



Magistrates Association

Date	24 May 2023
Committee	Family Court Committee
Draft response to	Family Procedure Rule Committee
Comments to	Helen Richardson – helen.richardson@magistrates-association.org.uk
Deadline for comments	24th May 2023
Link to consultation	https://www.gov.uk/government/consultations/early-resolution-of-private-family-law-arrangements

About the Magistrates Association

The Magistrates' Association is an independent charity and the membership body for the magistracy. We work to promote the sound administration of the law, including by providing guidance, training and support for our members, informing the public about the courts and the role of magistrates, producing and publishing research on key topics relevant to the magistracy, and contributing to the development and delivery of reforms to the courts and the broader justice system. With over 12,000 members across England and Wales, we are a unique source of information and insight and the only independent voice of the magistracy.



Exemptions to MIAMs

The Magistrates' Association has commented on each proposed amendment to the exemptions in the far-right column of the table below.

MIAM Exemption/ Evidence Requirements	Current Provision	Proposed Amendment	Magistrates' Association Comments
<u>Urgency</u> <u>r3.8(1)(c)(ii)(ad)</u>	<i>Urgency</i> <i>(c) the application must be made urgently because –</i> <i>(ii) any delay caused by attending a MIAM would cause -</i> <i>(ad) unreasonable hardship to the prospective applicant;</i>	Amend r3.8(1)(c)(ad) to remove “unreasonable hardship” and replace with “significant financial hardship” <u>Reasoning</u> To make clear that this exemption relates to financial hardship and therefore is likely to only be relevant in financial remedy cases (rather than private family law children cases)	Agree

<p><u>Previous MIAM attendance or previous MIAM exemption – NCDR attempted r3.8(1)(d)(ii)</u></p>	<p><i>Previous MIAM attendance or MIAM exemption (d) – (i) in the 4 months prior to making the application, the person attended a MIAM or participated in another form of non-court dispute resolution relating to the same or substantially the same dispute; or (ii) at the time of making the application, the person is participating in another form of non-court dispute resolution relating to the same or substantially the same dispute;</i></p>	<p>(1) Amend to include a non-exhaustive list of examples of types of NCDR being available to applicants AND (2) Remove subparagraph r3.8(1)(d)(ii) AND (3) Amend to ensure that exemptions based on NCDR attendance are supported by evidence from the NCDR provider</p> <p>Reasoning For proposal (1) – to ensure there are examples of common NCDR types available as a suggestion to parties.</p> <p>For proposal (2) – to ensure that parties still attend MIAMs even if they are already participating in NCDR, as MIAMs can still be helpful to refer to potentially more suitable forms of NCDR and provide other services.</p> <p>For proposal (3) – to ensure that the court has information about the type of NCDR that has taken place, to help</p>	<p>(1) Agree.</p> <p>(2) Agree. If an application is being made whilst NCDR is ongoing for substantially the same dispute a MIAM may be helpful to indicate other non-court options for resolving the dispute.</p> <p>(3) Agree. It may also be helpful for the rules to specify or provide examples of what constitutes evidence that the person has previously engaged with non-court dispute resolution.</p>
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		<p>inform its decision as to whether parties should still be required to attend a MIAM.</p>	
<p><u>Previous MIAM attendance or previous MIAM exemption – NCDR attempted</u> = <u>r3.8(1)(e), (f) and (g)</u></p>	<p><i>The MIAM requirement does not apply if –</i> <i>(e) –</i> <i>(i) in the 4 months prior to making the application, the person filed a relevant family application confirming that a MIAM exemption applied; and</i> <i>(ii) that application related to the same or substantially the same dispute; or</i> <i>(f) –</i> <i>(i) the application would be made in existing proceedings which are continuing; and</i> <i>(ii) the prospective applicant attended a MIAM before initiating those proceedings;</i> <i>or</i> <i>(g) –</i> <i>(i) the application would be made in existing proceedings which are continuing; and</i> <i>(ii) a MIAM exemption applied to the application for those proceedings; -</i></p>	<p>Remove sub-paragraphs (e) and (g).</p> <p>Reasoning Circumstances can change, and therefore even where a MIAM exemption applied previously, it should still be necessary to attend a MIAM before making a court application (unless a different exemption applies currently).</p>	<p>Agree. Paragraphs (e) and (g) relate to exemptions for applications made previously. Circumstances can change. However, it should be made clear that if the circumstances which led to the initial exemption are still relevant that an exemption for those same reasons can still apply (e.g. the situation remains urgent).</p>

