



Review of Civil Legal Aid – Call for Evidence

Family Mediation Council Response

February 2024

The Family Mediation Council (FMC) is responding to the Call for Evidence from the Review of Civil Legal Aid, as the review has the potential to have an impact of all civil legal aid categories, including Family Mediation, even though this is not specifically mentioned.

Legal aid for family mediation is critically important to reducing parental conflict among separated parents and ex-partners, as it helps them resolve issues without having to resort to a long and stressful court process which could prolong conflict.

We are concerned that family mediation appears to have been overlooked for the purposes of the Review of Civil Legal Aid (RoCLA), on the basis that the Ministry of Justice (MoJ) was conducting a separate consultation about mediation, but that consultation did not address the very real and urgent issues facing family mediation services with legal aid contracts, partly because the RoCLA review is in progress.

Family Mediation may represent a very small part of the legal aid budget, but it plays a very important role, and underpins the government's strategy for early resolution in family matters.

We would welcome clarity about the status of family mediation within the RoCLA review.

Overarching questions

1. Do you have any suggestions of changes that could improve civil legal aid – both short-term and longer-term changes?

Legal aid for family mediation should be a great strength of the current family mediation system, both for mediation and legal support for mediation, but it is in decline and is at risk of becoming extinct.

We have multiple suggestions that could improve legal aid for family mediation:

- Recognise the onerous nature of the administration requirements of the legal aid process, make the process more proportionate to mediation (as opposed to the higher value ‘civil representation’), and ensure payment rates recognise the work that has to be done in order to carry out the assessment.
- Abolish the multi-session rate, replacing it with a payment per session including for Child-Inclusive Mediation;
- Enable mediators to claim for a session once it is complete, rather than waiting for a case to conclude;
- Make a specific payment for preparation of an Open Financial Statement; and
- Review fees now, regularly increase fees annually in line with inflation and timetable periodic reviews that look at whether the assumptions on which fees are based (e.g. a Mediation Information and Assessment Meeting (MIAM) should normally last an hour) have changed;
- Review disbursement fees now, regularly increase line with inflation and schedule periodic reviews that look at whether the assumptions on which fees are based have changed;
- Review rules on co-mediation so that mediators can bring in a co-mediator where they judge this would be more appropriate for the case without being worried about whether the co-mediator will be paid;
- Allow payment for however many MIAMs are needed in a case; and
- Support trainee mediators by paying a co-mediation rate for trainees and by paying for them to mediate solo at Stage 2 of the Family Mediation Standards Board’s (FMSB) Staged Portfolio Pilot¹.

¹ The FMSB submitted a proposal relating to the Staged Portfolio Pilot to the Ministry of Justice in 2023. We understand this is under consideration.

1.1. Do you have any suggestions of changes – both short-term and longer-term changes – that could improve each of the following categories of law?

Our comments relate to Family Mediation and Help With Family Mediation only.

2. What are the civil legal aid issues that are specific to your local area? Please provide any specific evidence or data you have that supports your response.

The issues we raise apply throughout England and Wales.

3. What do you think are the changes in the administration of civil legal aid that would be most beneficial to providers? Please provide any specific evidence or data you have that supports your response.

- A change in the assessment process to make better use of technology and a process whereby the LAA confirms an applicant's eligibility for legal aid before a MIAM takes place/mediation commences as suggested in reply to question 14.
- Changes in fee structures as suggested in reply to question 6.
- The use of auditors who specialise in family mediation contracts, so that mediators do not have to explain how family mediation works when they are explaining their decisions at audit.
- Properly funded contracts longer than a year to allow businesses to put in place longer term business plans, with fee increases for annual inflation.

4. What potential risks and opportunities do you foresee in the future for civil legal aid: i) in general; and ii) if no changes are made to the current system? Please provide any specific evidence or data you have that supports your response.

