progress in the past two years, we fear that these proposals contribute to a wider trend of rolling back from the implementation of the Harm Panel. The proposals aim to increase the number of cases 'resolved without going to a courtroom'[18] and reduce the current court backlogs,

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[11] MoJ. (2020) *Assessing Risk of Harm to Children and Parents in Private Law Children Cases.* London: MoJ. Available online. P.89.
[12] Barlow, A., Hunter, R., Smithson, J. & Ewing, J. (2014) *Mapping Paths to Family Justice.* Exeter: University of Exeter. Available online. P.8.
[13] Cusworth, L et al. (2021) *Uncovering private family law: Adult characteristics and vulnerabilities.* London: Nuffield Family Justice Observatory. Available online.
[14] Howarth, S. and Caruana, C. (2017) *Mandatory mediation in family law – a review of the literature.* Available online.
[15] MoJ. (2020) *Assessing Risk of Harm to Children and Parents in Private Law Children Cases*. London: MoJ. Available online. P.40.
[16] MoJ. (2020). *Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Implementation Plan.* London: MoJ. Available online. P.4.
[17] MoJ. (2023). *Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Implementation Plan – delivery update.* London: MoJ. Available online. P.4.
[18] MoJ. (2023). *Supporting earlier resolution of private family law arrangements: A consultation on resolving private family disputes earlier through family mediation.* London: MoJ. Available online. P.3.

without adequately considering that – as submissions to the Harm Panel report show – 'victims and children need the protection of the court to counteract the abuser's power and control'.[19]

The MoJ's supporting document for the consultation states that 'in 2020/21, only 35% of applicants for relevant case types attended a MIAM before coming to court' and that this is 'not enough'.[20] However, the document goes onto acknowledge that the Harm Panel 'reported that 50%–60% of families coming to court will have allegations and/or other evidence of domestic abuse'.[21] If 50-60% of cases involve domestic abuse – Women's Aid research finds the figure to be at least 62% and even this is likely to be an underestimate – then the maximum number of applicants who would be attending MIAMs is around 40%, which is close to the current figure.

The proposals to make mediation compulsory is aiming to solve a problem that does not exist – it seems that the overwhelming majority of those who are suitable for a MIAM are attending one already – and they will have dangerous consequences for survivors. Marginalising abuse cases from court would also be economically short sighted; it would only lead to them returning at a later stage.[22] To achieve sustainable reform, the Government should prioritise implementing the recommendations of the Harm Panel in full, including adequately resourcing the courts, family justice agencies and domestic abuse support services.

5. We have serious concerns about the evidence base underpinning the proposals.

We do not believe that the evidence supports compulsory mediation – and we have concerns about the research cited in the MoJ's consultation document which is being used to justify these proposals. For example, the document states that 'research on the benefits associated with mediation shows positive outcomes for parents, many of whom report being satisfied with their agreement'.[23] This is taken from the Family Mediation Council (FMC) survey, which is a survey of mediator professionals rather than parents. The survey report says that 'only a small number of respondents knew what happened to cases after they had produced outcome documentation'[24] and it seems that the MoJ has taken participants agreeing to mediation outcomes as a proxy for parental satisfaction and positive results.

We also dispute that the research supports *compulsory* mediation. For example, the consultation document cites Thomas et al. 2016's findings that attempting dispute resolution earlier may help parents to reach agreements earlier. Whilst their paper does indeed find that parents preferred mediation services at an earlier rather than later stage, the consultation document does not explain that successful delivery of these services was predicted by – among other things – 'careful assessment of preparedness to avoid wasting resources if one or both partners was unwilling or not ready to engage in mediation'.[25] In other words, the voluntary nature of the talk-based services offered was important to outcomes.

Thomas et al.'s research also finds that the positive impact of the talk-based projects had reduced after seven months; it cannot be assumed that compulsory mediation would solve the issue set out in the consultation document that 'many families who come to court to make child arrangements return to court'.[26] Importantly, the research found that the talk-based services were limited in their effectiveness if either parent had serious health or learning difficulties. We urge the MoJ to carry out

[19] MoJ. (2020) *Assessing Risk of Harm to Children and Parents in Private Law Children Cases*. London: MoJ. Available online. P.145.
[20] MoJ. (2023). *Supporting earlier resolution of private family law arrangements: A consultation on resolving private family disputes earlier through family mediation.* London: MoJ. Available online. P.11.
[21] MoJ. (2023). *Supporting earlier resolution of private family law arrangements: A consultation on resolving private family disputes earlier through family mediation.* London: MoJ. Available online. P.11.
[22] Women's Aid. (2022). *Two years, too long: Mapping action on the Harm Panel's findings*. Bristol: Women's Aid. Available online. P.56.
[23] MoJ. (2023). *Supporting earlier resolution of private family law arrangements: A consultation on resolving private family disputes earlier through family mediation.* London: MoJ. Available online. P.23.
[24] FMC (2019). *Family Mediation Survey 2019 – Results.* London: FMC. Available online. P.4.
[25] Thomas et al. (2016) *Help and Support for Separated Families Innovation Fund Evaluation.* London: DWP. Available online.
[26] MoJ. (2023). *Supporting earlier resolution of private family law arrangements: A consultation on resolving private family disputes earlier through family mediation.* London: MoJ. Available online. P.10

and publish an equalities impact assessment of the compulsory mediation proposals. Not only are certain groups less likely to benefit from it, but for some it could be actively dangerous.

In terms of the international examples cited, we are concerned that the MoJ is not fully analysing and learning from the experiences of different countries; the consultation document does not engage with evaluations of the compulsory mediation programmes in Norway and New Zealand. A recent GREVIO report about Norway found that, despite compulsory mediation, 'the number of child custody disputes in courts is similar to the other Nordic countries with voluntary mediation schemes only'.[27] Not only is compulsory mediation potentially dangerous for survivors, but it can also be ineffective in reducing the number of cases in the family courts.