<p><u>Accessibility – r3.8(1)(k)</u></p>	<p><i>Other</i></p> <p><i>(k) –</i></p> <p><i>(i) the prospective applicant is or all of the prospective respondents are subject to a disability or other inability that would prevent attendance at a MIAM unless appropriate facilities can be offered by an authorised mediator;</i></p> <p><i>(ii) the prospective applicant has contacted as many authorised family mediators as have an office within fifteen miles of his or home (or three of them if there are three or more), and all have stated that they are unable to provide such facilities; and</i></p> <p><i>(iii) the names, postal addresses and telephone numbers or e-mail addresses for such authorised family mediators, and the dates of contact, can be provided to the court if requested; -</i></p>	<p>Amend the wording so the exemption would not apply where the prospective applicant or all of the prospective respondents can access a MIAM online/ by video, even if they are not able to attend in person.</p> <p>Reasoning</p> <p>To account for MIAMs held online and through video which now take place frequently.</p>	<p>Agree. Note however, the possibility of not being able to access online/remote MIAMs e.g. due to disability and lack of adjustments to the online MIAM process, lack of access to devices or reliable internet connection etc.</p> <p>Query whether the names and addresses of those mediator’s contacts who are unable to provide an accessible space or platform for MIAM should be required rather than merely requested. This may furnish the court with useful information on services provided by local mediators and possible issues with accessibility for future cases.</p>
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<p><u>Detention, bail conditions, license terms – r3.8(1)(l)</u></p>	<p><i>Other</i></p> <p><i>(l) the prospective applicant or all of the prospective respondents cannot attend a MIAM because he or she is, or they are, as the case may be –</i></p> <p><i>(i) in prison or any other institution in which he or she is or they are required to be detained;</i></p> <p><i>(ii) subject to conditions of bail that prevent contact with the other person; or</i></p> <p><i>(iii) subject to a licence with a prohibited contact requirement in relation to the other person; or</i></p>	<p>As above, amend the wording of (l)(i) so that the exemption would not apply if the prospective applicant or all of the prospective respondents could access online or video MIAMs.</p> <p>Reasoning</p> <p>To ensure that prison Governors consider whether a prisoner can attend an online or video MIAM which may be more suitable than producing the prisoner in person.</p> <p>(Consultees should note that victims of domestic abuse where the respondent is in prison shall still be able to claim the domestic violence exemption)</p>	<p>Partially agree.</p> <p>Being in prison should not necessarily be a barrier to attending a MIAM or potentially engaging in the entire mediation process online.</p> <p>However, given the context of a severely overburdened prison system the amended wording must account for the situation whereby a prison is not able to facilitate attendance at a MIAM either online or in person within a reasonable time period. An exemption should still be allowed where it was not possible/reasonable for the prison to facilitate attendance at a MAIM to allow the case to continue.</p>
<p><u>Habitual residence – r3.8(1)(m)</u></p>	<p><i>Other</i></p> <p><i>(m) the prospective applicant or all the prospective respondents are not habitually resident in England and Wales</i></p>	<p>Remove this provision r3.8(1)(m)</p> <p>Reasoning</p> <p>This relates to geographical location, and therefore is no longer relevant given the availability of online and video MIAMs.</p>	<p>Agree.</p>

<p><u>Mediator availability</u> <u>r3.8(1)(o)</u></p>	<p><i>Other</i> <i>(o) –</i> <i>(i) the prospective applicant has contacted as many authorised family mediators as have an office within fifteen miles of his or her home (or three of them if there are three or more), and all of them have stated that they are not available to conduct a MIAM within fifteen business days of the date of contact; and</i> <i>) the names, postal addresses and telephone numbers or e-mail addresses for such authorised family mediators, and the dates of contact, can be provided to the court if requested; -</i></p>	<p>(1) Amend to specify that this exemption should only apply if the applicant is unable to access a MIAM online/ by video.</p> <p>(2) Amend so that the details of contacted mediators must be provided to the court (rather than can be provided if requested).</p> <p>Reasoning To account for MIAMs held online and through video which now take place frequently.</p>	<p>Agree.</p>
<p><u>Distance from mediators – r</u> <u>3.8(1)(p)</u></p>	<p><i>Other</i> <i>(p) there is no authorised family mediator with an office within fifteen miles of the prospective applicant's home; or</i></p>	<p>As above, amend the wording to account for the prospective applicant or all of the prospective respondents not being able to access a MIAM online/ by video.</p>	<p>Agree.</p>