Figures for family mediation cases and expenditure have been fairly constant since 2014-15 following the dramatic post-Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) fall from 13,609 starts in 2012-13 to 8,478 the following year². Geographical distribution is varied. The February 2024 National Audit Office (NAO) Report³ notes (p.7, para 8) that more than a decade on legally aided mediation referrals have not been restored to pre-LASPO levels even though the MoJ estimates there

² Legal Aid Statistics, Table 7.2 Mediation Starts and Outcomes <https://www.gov.uk/government/statistics/legal-aid-statistics-quarterly-july-to-september-2023>

³ National Audit Office, Government's management of legal aid, 6 February 2024 (HC 514)

would be substantial financial savings in doing so. The NAO Report also notes (at 1.15, pp.21-22) that this has led to a 14% increase in litigants-in-person from 2013 to 2023, and the MoJ itself recognises that the LASPO reforms were unsuccessful in diverting cases from family courts to mediation with mediation assessments remaining at around 40% of pre-LASPO levels (para.1.19, p.23).

There are significant opportunities to increase take up if serious action is taken to properly fund family mediation, including Child-Inclusive Family Mediation. A relatively small investment would secure the retention of legally aided family mediation services, ensuring legal aid remains available for families who need it. This investment would underpin the government's commitment to helping families resolve issues early, before they become entrenched. It would reduce pressures on courts, freeing up court time for the cases that need judicial attention. It would give the children of low-income families a voice, allowing them to feel heard as their parents make arrangements for their future.

This review also provides the Ministry of Justice the opportunity to ensure there is clarity about its overarching strategy for the long-term funding of mediation, including through the voucher scheme alongside legal aid.

By contrast, if no changes are made, the number of services and mediators offering legal aid will continue to decline. This is a future sustainability risk for legal aid mediation providers as noted by the National Audit Office Report (p.49). It places ever more pressure on the remaining services which will become less and less viable each time they take on a legal aid case rather than a privately paying case; taking on a case that needs a subsidy rather than one that can provide that subsidy. See the answer to question 6 below for more details.

- 5. What do you think are the possible downstream benefits of civil legal aid? The term 'downstream benefits' is used to describe the cost savings, other benefits to government and wider societal benefits when eligible individuals have access to legally aided advice and representation. Please provide any specific evidence or data you have that supports your response.**

Mediation helps reduce parental conflict, which has significant wider 'downstream benefits'.

Professor Gordon Harold has summarised the impact of inter-parental conflict for the Family Solutions Group⁴, noting that this leads to poor outcomes for children which results in cost to the public purse in areas of health, education and criminal justice. Professor Harold goes on to say that ‘By contrast, actions designed to reduce the level of inter-parental conflict are associated with positive long-term outcomes. There are clear improvements in mental health, behaviour, school outcomes and long-term relationships. These positive outcomes have benefits not just for the individuals but for the whole of society. They produce widespread cost savings, ranging from the education system to the health and social care system, the civil and criminal justice system and they also produce positive future employment outcomes.’

In addition, investment in mediation would reduce the overall cost of private family law: the costs of court administration, judiciary and CAFCASS for a private law case would be several times the cost of legally aided mediation.

Fees

The Review aims to ensure that civil legal aid offers a financially viable business option for legal aid providers (both private and not-for-profit) and is an attractive career option. This question seeks views on the incentives created by the structure of the current fee system.

6. What are your views on the incentives created by the structure of the current fee system?

Current structure for family mediation businesses that undertake legal aid

The majority of family mediation work undertaken on legal aid is through small services.

Other areas of legal aid have seen more viable business practices where the volume of work enables economies of scale to be taken advantage of, particularly in respect of

- Paperwork including all the administration of means testing undertaken by non-fee earners;
- Full diaries for fee earners; and
- Utilisation of office space in different locations either permanent or serviced.

⁴ A simple summary of the evidence as regards Inter-Parental Conflict and Family Separation, Professor Gordon Harold <https://www.familysolutionsgroup.co.uk/wp-content/uploads/2022/06/Inter-Parental-Conflict-and-Family-Separation.pdf>

The Legal Aid Agency may want services to continue to develop these business practices. However, it is not a model that family mediation services have been able to develop, as they cannot afford this structure. Even the most efficient and larger mediation firms find it difficult to operate if fees are not increased for many years⁵. This is a market sustainability issue also identified in the National Audit Report (para. 13, p9).