Overall, the mediation proposals put the focus on individuals who supposedly 'act in a way that unnecessarily prolongs court proceedings'[28] without considering the structural changes which are essential to guaranteeing safety and effectiveness in the family courts. We strongly believe that for the MoJ to achieve its aims of reducing pressures on the court system and the adversarial nature of disputes, whilst protecting the safety of adult and child survivors, it should **withdraw these proposals and instead prioritise implementing the Harm Panel's recommendations.** These include adequately resourcing the family justice system, investing in the 'Pathfinder' pilots to develop a more tailored and trauma-aware approach to cases, improving coverage of evidence-based perpetrator programmes, and providing specialist support to survivors.

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. We strongly oppose a mandatory requirement for separating parents to attend a shared parenting programme. Even with an exemption in place, we are clear that not all survivors will be protected for the following reasons:

- Not all survivors have access to an accepted form of evidence. The evidence requirements to access an exemption to a MIAM currently mirror those required for accessing legal aid under the domestic violence gateway – including convictions for domestic violence offences, protection orders, findings in court, and evidence from third party professionals. Whilst these requirements provide a much wider range of evidence types than the original legal aid gateway, survivors still face barriers to providing such evidence – in particular because many have never disclosed the abuse to a professional. There remain multiple barriers preventing victims from reporting abuse and seeking help – particularly coercive control which, as the Harm Panel identified, uses isolation as key strategy 'to prevent disclosure, instil dependence, express exclusive possession, monopolise [survivors'] skills and resources, and keep them from getting help or support'.[29] Stark's work on coercive control has shown how perpetrators prevent communication, forbidding calls or visits to family and friends and preventing victims from calling the police or accessing medical or other support[30] - meaning the survivor may not have any interactions with professionals to use as evidence. As the government's statutory guidance for the Domestic Abuse Act 2021 makes clear, the shame and stigma of disclosing abuse, and the fear or not being believed also remain fundamental barriers to reporting. Women from minoritised groups experience further barriers, including unmet language and communication needs, religious, community or family pressures, and fears around

[27] GREVIO. (2022) *Baseline Evaluation Report: Norway.* Strasbourg: GREVIO. P.49.
[28] MoJ. (2023). *Supporting earlier resolution of private family law arrangements: A consultation on resolving private family disputes earlier through family mediation.* London: MoJ. Available online. P.8
[29] Barnett, A. (2020) *Domestic abuse and private law children cases: A literature review*. London: MoJ. Available online. P.17.
[30] Stark, E. (2007) *Coercive Control: How Men Entrap Women in Personal Life*. New York: Oxford University Press. P.262.

immigration control.[31] As such, an exemption relying on evidence will always exclude some survivors, particularly the most isolated and minoritised.

- Survivors fear repercussions from the perpetrator if they disclose abuse.[32] Domestic abuse is a high harm, high risk crime and it is well evidenced that this does not end when a relationship ends; research has consistently shown that women and their children are at significant risk when leaving an abusive partner. Leaving an abusive partner has been identified by the World Health Organisation as a risk factor for being a victim of femicide.[33] The Femicide Census shows that of the 888 women killed by partners or former partners between 2009-2019 in the UK,[34] at least 43% were known to have separated, or taken steps to separate, from the perpetrator. Of the cases where women had separated, or made attempts to separate, the vast majority (338, 89%) were killed within the first year and 142 (38%) were killed within the first month of separation, or when the victim first took steps to separate. The point of, and after separation, is an intensely dangerous time for a woman escaping an abuser and many therefore continue to fear escalating abuse if they report.

- Survivors fear it will harm their case if they disclose abuse or have previous negative experiences of reporting domestic abuse in the family courts. The literature review for the Harm Panel cited examples of women being advised by their legal representatives not to raise allegations of domestic abuse on the basis that this would count against them and to 'pull themselves together' and 'move on' from the abuse.[35] We continue to hear from survivors that do not disclose abuse during private law children proceedings because they are scared it will negatively impact their case and, as a result, their children. As the recent report of the UN Special Rapporteur on Violence Against Women concluded, 'allegations of domestic violence tend to receive insufficient scrutiny by courts and to trigger problematic assumptions'.[36] In particular, the report demonstrated how counter allegations of 'parental alienation' are used as a tactic by perpetrators of domestic abuse to side-line allegations of domestic abuse, and has a significant impact on custody outcomes, despite the fact it is a 'discredited and unscientific' concept.[37]. The misogynistic bias is common and, as research has shown, is now upheld by lawyers advising women not to mention their abuse for fear of losing custody of their children to the abusive parent.[38] In this context, it is completely understandable that women fear raising domestic abuse at all in the family courts.

- Survivors often do not realise or identify what they are experiencing to be domestic abuse,[39] particularly in relation to coercive and controlling behaviour. The government's statutory guidance for the Domestic Abuse Act 2021 makes clear that individuals do not always realise they are victims of domestic abuse, and this is clear in the experience of Women's Aid's direct support services to survivors. In our experience, women often contact us because 'something isn't right' but they are unsure of whether their partner is abusive. It is only once they discuss the behaviours with a domestic abuse specialist that patterns of abuse, and their impact, are identified.