<p><u>Mediator exemptions – r 3.8(2)</u></p>	<p><i>Other</i> <i>(2) an authorised family mediator confirms in the relevant form (a ‘mediator’s exemption’) that he or she is satisfied that –</i> <i>(a) mediation is not suitable as a means of resolving the dispute because none of the respondents is willing to attend a MIAM; or</i> <i>(b) mediation is not suitable as a means of resolving the dispute because all of the respondents failed without good reason to attend a MIAM appointment; or</i> <i>(c) mediation is otherwise not suitable as a means of resolving the dispute.</i></p>	<p>Remove sub paragraph (c) –</p> <p>Reasoning From our engagement with the FMC and mediators, we have been made aware that mediators would not use this exemption, as all scenarios are covered by other exemptions above, and subparagraphs (a) and (b).</p>	<p>Agree but see note above about respondents in prison. Would (c) or a version of (c) be worth retaining in the event that a party could not attend due to difficulties in attending from prison (e.g. an issue with being produced from prison to attend in person or failure of online video link).</p> <p>e.g.</p> <p><i>(c) mediation is not suitable as a means of resolving the dispute because all of the respondents were unable to attend a MIAM appointment due to being in prison and prison staff being unable to facilitate attendance at a MIAM.</i></p>
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Overall comment

The Magistrates' Association supports the exploration in the Ministry of Justice's ongoing consultation. It is our members experiences that despite previous attempts to increase the uptake of MIAMs and NCDR that parties continue to come to court where their cases would have been better resolved through NCDR. Whilst these amendments strengthen the MIAM attendance provisions, we consider that there will continue to be instances where parties who could resolve their cases out of court will be heard by courts.

Section 1 - MIAMs

Question 1: Do you consider that there would be any specific issues that may arise as a result of the proposed amendments to Rule 3.8? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

See comments in far-right column added to table.

Question 2: Do you consider there are further amendments which could be made to Rule 3.8 to increase attendance at MIAMs (in the appropriate cases)? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

No.

Standalone MIAMs

Question 3: Do you consider that there are benefits to applicants attending a pre-application standalone MIAM (in instances where the respondent doesn't engage or is not contactable, for example), as opposed to both parties attending post-application when ordered by the court? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

Yes.

By attending the pre-application MIAM, the applicant parent can be signposted to other services which may be of assistance to the family. For example, MIAM's could signpost parents to child contact centres which may facilitate contact where parents are experiencing conflict.

However, the Magistrates' Association would encourage consideration of the retention by the court of a broad power to order a post application MIAM attendance. We consider that the court should have the power to order the parent who did not attend a pre-application MIAM to attend a post application MIAM, with or without the applicant parent. If the court has a broad discretion as to how and who should attend a post-application MIAM the most appropriate order can be made for the parties.

For example, where a parent who attended a pre-application MIAM where the other parent was uncontactable, the court may consider that the applicant parent need not attend a MIAM again post-application, particularly if it has not been long since they attended the original MIAM or where they are already open to NCDR. However, where there has been a long delay since the pre-application MIAM the court may consider it is worthwhile that the applicant parent attends a post-application MAIM on order of the court with the respondent parent.

In summary, the court should retain the power to order post-application MIAMs in whichever way best suits the case before it.

Ordering Parties to Attend a MIAM when Circumstances Change

Conduct of MIAMs

The Committee has considered whether rule 3.9 should be more prescriptive about how a MIAM is conducted and what it involves. The Committee proposes that the Rules be amended to ensure the person conducting the MIAM is required to assess the suitability of all forms of NCDR and suggest to the participants which form(s) of NCDR could be most suitable and why. As part of this, the Committee proposes that the person conducting the MIAM provides the participants with information on how to proceed with the different types of NCDR, should they be suitable and of interest to the parties.

Question 4: Do you consider that there would be any specific issues that may arise as a result of the proposals relating to Rule 3.9? Please answer “Yes” or “No” and give full reasons and examples to support your answer. If you are unable to answer this question, please state “Don’t know”.

Yes.

It would be necessary for all FMC accredited mediators to be familiar with multiple NCDR options, their processes, funding arrangements and providers in order to be able to assess all NCDR and provide information about non-mediation and non-court options. It would therefore be advisable that, as part of the FMC accreditation criteria, that continuing professional development requirements were included in order to ensure that MIAM providers have sufficient training and expertise to make these assessments before this rule change is brought in.

Question 5: Do you agree that the person conducting the MIAM should “assess” the suitability of different forms of NCDR at the MIAM? Please answer “Yes” or “No” and give full reasons and examples to support your answer. If you are unable to answer this question, please state “Don’t know”

Don’t know.

See response to Question 4 on the need for adequate training and accreditation requirements for FMC accredited MIAM providers. Mediation professionals and the FMC would need to advise as to the feasibility of MIAM providers also being sufficiently trained in other NCDR options in order to ensure that they can accurately assess the suitability of parties and circumstances for other NCDR options.