Mediators want to do legal aid work, but are finding this increasingly difficult with the current legal aid fee rates and administration burden. If that is accompanied by increased work with the changes to how Universal Credit is assessed, the economics of continuing legal aid provision is aggravated further.

These factors need to be considered when making any changes to legal aid administration for family mediation. It is probably the case that it will require a different approach to other areas of legal aid where larger firms dominate. For example, the removal of Universal Credit as a gateway to legal aid increases the administration required from providers as does any requirement for evidence of means. Larger entities with non-fee-earning staff undertaking administration will absorb these changes more easily and with less financial impact, as will organisations whose average case fee is measured in the thousands rather than the hundreds (as is the case with mediation) and the tens (for MIAMs).

Further evidence is required to establish:

- The volume of mediation work undertaken by providers of different sizes and their geographical distribution;
- The most efficient methods of handling legal aid administration for a sole trader through to a large firm, a cost/ benefit analysis of all currently required administration and any changes in administration;
- Potential incentives for administrative collaboration in delivering services, particularly in ‘desert areas’; and
- Whether financial incentives will attract existing legal aid providers to provide a service in ‘desert areas’ including potential full or partial pre-payment for a quota of cases.

⁵ Using the Bank of England’s inflation calculator, a MIAM paid at £87 in 2004 would be worth £149.45 today. It is still paid at £87. In addition, the Legal Aid Agency no longer pays a £25 willingness test, which used to be paid to cover the administration costs of establishing whether a second participant was willing to attend a MIAM.

A financially viable business option?

The current fee system does not offer a financially viable business option for family mediators.

Family mediation services tell us that fees from privately paying work subsidise legal aid work and has done so for many years. This means the system is not sustainable.

This is demonstrated by a reduction in the number of firms offering legal aid for family mediation since contracts were awarded in 2018, from 182 to 107 now⁶.

With fewer services offering legal aid, this means there is more legal aid work for those firms who do continue to offer this. However, if the proportion of legal aid work increases, this decreases a firm's ability to do private work, so the ability to subsidise legal aid work decreases.

We are conscious that there is wide concern about the sustainability of civil legal aid generally as evidenced in the 2024 National Audit Report (p.9), but believe this is particularly acute for family mediation. This can be seen by firms with legal aid contracts for multiple areas choosing to apply to renew contracts for other areas, but not for family mediation. When the same amount of work has to be done for an assessment for a case that could result in fees of thousands of pounds (the average for civil representation) or for an £87 MIAM fee, it is easy to see why the system is no longer working for family mediation services.

The current fee system does not work for family mediation as the fees paid are not sufficient to cover the work that needs to be done.

Rates of payment and the structure of fees need to be reviewed urgently.

Structure of current fee system

The broad structure for legal aid for family mediation is as follows:

- A single fee is paid for a MIAM. This can be claimed once the MIAM has taken place.
- Either a single session fee or a multiple session fee is paid for mediation. This can be claimed once the mediation is complete.

⁶ Current number listed in the Directory of Legal Aid Providers: <https://www.gov.uk/government/publications/directory-of-legal-aid-providers> Historic number from FMC records.

- A co-mediation fee can be paid in complex cases, but this must be justified and as it has been common for the Legal Aid Agency to question whether co-mediation is justified at audit, many mediators are reluctant to bring in a co-mediator even when, in their professional judgement, a second mediator is required, as mediators don't know if the co-mediation rate will be paid.
- Disbursements – such as for an interpreter – can be claimed, but where a service is not available at or below the fixed fee the Legal Aid Agency prescribes, mediators must obtain three quotes for each disbursement. Disbursements are paid when the MIAM or mediation fee is claimed.
- Where one party is eligible for legal aid, the Legal Aid Agency pays for the other party to attend a MIAM and the first mediation session. If the mediation continues, the non-legally aided party pays fees privately or can currently apply for up to £500 of their costs to be met by the Family Mediation Voucher Scheme.