As such, we are clear that any system which mandates a shared parenting programme will include at least some women experiencing domestic abuse – even with the proposed exemption system. As made clear by the fact that the Government is proposing an exemption, shared parenting programmes can be extremely harmful if there is an abusive parent involved. Given

[31] Home Office. (2022). *Domestic Abuse Statutory Guidance*. London: Home Office. Available online.
[32] 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.
[33] World Health Organisation. (2012) *Understanding and addressing violence against women: Femicide.* Geneva: WHO. Available online.
[34] Femicide Census. (2020). *UK Femicides 2009-2018*. London: Femicide Census. Available online. P.30.
[35] Barnett, A. (2020) *Domestic abuse and private law children cases: A literature review*. London: MoJ. Available online. P.69.
[36] Alsalem, R. (2023*). Custody, violence against women and violence against children.* New York: United Nations. Available online. P.4.
[37] Alsalem, R. (2023*). Custody, violence against women and violence against children.* New York: United Nations. Available online. P.18.
[38] WRC. (2022) *The pathologising of women survivors of male violence by family court experts.* London: WRC. Available online.
[39] MoJ. (2020) *Assessing Risk of Harm to Children and Parents in Private Law Children Cases*. London: MoJ. Available online. P.50.

the well documented harm caused by domestic abuse to women and children, it is highly inappropriate for the Government to mandate attendance in a programme aimed at 'building a new relationship' with an ex-partner, when the evidence suggests that not all survivors will be able to access an exemption from this.

It is important to recognise that such a requirement will further intensify concerns with shared parenting programmes that are already being experienced by survivors of domestic abuse. The Harm Panel found that there is an overwhelming drive towards co-parenting in the family courts, regardless of the severity of the domestic abuse perpetrated. Multiple respondents to the Harm Panel's call for evidence 'noted victims of domestic abuse and their former partners being ordered to attend Separated Parents Information Programme (SPIP, in England) or Working Together for Children (WT4C, in Wales) courses which focus on co-parenting and are not appropriate for domestic abuse cases'.[40]

As the Panel evidenced, in cases of domestic abuse, such programmes risk re-traumatising survivors, enabling and emboldening the perpetrator. The report included evidence that survivors ordered to go on such programmes found them 'distressing' and 'insensitive', and it highlighted how mandating parents to work together to facilitate contact arrangements is completely inappropriate for domestic abuse cases. One example demonstrated how such programmes can open up opportunities for a perpetrator to abuse, such as the parents' 'communication book' which was used by the abuser to make allegations and send abusive messages – sometimes hidden references that only the victim would recognise.[41]

More widely, for a shared parenting programme to be effective, **we would consider it crucial for both parties to want to attend and be motivated to do so – forcing parents to do so, particularly where there is a power imbalance and a parent is abusive, will not achieve the intended outcome**. As a focus group participant quoted in the Harm Panel report stated, 'you can't work together or co-parent with someone like that'.[42]

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

N/A

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**

We support the development of better online information and resources providing information on the court process – which can feel complex and daunting to parties involved. Our research with survivors has demonstrated that their experiences of child contact procedures in the family courts is stressful and frightening, and has long term impacts on their health, wellbeing and family lives.[43]

However, we are clear that **the most significant reform required to assist those with a private family law dispute would be access to early legal advice**. This is essential to set out their options and provide appropriate advice on the process. Inequalities around access to legal advice and representation, and the impact of these inequalities on court outcomes, has been well evidenced. Litigants in person in domestic abuse cases report feeling unheard, disregarded, unsupported and

[40] MoJ. (2020) *Assessing Risk of Harm to Children and Parents in Private Law Children Cases*. London: MoJ. Available online. P.143.
[41] MoJ. (2020) *Assessing Risk of Harm to Children and Parents in Private Law Children Cases*. London: MoJ. Available online. P.143.
[42] MoJ. (2020) *Assessing Risk of Harm to Children and Parents in Private Law Children Cases*. London: MoJ. Available online. P.143.
[43] 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.

unable to follow the court's processes.[44] We support the position of the Law Society that legal aid for early legal advice should be available for all, as this would provide the best possible information to individuals regarding their options, the costs and impacts of litigation, and the alternative dispute resolution processes – such as mediation – which are available. We consider that this would support the Government in achieving its objectives of resolving more disputes, where appropriate, outside of the courtroom.

Whilst survivors of domestic abuse can access legal aid, this is dependent on providing evidence – the problems with which are set out in our response to question one – and subject to a means test. As the Harm Panel evidenced, this can penalise victims financially who may well have equity in a house, or elsewhere, but have very limited available cash to afford legal representation – and can exacerbate economic abuse experienced by a victim if their assets are controlled by the abuser who blocks access to them.[45]

Whilst we welcome the government's recent expansion of access to legal aid, it fell short of delivering the Harm Panel's recommendations - that **legal aid should be made available to alleged perpetrators as well as alleged victims of domestic abuse in the interests of the child**. This would ensure that evidential requirements do not place barriers in the way of survivors of abuse and parents seeking to protect a child from sexual abuse where the nature of the abuse is such that third party evidence may not be available. Parties should not be faced with administrative barriers to accessing legal aid and Legal Aid Agency decision making should be better coordinated with court timetables.[46] We urge the Government to act upon these recommendations.

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?

As stated in our response to question three, we would support the development of an online tool as this could help parents to navigate what can be a challenging and complex process. It is crucial that this is not only focused on supporting families to 'resolve their issues earlier', but also provides appropriate and effective signposting to help and support, and information about how to access other relevant family court processes.

From a domestic abuse perspective, we would recommend that the tool includes the following:

- a number of questions or prompts to the user to support the identification of domestic abuse;
- signposting information and access to specialist domestic abuse services, including services led 'by and for' minoritised groups, national helplines and live chat services;
- information on rights and entitlements within this process, including to legal aid and relevant exemptions;
- information and signposting to other relevant legal proceedings – including protection orders and divorce proceedings.

An online tool represents an opportunity to support survivors to recognise and identify the abuse they are experiencing and to access the right help and support. It is important to recognise that family court processes and procedures, and the availability of specialist support services and interventions, differ across England and Wales. It will therefore be important that the tool can be tailored to the user's geographic area. **It will also be essential that such a tool is fully accessible** – including to those with a disability and for whom English is not a first language.