It will also be essential for MIAM providers to have a comprehensive understanding of costs and funding options available when assessing parties’ suitability for NCDR options.

The Timing of When MIAM Exemption Evidence Should be Provided to the Court

Question 6: Do you consider that there would be any specific issues that may arise as a result of the proposal that any required evidence of a MIAM exemption should be provided with the application to court? Please answer “Yes” or “No” and give full reasons and examples to support your answer. If you are unable to answer this question, please state “Don’t know”.

Yes.

The Magistrates’ Association agrees that requiring evidence of any exemption to a MIAM should be provided together with the application to court. The only reservation regards the evidence of domestic abuse allegations. It is possible that domestic abuse may be present despite a lack of arrest, police caution or criminal proceedings. Alleged victims of domestic abuse may not have started criminal proceedings but may feel able to express allegations to the family court on application. Additional care should be taken in requiring evidence of domestic abuse where the requirement MIAMs are to be more robustly implemented.

Consideration should be given to either (a) broadening the types of evidence for the domestic abuse exemption (b) creating some sort of safety net for those alleging domestic abuse. For example, could there be an option for applicants to express a desire to have separate MIAMs from their partner (rather than a joint MIAM) due to domestic abuse concerns.

The Timing of When the Court Reviews Claimed MIAM Exemptions

For private family law children proceedings, the Committee proposes to bring forward the point at which the court must review a claimed MIAM exemption, and any supporting evidence, to the gatekeeping stage.

Question 7: Do you consider that there would be any specific issues that may arise as a result of the proposed amendments to bring forward the point at which the court must review the MIAM exemption and any supporting evidence to the gatekeeping stage for private family law children cases? Please answer “Yes” or “No” and give full reasons and examples to support your answer. If you are unable to answer this question, please state “Don’t know”.

Yes.

The Magistrates’ Association agrees with the reasoning of the committee that, in order for MIAM exemptions to be appropriately evidenced and for that evidence to be effectively assessed that assessment of the evidence supporting an exemption needs to occur at a gatekeeping stage. Any later consideration of the evidence supporting a MIAM exemption would risk perpetuating the reported reticence of judiciary referring parties back for a MIAMs due to increased delay.

However, the assessment of evidence in this way will add to the burden on legal advisors in the magistrates’ courts and such a move would need to be sufficiently resourced to ensure that delays do not build up at the gatekeeping stage. Depending on time estimates for how long the assessment of MIAM exemption evidence will take and resourcing required this proposal should impact how resourcing decisions and legal advisor recruitment and retention needs are assessed across England and Wales. The Magistrates’ Association is acutely aware of the difficulties some areas in England and Wales are currently facing with the recruitment or retention of legal advisors. It will be essential to

understand the time and resource implications of this change and to consult HMCTS about the impact of this change before implementation.

Question 8: Do you consider that there would be any specific issues that may arise as a result of the proposal that where a claimed exemption is no longer relevant, the court has the power to order both parties to attend a MIAM, where appropriate? Please answer “Yes” or “No” and give full reasons and examples to support your answer. If you are unable to answer this question, please state “Don’t know”.

No.

Provided that this is a discretionary power of the court, rather than requiring the court to make an order where MIAM exemptions are no longer relevant, we do not foresee specific issues. The court can order attendance or choose not to order attendance if it is clear that a MIAM will not be of assistance or would only add further delay.

Section 2 – Dispute Resolution

Question 9: Do you agree with the proposal to give the court the power to adjourn private family law children proceedings and/or financial remedy proceedings, when the court believes that NCDR would be beneficial for the parties, to allow them to attempt to resolve their issues outside of court?

Please answer “Yes” or “No” and give full reasons and examples to support your answer. If you are unable to answer this question, please state “Don’t know”.

Yes.

The power proposed by the Committee appears to be sufficiently flexible to ensure that the court can adjourn or choose not to adjourn depending on what the circumstances of the case call for.

Question 10: Do you have any views on the appropriate timing for the court to adjourn proceedings in private family law children cases and/or financial remedy cases, in response to the issues raised in Paragraph 34(e)(i) and (ii)? Please answer “Yes” or “No” and give full reasons and examples to support your answer. If you are unable to answer this question, please state “Don’t know”.

Yes

The timing laid out in (e)(ii) appears appropriate. Magistrates would wish to hear from the parties, for example about any attendance at a MIAM or exploration of NDCR the parties may have undertaken before considering an adjournment.

Questions 11-17 refer to financial remedy proceedings only and therefore do not apply to magistrates' courts.

Question 18 concerns single lawyer models and is also outside of the remit of the Magistrates' Association.