An £87 fee is paid for a MIAM. This includes all administration including the legal aid assessment, a share of overheads, and the delivery of MIAM itself. A MIAM is usually expected to last an hour⁷, excluding a detailed legal aid assessment. Where potential legal aid applicants are not on Universal Credit, the assessment takes a significant amount of time – often two to three hours, going back and forth with the applicant to ensure documents are provided and any income and assets are declared, which is particularly complex for clients who have just separated from a partner. With Universal Credit being withdrawn as a passporting benefit, these long assessments are going to become common and firms just about managing to keep legal aid services afloat now will not be able to sustain the change.

The multiple session fee is based on three sessions, which was believed to present an average multiple session rate at the time it was introduced. This average is outdated, and doesn't take in to account Child-Inclusive mediation or that cases have become more complex.

As acceptable disbursement rates (e.g. for interpreters) are unrealistic, mediators have to carry out additional work to obtain three quotes for services that are necessary in order to enable the mediation to go ahead.

The fact that fees cannot be claimed until after a mediation has concluded mean mediation services are often paid months after they have carried out work (especially if waiting for pension valuations or

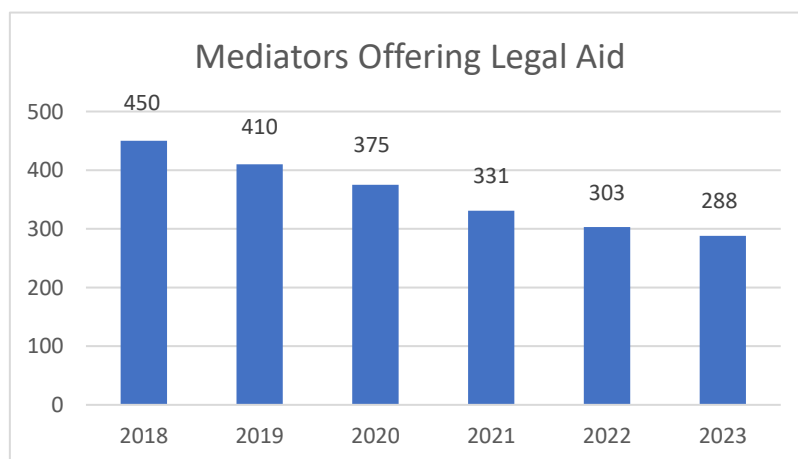
⁷ Part 5, Family Mediation Council Standards for Mediation Information and Assessment Meetings (MIAMs), August 2022
<https://www.familymediationcouncil.org.uk/wp-content/uploads/2022/08/FMC-MIAM-Standards-August-2022.pdf>

similar external reports in property and finance cases), despite having to pay mediators and disbursements much sooner.

In some cases, there are more than two mediation participants (e.g. when there are wider family members involved in the care of a child and who are considering applying to court for a Special Guardianship or Child Arrangements Order) and each potential mediation participant must have a separate MIAM. However, the current fee structure is based on the assumption that there will only be two parents or ex-partners involved in a case, and therefore only two MIAMs can be claimed for on any one case. By not paying for services that mediators must provide, the legal aid system doesn't present itself as a viable business option.

Career Options

The current fee system means that providing legal aid for family mediation is not an attractive career option. The number of mediators offering legal aid for family mediation has decreased by 36% over the past six years⁸ (see graph below), and a significant proportion of mediators who do still offer legal aid at present have told us they are likely to stop doing so when Universal Credit ceases to be a passporting benefit due to the increased administrative burden that this will bring.



The fact that family mediation legal aid is not an attractive career option is reinforced by the fact that **only 14% of the mediators who became accredited within the last three years work for a service that offers legal aid**, compared to 53% of mediators with more than three years post-accreditation experience.