[44] MoJ. (2020) *Assessing Risk of Harm to Children and Parents in Private Law Children Cases*. London: MoJ. Available online. P.46.
[45] MoJ. (2020) *Assessing Risk of Harm to Children and Parents in Private Law Children Cases*. London: MoJ. Available online. P.46.
[46] MoJ. (2020) *Assessing Risk of Harm to Children and Parents in Private Law Children Cases*. London: MoJ. Available online. P.182.

We look forward to working with the Government to improve signposting and access to support for survivors of domestic abuse and would be happy to provide further advice on the development of the tool in this regard.

Question 5: Do you think it is appropriate for mediators to determine suitability for a co-parenting programme at an information meeting?

No. We are highly concerned about such an approach from a domestic abuse perspective. As reflected in our response to question one, we are clear that not all women who are experiencing domestic abuse will disclose it to a professional or recognise what they are experiencing as domestic abuse. In addition, the dynamics of domestic abuse and strategies of perpetrators are complex and hard to recognise, and perpetrators are well practiced in appearing charming to others[47] and manipulating professionals. **High levels of skill, training and understanding are therefore required to identify who holds power and control within a relationship**. **As training and understanding on domestic abuse remains a significant concern in the family justice system,[48] we are not confident that mediators and other professionals will be able to identify domestic abuse** and determine suitability for a co-parenting programme. Further concerns regarding the current training and accreditation of mediators in respect of domestic abuse are outlined in our response to questions thirteen and fourteen.

In the current context, therefore, we would have serious concerns that women experiencing domestic abuse would be unsuitably referred to a shared parenting programme and urge the Ministry of Justice to withdraw the mandatory requirement to attend one. **If such a requirement was to go ahead, the only safe way for this to be operate would be for a domestic abuse specialist to assess undisclosed domestic abuse** and suitability for a shared parenting programme. As the prevalence of domestic abuse is so high in child arrangement cases, the emphasis should be on establishing the absence of domestic abuse rather than its presence.

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

Australia

In 2006, the Australian Government brought in compulsory pre-court family dispute resolution, with exemptions for domestic abuse. As the consultation document mentions, the 2009 evaluation found problems in cases of domestic abuse.[49] These included the following:

- There was a lack of understanding among professionals, including lawyers and decisionmakers, about domestic abuse and the way in which it affects children and parents.
- Despite exemptions, there was evidence that encouraging the use of non-legal solutions and setting up the expectation that most parents will attempt mediation meant that mediation was occurring in some cases where there are very significant concerns about violence and safety.
- Around 30% of parents using various relationship services reported experiencing fear of the other party when these services were being used.
- A majority of lawyers perceived that the reforms favoured fathers over mothers. There was concern among a range of family law system professionals that mothers had been disadvantaged in a number of ways, including in relation to negotiations over property and financial settlements.

It is not just the safety of the mother which may be threatened by compulsory mediation, but also that of the child. The 2009 evaluation found that **up to one-fifth of separating parents had safety**

[47] Barnett, A. (2020) *Domestic abuse and private law children cases: A literature review*. London: MoJ. Available online. P.74.
[48] MoJ. (2020) *Assessing Risk of Harm to Children and Parents in Private Law Children Cases.* London: MoJ. Available online. P.77.
[49] Kaspiew, R., Gray, M., Weston, R., Moloney, L., Hand, K. & Qu, L. (2009) *Evaluation of the 2006 family law reforms.* Melbourne: Australian Institute of Family Studies. Available online. Pp.231-254.

concerns that were linked to parenting arrangements made through mediation, which is highly concerning.

Reforms in 2011 to prioritise the safety of the child led to the introduction of a specialist, multi-disciplinary and lawyer assisted approach. This allowed for mediation in cases of domestic abuse – but the evaluation noted 'concerns that FDR may be inappropriately used in some family violence cases, particularly where screening processes are inadequate, and may produce outcomes that are unsafe for children and caregivers.'[50]

Despite extensive work on different models of mediation in Australia, many academics have concluded that what is needed is wider cultural and systemic change. Compulsory mediation can form a barrier to much needed cultural reform; it creates a system which values mediated settlements and shared parenting, where allegations of violence sit uncomfortably.[51] Australian family justice processes still provide opportunities for perpetrators to continue and even expand coercive and controlling behaviour, with legal actors often not identifying this behaviour and responding appropriately.[52] Australian legal organisations are calling for responses to domestic abuse to be strengthened in the family law system, effective legal help for the most disadvantaged and better understanding of domestic abuse across the board.[53]

Norway

Norway is cited in the consultation document, alongside New Zealand, as a country where compulsory mediation has been introduced – but the document does not include learnings from evaluations. In the case of Norway, a recent GREVIO report was very critical of their approach to compulsory mediation, stating:

> '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.'[54]

It also found that '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'.[55] **This demonstrates that compulsory mediation is not only dangerous for survivors, but that it can be ineffective in reducing the number of cases in the family courts.**

Even if the compulsory mediation could be made safe for survivors of domestic abuse, the level of resource required to train all professionals involved and conduct specialist assessments in each case may well render it ineffective in reducing pressures on the courts.

Canada

Some regions of Canada have compulsory pre-court mediation programmes. While domestic abuse is generally listed as an exclusion criterion, there are still issues in practice. Some of the problems which academics have raised with us include the following:

- Despite the exclusion mechanism, there is pressure to undergo mediation.
- Some survivors who do not have enough financial resources to pay for court proceedings due to limitations on access to legal aid chose mediation for financial reasons, despite it not being appropriate for their situation.