⁸ Statistics come from the Family Mediation Council's Register of Mediators. We can provide more detailed information on request.

The current system does not support mediation trainees. The Legal Aid Agency will allow a mediator to co-work a MIAM or a mediation with an Accredited Mediator in order to gain experience which they can use to build up the experience and evidence they need to become an accredited mediator, but the Legal Aid Agency does not pay for this.

Mediators who are working towards accreditation, or services supporting them, therefore have to rely on privately paying clients for income. Swapping privately paying clients for legally aided clients upon accreditation makes no financial sense, as illustrated by the fact that **only two mediators who became accredited in 2023 work for a service which has a legal aid contract.**

Furthermore, where services with a legal aid contract invest in a mediator and support them through the accreditation process, the mediator is likely to receive a significantly higher salary at a firm that does not offer legal aid, and so services are losing accredited mediators to competitors.

6.1. Do you think these support the effective resolution of problems at the earliest point?

Legal aid for family mediation can be incredibly effective in resolving problems at the earliest point, but only if it is properly funded.

Legal aid statistics show 62% of family mediation cases have a successful outcome⁹.

The Family Mediation Voucher Scheme showed mediation has an overall success rate of 69%, and that where one party has legal aid and the other had a mediation voucher, success rates were 70%¹⁰.

Mediators tell us legal aid cases are more successful where the non-legally aided party has a mediation voucher as they are more willing to come to a second mediation session, which gives more time for issues to be discussed properly and outcomes agreed.

The Family Mediation Voucher Scheme also showed that cases where Child-Inclusive Mediation has taken place have a success rate that is higher still, at 74%. Child-Inclusive Mediation is not properly funded by the current legal aid system. Child-Inclusive Mediation takes at least three mediation sessions, irrespective of the other issues that need to be resolved. By basing a multi-session fee on a

⁹ Legal Aid Statistics, Table 7.2 Mediation Starts and Outcomes <https://www.gov.uk/government/statistics/legal-aid-statistics-quarterly-july-to-september-2023>

¹⁰ Ministry of Justice, Family Mediation Voucher Scheme Analysis, March 2023, Page 11

<https://assets.publishing.service.gov.uk/media/6419cd288fa8f547c7ffd692/family-mediation-voucher-scheme-analysis.pdf>

three-session structure, the current system does not support the effective resolution of problems at the earliest point.

In property and finance cases, mediation participants are required to disclose their assets and income, so that agreements can be reached on the basis of an understanding of each participant's financial position. This can be summarised in an Open Financial Statement (OFS), which can take approximately two hours to produce. The OFS is signed by both clients as part of the process of 'full and frank' financial disclosure. This is a requirement within the mediation process but can also be a useful tool for Courts where any Orders post mediation are sought. Unlike a Memorandum of Understanding, the OFS is produced on an 'open' basis, so it can be shown to a Court following the conclusion of mediation as a record of the clients' financial information. Time spent on the preparation of an OFS is not remunerated separately under legal aid contracts, which means the Legal Aid Agency is missing the opportunity to help participants agree a document of central importance when reaching an agreement about property and finance.

As well as these current concerns, we have a more fundamental concern that if the current system remains as it is, more providers will choose not to hold legal aid contracts and the public will not be able to find a mediator who offers legal aid, which would be catastrophic for the government's policy on encouraging people to resolve disputes at the earliest point.

6.2. How could the system be structured better?

Please provide any specific evidence or data you have that supports your response and any views or ideas you may have on other ways of payment or incentives.

- Recognise the onerous nature of the administration requirements of the legal aid process, and make the process more proportionate for family mediation as recognised in the Voucher Scheme. Family mediation financial risks are significantly lower than higher value 'civil representation' and can be mitigated in a lighter process driven manner with the development of evidence-based audit triggers.
- Ensure payment rates recognise the work that has to be done in order to carry out the assessment.
- Abolish the multi-session rate, replacing it with a payment per session including for Child-Inclusive Mediation;

- Enable mediators to claim for a session once it is complete, rather than waiting for a case to conclude;
- Make a specific payment for preparation of an Open Financial Statement; and
- Review fees now, regularly increase fees annually in line with inflation and timetable period reviews that look at whether the assumptions on which fees are based (e.g. a MIAM should normally last an hour) have changed;
- Review the disbursement fees now, regularly increase line with inflation and schedule periodic reviews that look at whether the assumptions on which fees are based have changed;
- Review rules on co-mediation so that mediators can bring in a co-mediator where they judge this would be more appropriate for the case without being worried about whether the co-mediator will be paid;
- Allow payment for however many MIAMs are needed in a case; and
- Support trainee mediators by paying a co-mediation rate for trainees and by paying for them to mediate solo at Stage 2 of the FMSB's Staged Portfolio Pilot¹¹.

Career development and diversity

These questions seek views on career development and how diversity of the profession could be increased. It is important for the sector to reflect the society it serves and make use of the best talent in society, so that members of the public can be confident in the legal services they receive. A more diverse sector also means a more diverse pipeline to the judiciary. The MoJ is eager to understand what more it can do to improve diversity in the context of civil legal aid practitioners.

- 7. Is there anything in particular in civil legal aid that prevents practitioners with protected characteristics from starting and continuing their careers? If yes, how could this be addressed? Please provide any specific evidence or data you have that supports your response.**

It is expensive to train and become an accredited mediator, and the support of accredited mediators is needed to develop the skills and experience to reach accreditation.

¹¹ The FMSB submitted a proposal relating to the Staged Portfolio Pilot to the Ministry of Justice in 2023. We understand this is under consideration.

Mediation services with legal aid contracts struggle to afford to support mediators working towards accreditation, and so there are limited opportunities for firms with legal aid contracts to support those with protected characteristics from starting and continuing their careers.

8. How can the diversity of the profession be increased in legal aid practice, including ethnicity, disability, sex, age and socio-economic background? Please provide any specific evidence or data you have that supports your response.

See above answer to question 6 about viable businesses and career options.

If the Legal Aid Agency supported trainee mediators by paying a co-mediation rate for trainees, and by paying for them to mediate solo at Stage 2 of the FMSB's Staged Portfolio Pilot, trainees would have access to the support necessary and be able to access cases to gain experience needed in order to become accredited, whilst ensuring that the quality of mediation meets expected professional standards.

This would enable people who cannot afford to work for free whilst working towards accreditation to become accredited mediators.

User needs

The Review aims to ensure that the civil legal aid system is accessible to people eligible for legal aid, and that these individuals can successfully apply for and receive legal aid. These questions seek views on the experience and needs of those seeking and receiving civil legal aid and how these needs can be best met.

9. What barriers/obstacles do you think individuals encounter when attempting to access civil legal aid? Please provide any specific evidence or data you have that supports your response.

Capital eligibility limits can sometimes prevent users with a low income from accessing legal aid where capital assets are trapped (e.g. family home), because the rules and the application of these surrounding trapped assets are not clear and consistent. This is particularly the case in London and surrounding areas.

Rules are also unclear for potential mediation participants who are parents, but who are under 18. Where these young people, often 16 or 17 years old, are living at home with their own parents or step-parents, it is not just the young person's income that is taken in to account but sometimes the income of adults whose care they are in. However, sometimes those adults won't want to disclose their income or assets, and so a full assessment of the young person's eligibility for legal aid cannot be carried out.

Users with additional needs or disabilities may face obstacles in accessing civil legal aid as the support they need to access a service may not be available from the start. For example, if somebody who doesn't speak English needs to access a mediation service, the mediator can arrange for an interpreter, but they can only do so once it has been established how this service will be paid for. If the user is eligible for legal aid, the costs of the interpreter used to ascertain that someone is eligible for legal aid will have been incurred before the application for legal aid is made, and so will be irrecoverable.