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[50] Australian Government. (2019) *Family Law for the Future — An Inquiry into the Family Law System.* Queensland: Australian Government. P.252.
[51] Douglas, H. (2017) Secondary Victimization: Domestic Violence Survivors Navigating the Family Law System. In: *Criminology and Criminal Justice*, 18 (1). Available online.
[52] Laing, L. (2016) Secondary Victimization: Domestic Violence Survivors Navigating the Family Law System. In: *Violence Against Women,* 23 (11). Available online.
[53] Snell, L. (n.d.) *Urgent action needed now to put Safety First in Family Law.* Available online.
[54] GREVIO. (2022) *Baseline Evaluation Report: Norway.* Strasbourg: GREVIO. P.7.
[55] GREVIO. (2022) *Baseline Evaluation Report: Norway.* Strasbourg: GREVIO. P.49.

- Women who refuse mediation can be seen as hostile, and this can be used against them in child custody or child protection proceedings – reinforcing the idea that women do not want to collaborate with the child's father and that they are 'alienating' mothers.
- Professionals should not carry out mediation in domestic abuse cases, but they are often have a very limited understanding of domestic abuse which hinders their ability to screen for it. Some mediators also argue that they have the skills to conduct mediation in domestic abuse cases.

Overall, we strongly believe that for the MoJ to achieve its aims of reducing pressure on the court system and the adversarial nature of disputes, it should prioritise implementing the Harm Panel's recommendations. These include adequately resourcing the family justice system, investing in the 'Pathfinder' pilots to develop a more tailored and trauma-aware approach to cases, introducing a Statement of Practice to ensure a consistent and ethical response, and providing specialist support to survivors. As the recent Harm Panel progress report shows, action on some of the recommendations has not begun or has not progressed.[56] The recommendations were designed as a package to deliver system-wide culture and practice transformation; they should be delivered in full to ensure an effective and safe response to child and adult survivors in the family courts.

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

Women's Aid does not agree with the proposed model of compulsory mediation, as we have serious concerns about its implications for adult and child survivors of domestic abuse. **Rather than focusing on the format of the MIAM, we believe the MoJ should prioritise addressing the systemic failings in the family courts in cases involving allegations of domestic abuse and other forms of harm.**

Resource restrictions have led to an incentive to prioritise public law cases and try to encourage other routes for private law children cases, such as mediation, even where there has been domestic abuse. This has led to a paradoxical situation where, at the same time as awareness and understanding of the dangers of coercive and controlling behaviour for survivors and their children has begun to increase, this type of abuse has been marginalised and not investigated properly in the courts.

This is not only dangerous but economically shortsighted. Marginalising these cases will only lead to more cases returning at a later stage.[57] To achieve sustainable reform, it is essential that the Government prioritises the Harm Panel's recommendations around the additional investment needed across a range of areas, including the family court estate, Cafcass, DAPPs, supervised contact centres, and specialist assessments.

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 mediation or other possibilities?

We oppose the introduction of a 'reasonable attempt to mediate' standard, as we have serious concerns that it will be exploited by perpetrators. A perpetrator will likely claim that a survivor's hesitancy to negotiate or valid concerns about him are in fact a tactic to obstruct, as part of a strategy of delegitimising her and strengthening his case.

We are not confident that family court professionals will be able to recognise such strategies and make unbiased judgements about attempts to mediate. The Harm Panel Literature Review found issues with judges expressing sympathy for violent fathers and professionals being manipulated by

[56] MoJ. (2023). *Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Implementation Plan – delivery update.* London: MoJ. Available online.
[57] Women's Aid. (2022). *Two years, too long: Mapping action on the Harm Panel's findings*. Bristol: Women's Aid. Available online. P.56.

perpetrators of abuse, who were charming and on their 'best behaviour'.[58] Coy et al. found that professionals were 'convinced by men's presentation as Dr Jekyll and [missed] the Mr Hyde of behind closed doors'.[59] A lack of understanding of domestic abuse leads to failures to identify who holds the power and control in a relationship. It is also a barrier to understanding why the non-abusive parent may sometimes seem 'uncooperative' or 'not engaging'.[60]

Furthermore, given the sexist culture in the family courts, we are concerned that professionals making a subjective judgement of 'reasonableness' will judge mothers more harshly than fathers – a trend already seen in other parts of the family justice system.[61] Research by Women's Aid and Queen Mary University of London found differential treatment of mothers and fathers by family justice professionals, with mothers being expected to be calm and accommodating while aggressive behaviour by fathers was tolerated in court.[62]

Studies report mothers experiencing considerable pressure from courts, Cafcass officers, fathers and their own lawyers to agree contact arrangements or attend mediation.[63] Where mothers resist these attempts, this is not seen as arising from justifiable fear and concern for their children but as 'gatekeeping' and 'implacable hostility' by courts and professionals.[64] The Women's Resource Centre found that mothers are pathologised in two thirds of cases where they advocate for the safety of their children, which can be linked to deep-seated misogynistic institutional attitudes.[65]

In addition, requiring mediators to make an assessment of the participants' engagement would threaten the impartiality, confidentiality and neutrality of the process, three principles which are at the core of the mediation profession.[66]

For these reasons, **we believe that the 'reasonable attempt to mediate' standard is dangerous and should not be adopted. Instead, the MoJ should focus on tackling the underlying attitudes, awareness issues and norms which are currently leading to women being pressurised into mediation and judged harshly for raising valid concerns.**

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. We do not believe mediation should be compulsory, however, if the MoJ chooses to pursue this policy, there needs to be an effective exemption for domestic abuse, as well as urgent applications and child protection circumstances (which may include cases of domestic abuse). **The exemption must meet survivors' needs and be implemented consistently, addressing the issues with the current system.** These issues lead, as Barlow et al. found, to cases involving domestic abuse being inappropriately accepted into and 'settled' in mediation.[67]

Currently, even where survivors evidence abuse, they may still end up attending a MIAM against their preferences. This was found by the Harm Report, which stated that:

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[58] Barnett, A. (2020) *Domestic abuse and private law children cases A literature review*. Available online. P.68.
[59] Coy, M., Perks, K., Scott, E. & Tweedale, R. (2012) *Picking up the pieces: Domestic violence and child contact.* London: Rights of Women. P.58.
[60] Women's Aid. (2016) *Nineteen Child Homicides: What must change so children are put first in child contact arrangements and the family courts.* Bristol: Women's Aid. Available online. P.28.
[61] WRC. (2022) *The pathologising of women survivors of male violence by family court experts.* London: WRC. Available online.
[62] 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.47.
[63] Barnett, A. (2020) *Domestic abuse and private law children cases A literature review*. Available online. P.67.
[64] 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.33.
[65] WRC. (2022) *The pathologising of women survivors of male violence by family court experts.* London: WRC. Available online. P.3.
[66] FMC. (2018) Code of Practice for Family Mediators. London: FMC. Available online. P.7.
[67] Barlow, A., Hunter, R., Smithson, J., & Ewing, J. (2017) *Mapping paths to family justice: Resolving family disputes in neoliberal times*. London: Palgrave Macmillan.

> ‘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.’[68]

This is occurring despite the explicit exemption provided by Practice Direction 12J (PD12J), which is not universally understood or adhered to in the family courts. Qualitative and quantitative studies undertaken prior to and after the implementation of PD12J revealed that domestic abuse was frequently minimised, marginalised, downgraded and not taken seriously by courts and professionals.[69]

The studies also revealed limited understanding of domestic abuse, which was predominantly considered by courts and professionals to be ‘relevant’ to child arrangements only when it involved recent, severe physical violence. Additionally, courts and professionals tended to see domestic abuse as ‘a thing of the past’ and expected mothers to ‘move on’, with pressure on all sides to reach agreement for contact.[70] Research by Women’s Aid found that allegations of violence against women and their children may not be taken seriously by family courts solely where they are first disclosed officially as part of a custody proceeding, which demonstrates a lack of awareness of the many reasons why women do not disclose abuse (see response to question one).

It is because of issues like these that ‘navigating the justice system can be as distressing for some victims as the abusive behaviour which they are seeking to escape’, as the Home Affairs Committee found.[71] Given the deep-seated and systematic issues’, **the exemption should be accompanied by specialist, regular training; a programme of cultural change; monitoring and accountability for the implementation of PD12J; and specialist support for survivors,** if it is to work as it should to protect survivors from the dangers of mediation with their abuser.

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

N/A

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

Domestic abuse is a form of violence against women and girls (VAWG) which includes so-called ‘honour-based’ abuse, female genital mutilation (FGM), dowry related abuse, transnational marriage abandonment and forced marriage. **It should be made clear in the guidance that the exemption applies to all forms of VAWG, not only domestic abuse**. This is already specified in Practice Direction 12J[72] but it would need to be reiterated in the design of an exemption to compulsory mediation.

Cases involving child sexual abuse should also be exempt; any disclosure by a child or allegations by a parent based on behaviour witnessed in a child should receive an automatic exemption.

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?

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[68] MoJ. (2020) *Assessing Risk of Harm to Children and Parents in Private Law Children Cases*. London: MoJ. Available online. P.89.
[69] Barnett, A. (2020) *Domestic abuse and private law children cases: A literature review*. London: MoJ. Available online. P.90.
[70] Barnett, A. (2020) *Domestic abuse and private law children cases: A literature review*. London: MoJ. Available online. P.146.
[71] Home Affairs Committee. (2018) *Domestic Abuse.* London: House of Commons. Available online. Para.117.
[72] FPRC. (2023). Practice Direction 12J: Child Arrangements & Contact Orders: Domestic Abuse and Harm. London: GOV.UK. Available online.

We do not believe mediation should be compulsory. However, if the MoJ chooses to pursue this policy, there needs to be an effective exemption for domestic abuse. The exemption process should match the reality of survivors' circumstances and experiences.

There are multiple reasons why survivors may not disclose domestic abuse, and perpetrators often employ isolation a key strategy of coercive control to prevent disclosure and keep survivors from getting help.[73] Barriers to disclosing are outlined in detail in the introduction and in our response to question one. As a result of these barriers, it is difficult for survivors to obtain the required forms of evidence from professionals. As a participant in Women's Aid's research with Queen Mary University of London stated so clearly:

> '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.'[74]

The exemption system must tackle the barriers to women disclosing and evidencing abuse, as well as issues of culture, understanding and bias which are preventing PD12J being adhered to. Given the deep-seated flaws in the current system (see our answer to question 9a), **we believe the only workable model is self-certification by survivors without a requirement for evidence**. As false reporting of domestic abuse in child arrangement cases is very low – with most false allegations being the result of misinterpretation[75] - this would widen access to the exemption for survivors in a safe and effective way.

This is not without precedent; we hear from family law practitioners in Australia that both mediation services and the family courts accept evidence of domestic abuse, or the risk thereof, based solely on self-identification and disclosure – even where the allegations are disputed or denied by the other party. There is no 'testing' of evidence. Cases are only referred back to mediation where it is clear that what the party is alleging is definitely not domestic abuse.

If the Government choses to keep the list of accepted forms of evidence, the list should be updated (it currently uses the term 'domestic violence') to reflect the definition of domestic abuse in the Domestic Abuse Act 2021. It should be made clear in both the guidance and any related training that domestic abuse includes physical, sexual, economic, psychological and emotional abuse, as well as coercive, controlling, violent and threatening behaviour. It must also align with PD12J and clarify that 'domestic abuse' includes other forms of VAWG, as set out in our response to question ten.

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

We do not believe that pre-court mediation should be compulsory for any types of application. However, if it were to be required, then this should be fully funded. Many survivors have experienced financial abuse which significantly impacts on their ability to pay for court proceedings.[76]

We are concerned, however, that some survivors may 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**

[73] Barnett, A. (2020) *Domestic abuse and private law children cases A literature review*. London: MoJ. Available online. P.17.
[74] 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.
[75] WRC. (2022) *The pathologising of women survivors of male violence by family court experts.* London: WRC. Available online. P.5.
[76] Women's Aid. (2019). *The Economics of Abuse.* Bristol: Women's Aid. Available online. P.6.

alleged. This would also help ensure 'equality of arms' and enable allegations of abuse to be properly considered.