'Help With Family Mediation' is the time-limited fixed fee legal advice available to clients who are receiving legal aid for family mediation. The paucity of firms with family law contracts offering this service is a barrier that users face in trying to resolve matters through family mediation. The purpose of the 'Help With Family Mediation' scheme is to ensure the mediation participants receive some legal advice alongside mediation so they could make informed decisions in the mediation. All law firms with Family Law Contracts are eligible to conduct this work, but only a handful across the country do so and so clients cannot access this.

As well as the existing barriers identified above, we are concerned that the removal of Universal Credit as a passporting benefit will create obstacles in the future. If there are fewer providers, people will find their applications won't be able to be processed so quickly. Having to provide more documentation to prove eligibility may be a barrier to those who live chaotic lives and/or those who cannot provide this digitally. There are concerns too that the change in Universal Credit as a passporting benefit may affect women more than men, as women are much more likely to be disproportionately affected by this change.

10. What could be done to improve client choice such that it is easier for clients to find civil legal aid providers and make informed decisions about which one best meets their needs? Please provide any specific evidence or data you have that supports your response.

The search facility on the FMC website allows clients to find mediators who offer legal aid, who are qualified to conduct Child-Inclusive Mediation and who offer online mediation. This search facility is kept under review.

In order for this to continue to be a useful facility, there needs to be a good number of mediators who continue to offer legal aid.

Geographical distribution is varied. The development of on-line mediation during the pandemic and its continuation has mitigated the geographical variation. More can be done to encourage delivery in 'desert areas' by existing providers, including:

- a review of the necessity of some of the 'physical presence' contractual provisions,
- support for physical presence sessions including travel, subsistence and meeting accommodation, and
- advance payment of a proportion of contracted 'desert area' numbers.

11. Do you think that some people who are eligible for civil legal aid may not know that it is available and/or how to access it? If so, how do you suggest that this is addressed? Please provide any specific evidence or data you have that supports your response.

Mediators tell us that lots of clients are not aware that legal aid is available for family mediation until the mediator tells them about this. This is concerning as some people might not approach a mediator at all if they are concerned about cost.

The Ministry of Justice is seeking to improve the provision of information about early dispute resolution options, and it is recommended that the availability of legal aid for family mediation is an integral part of the information provided.

- 12. How do you think that people receiving civil legal aid can be supported in cases where they have multiple or ‘clustered’ legal issues and some of these are outside of the scope of civil legal aid? Please provide any specific evidence or data you have that supports your response.**

Mediators signpost clients to different services when they identify that families can benefit from these. A comprehensive guide to support services for families in each local area would be helpful.

- 13. How do you think that the Exceptional Case Funding scheme is currently working, and are there any ways in which it could be improved? Please provide any specific evidence or data you have that supports your response.**

N/A

Use of technology

The Review aims to feed into MoJ’s wider strategic objectives on the use of technology. Technology should enable users to engage with the legal process and support the smooth running of the civil justice system. These questions seek views on how the use of technology could improve civil legal aid, including through where appropriate, remote advice.

- 14. What are the ways in which technology could be used to improve the delivery of civil legal aid and the sustainability of civil legal aid providers? We are interested in hearing about potential improvements from the perspective of legal aid providers and people that access civil legal aid. Please provide any specific evidence or data you have that supports your response.**

Legal Aid Assessment

As already stated above, the legal aid assessment can be incredibly onerous for services, particularly when Universal Credit cannot be used as a passporting benefit. The Legal Aid Agency has attempted to make the process less difficult by introducing an enhanced online legal aid calculator, and this does make calculations more straight forward. However, it hasn’t reduced the need for a mediation service having to check bank statements, enquire after ad hoc income (people in receipt of legal aid often transfer money between accounts or have loans from family and friends which helps them manage very tight finances), ensure the right number of payslips are provided etc.

An online legal aid assessment tool, which is quick and easy to use, and allows for a definitive response to be given about whether a client is eligible for legal aid or not would make a significant difference to the sustainability of family legal aid providers.