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

No – we believe additional regulation is required.

Accreditation training

We are not confident that that mediators are adequately trained to assess and respond to domestic abuse by screening for it, identifying unreported abuse, evaluating suitability for mediation, providing appropriate signposting and notifying other agencies were appropriate - duties which are set out in the FMC's Professional Competence Standards.[77]

We recognise the FMC's commitment to ensuring mediators receive training on domestic abuse, however, there is little information about the current nature, scope and content of training in their published guidance and standards. The Family Mediation Standards Board (FMSB) Assurances Process document states that, to become an accredited FMC member, mediators must undertake a foundation course with an FMSB-approved provider. These courses must refer to the Professional Competence Standards and Code of Practice – which include the duties listed above. Most training providers do not publish the content of their training online. Where content is given, it seems that the nature, depth and extent of training on domestic abuse varies.

Research has found that mediators 'routinely ignore, reframe, or reject allegations unless there is an existing external evidence to support the claim', which can be traced back to their institutional role which centres upon settlement and contact seemingly at the expense of risk management.[78] Indeed, aspects of the FMC's guidance do not seem to be founded on an understanding of the dynamics of domestic abuse. The MIAM Guidance document recommends separate, non-consecutive MIAMs to avoid the risk of 'one participant exercising control over the other, so making screening for domestic abuse difficult' and lists 'assessment for domestic or child abuse' as one point in a suggested order for delivery.[79] This assumes that a direct question about domestic abuse at a given point will elicit disclosure from survivors, and that survivors are not controlled by abusers when they are not physically present. However, we know that neither are true – see the points about disclosure in our answer to question one. As the Harm Panel literature review explains, coercive and controlling strategies of abuse have an ongoing, cumulative effect, so it is unrealistic to envisage 'normal' life between incidents of violence; victims have little or no space for autonomous action or decisions.[80]

As the dynamics of domestic abuse and strategies of perpetrators are complex and hard to recognise, we believe that is essential that domestic abuse training is comprehensive and ongoing, designed and delivered by specialists in domestic abuse, and informed by survivors' experiences. The FMC's language about domestic abuse and the lack of detail about training and accreditation suggest that such an approach is not currently being taken.

Post-accreditation training

We also have concerns about post-accreditation regulation. The FMC Standards aim to ensure professional judgement and 'appropriate flexibility' rather than 'inflexible compliance with detailed checklists'.[81] It is understandable to aim to equip mediators to respond to individuals with different needs, but this emphasis leads to a quality assurance process which may not be as robust as it needs to be.

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[77] FMC. (n.d.) *The FMC professional competence standards for family mediation*. London: FMC. P.19.
[78] 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.
[79] FMC. (2022). *Good Practice Guidance for Mediation Information and Assessment Meetings (MIAMs).* London: FMC. P.8, p.7.
[80] Barnett, A. (2020) *Domestic abuse and private law children cases A literature review*. London: MoJ. Available online. P.18.
[81] FMC. (2022). *Standards for Mediation Information and Assessment Meetings (MIAMs).* London: FMC. P.2.

A key element of quality assurance monitoring is the continuing professional development (CPD) requirement – and the guidance on CPD states that there are 'no restrictions on the kind of activities that can count'.[82] It appears that domestic abuse courses undertaken for this requirement tend to be led by a mediator, solicitor or legal academic. For the reasons cited above, we are not confident that training developed by non-VAWG specialists will result in the in-depth, nuanced understanding of domestic abuse necessarily for mediators who will likely encounter domestic abuse cases on a daily basis.

Another key element of quality assurance monitoring is self-certification that the mediator is adhering to FMC standards. We are unsure how accurate and reliable such self-assessment is. As an illustration, an FMC survey found that 94% of mediators felt confident to assess whether mediation was suitable in cases involving domestic abuse, despite the fact that only 79% of mediators answering the survey had had face to face training on domestic abuse (with no information provided on the type, extent and provider of that training).[83]

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

Given the issues outlined above, **we believe that assessment for undisclosed domestic abuse should not be the responsibility of a mediator, but a domestic abuse specialist** – see our response to question five.

Even with this transferred responsibility, there is still a need to ensure a consistent and appropriate response to domestic abuse from mediators, as some survivors may still end up in mediation. To do this, **we propose that the FMC introduces clearer standards for domestic abuse awareness and greater regulation of domestic abuse training**. Standards would need to specify that training should be developed and delivered by specialist organisations and is mandatory - not just as part of foundation training for accreditation, but also as part of continuous professional development for reaccreditation.

The training should cover the types of domestic abuse, its dynamics, myth-busting and in-depth exploration of coercive and controlling behaviour, and Women's Aid would welcome the opportunity to work with the MoJ and FMC to develop this further. We engaged with the FMC in 2015 on domestic abuse training for mediators, but this was indirect (via a train the trainer model) and time limited. We recommend a more comprehensive and consistent approach to the provision of specialist training on domestic abuse for all accredited mediators going forwards. **To ensure high take up in practice and consistent knowledge across the mediation sector, funding from the government is likely to be required.** It will also be important for mediation services to build active partnerships and referral protocols with their local specialist domestic abuse services so that survivors receive the support they need where domestic abuse is identified.

To ensure the safety of survivors throughout the family justice system, **multidisciplinary training on domestic abuse delivered by specialist VAWG organisations should also be rolled out across all family justice related professions, as per the recommendation in the Harm Panel**. The Harm Panel found that, in the courts, coercive and controlling can be reframed as 'harmful conflict', the solution to which is considered to be mediation and cooperation, rather than protection of the child and adult survivors from the other parent's abuse. This dangerous reframing was seen recently in the K and K [2022] EWCA Civ 468 Court of Appeal judgement, where the judge found that the parents should have attended mediation – despite the fact that the mother had experienced domestic abuse. Currently, 'family court practitioners and the very process they uphold are freely used as conducive contexts for predominantly male abusers to humiliate, impoverish and control their ex-partners and children, with abusive motivations extremely rarely identified'.[84] Specialist training and a programme

[82] FMC. (2014*) FMC Manual: Professional Standards and Self-Regulatory Framework.* London: FMC. P.10. Available online.
[83] FMC (2019). *Family Mediation Survey 2019 – Results.* London: FMC. Available online. P.7.
[84] WRC. (2022) *The pathologising of women survivors of male violence by family court experts.* London: WRC. Available online. P.3.

of cultural change are urgently needed to counter the lack of awareness, bias and misunderstandings which enable this.

Finally, we have heard of cases of mediators who are not registered with the FMC conducting MIAMs and signing the MIAM forms. As registration with the FMC is currently voluntary, the MoJ should provide a legal definition of a 'mediator' and consider enforcement mechanisms to ensure that those whose practice falls outside the definition and/or are not registered with the FMC cannot conduct MIAMs.

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?

We believe that non-mediation forms of dispute resolution carry the same risks to survivors as mediation, as outlined in our introduction – including the risk of manipulation by the perpetrator, further abuse, and survivors being forced into decisions they are not comfortable with. As such, **none of these forms of non-court dispute resolution should be made mandatory, as this restricts access to the protection the court can offer survivors.**

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

Please see concerns above.

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?

Please see concerns above.

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?
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?

We strongly oppose the proposal to make mediation mandatory, and the creation of these powers for the court. **Mediation should be a voluntary and confidential negotiation** – it is extremely concerning that the details of such a process would then be used in court through the parties having 'to explain themselves'. The confidentiality of any discussion and proposal made during the mediation process is essential to encourage parties to feel free to negotiate and reach an agreement. We are concerned that the government is proposing to undermine this, and it is unclear how this would support effective dispute resolution – see our points in the introduction about the Thomas et al. 2016 report, which finds a correlation between voluntary mediation and successful outcomes.

As outlined in our response to question eight, the introduction of a 'reasonable standard to mediate test' would also be highly likely to be weaponised by a perpetrator in a domestic abuse case. We are not confident that professionals in the family court, or judges and magistrates, have the skill and expertise to be able to recognise such strategies and make unbiased judgements about attempts to mediate.

We have severe concerns about the potential impacts that these proposed powers could have to exacerbate and escalate domestic abuse, and to affect the courts' decision making with regard to private law children arrangements. Instead of these powers, **the focus should be on training family justice professionals to recognise and interrupt the ways perpetrators abuse processes to cause harm to survivors.**

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?

We completely oppose the introduction of costs orders in private law children proceedings. We are unclear on the evidence base for this proposal and are concerned that it will have highly damaging impacts.

As the consultation document states, costs orders are not typically used in family cases due to the potential impact on the child and this would set a very dangerous precedent. Evidence shows that there is a link between deprivation and private law applications[85], which indicates that such a proposal will have a disproportionate impact on those who are already facing economic disadvantage. It will it mean there may be less money available to meet the family's needs and could have a further negative impact on the child's welfare. We are also concerned that it would be highly likely to increase the fear that survivors of domestic abuse face in family court proceedings and may mean they are less likely to seek the protection of the court, contrary to their Article 6 Right to a Fair Trial.

It is highly likely that abusers will allege that survivors are obstructing mediation proceedings in order to obtain a costs order against the victim, as a tactic of economic abuse. As the Harm Panel concluded so clearly, currently 'family courts appear to struggle to understand and address […] power dynamics' in domestic abuse, and many survivors reported to the Panel that judges and magistrates disbelieve and discredit their allegations of abuse.[86] We are highly concerned that a discretionary power for judges to make costs orders in this way would be inconsistently applied in cases of domestic abuse, and would have adverse impacts on survivors and their children. **We recommend that the government withdraw the proposal to introduce costs orders in private law children proceedings and to prioritise specialist, mandatory training on domestic abuse for all family justice professionals** as part of a wider strategy to prevent court decisions and processes from being co-opted for harm by perpetrators.

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?

We oppose the introduction of any power to make mediation compulsory and order parties to make 'a reasonable attempt' to mediate. We are particularly concerned that the relevance of a 'previously claimed exemption' for domestic abuse could be called into question. As set out in our response to

[85] Cusworth, L. et al. (2021) *Uncovering private family law: Who's coming to court in England?* London: Nuffield Family Justice Observatory. Available online.
[86] MoJ. (2020) *Assessing Risk of Harm to Children and Parents in Private Law Children Cases*. London: MoJ. Available online. P.45.

question one, domestic abuse does not end when a relationship ends and survivors continue to experience abuse, particularly coercive and controlling behaviour, long after separation.

As previously mentioned, there also remains very limited understanding and identification of post-separation abuse and coercive control by professionals, judges and magistrates within the family justice system. We would therefore anticipate survivors being wrongly ordered to start mediation because domestic abuse was perceived to be 'historic' or 'no longer relevant'. **We are concerned that such proposals would undermine the government's recent positive steps to criminalise coercive and controlling behaviour post-separation**, through an amendment to the Domestic Abuse Act 2021. We are clear that such powers could have extremely negative impacts on survivors of domestic abuse.

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?

We are concerned that the overall drive for this consultation appears to be driven by an imperative to reduce pressures on the courts system, rather than prioritising reform of how the family justice system responds to domestic abuse and other forms of harm – as the Government committed to in their response to the Harm Panel report. We are clear that court fees should not serve as a barrier to the protection of court for those who need it, and court fees should be set with the needs of survivors in mind.