It could be a tool that is completed by applicants alone, or with the help of providers if necessary. It could allow for evidence to be uploaded, and any queries to be sent to a Legal Aid Agency team for checking. Once approved, the tool could provide the applicant with a reference number to give to the legal aid provider within a certain time frame, which the provider enters in to the legal aid system when making a claim.

Not only would this reduce the amount of work that a service provider has to do, it would significantly reduce the amount of work that the Legal Aid Agency has to do on audit, to check that legal aid has been appropriately claimed.

Legal Aid Audit

Legal Aid Audits take place in person, with auditors visiting mediation providers. This results in travel and venue costs (even if the latter forms part of overheads and is unnecessary, as well as travel time for both the auditors and service managers.

Auditors could meet services via online video conferencing and access documentation remotely.

Offering an option of an online audit could therefore save travel time and cost, without any loss of the quality of the audit.

Remote Provision of MIAMs and Mediation

The Covid pandemic brought about significant change to the way that family mediation services operated, and the profession has learnt a lot about the delivery of services online since.

Prior to the pandemic, many mediators never envisaged carrying out online mediation: in March 2020 mediators adapted very quickly to offer safe and successful mediation online.

LAA statistics illustrate that the shift to online working did not affect the proportion of cases in which legally-aided MIAMs led to mediation (60% from 2019/20 through to the first quarter of 2021/22) or cases in which agreements were reached (also 60% over the same period)¹².

Likewise, the Family Mediation Voucher Scheme shows that online mediation and in person mediation have very similar outcomes (68% and 71% success rates respectively)¹³.

Even now, though many mediators offer in-person appointments, they are finding that clients often prefer the online option. Client feedback is that online mediation provision is more convenient: clients don't have to find the time or money to be able to afford to travel, or the consequential child care/time off work that travel may necessitate. Clients also really like that they don't have to sit in a room with their ex-partners.

Notably mediators have told us that shift to online working was critical to them finding the efficiencies they needed in order to be able to continue to provide legal aid services: costs are reduced as mediators spend less on offices, and less time and money travelling to outreach offices. Mediators have also told us that online working increases efficiency as: most documents are received and stored electronically, making audit trails easier; mediators can offer clients earlier appointments online, and can work earlier or later than they would if working in person - they don't need office buildings to be open or to keep other staff on hand to ensure safety; fewer appointments are cancelled by clients because appointments are easier to attend; and remote working facilitates the training and development of new mediators - it is easier for them to access observations and follow cases to a conclusion.

Despite the advantages of online working, this isn't always best for clients in mediation, and they may choose to mediate in person, or not be able to mediate online. It is therefore imperative that legal aid contracts allow for client choice when it comes to the delivery of a MIAM or mediation session.

We know that clients already use technology when making enquiries or booking an appointment, which is one exclusively by telephone, e-mail or online contact forms. Nobody visits mediation offices to make enquiries or book appointments, and so it is not necessary to retain a premises or reception for this purpose.

¹² Legal Aid Statistics, Table 7.1 MIAMs and Table 7.2 Mediation Starts and Outcomes

<https://www.gov.uk/government/statistics/legal-aid-statistics-quarterly-july-to-september-2023>

¹³ Ministry of Justice, Family Mediation Voucher Scheme Analysis, March 2023, Page 11

<https://assets.publishing.service.gov.uk/media/6419cd288fa8f547c7ffd692/family-mediation-voucher-scheme-analysis.pdf>

15. Remote legal advice, for example advice given over the telephone or video call, can be beneficial for delivering civil legal aid advice. Please provide any specific evidence and thoughts on how the system could make the most effective use of remote advice services and the implications for services of this.

To enable clients to have a choice about whether to attend a MIAM or mediation session in person or online, whilst allowing services to operate efficiently, the legal aid contract should be amended as follows:

- Contractual provisions should allow unlimited remote applications
- A change in office requirements so that mediators can work from any location (including from home) as long as this is consistent with standards on appropriate location which are set by the FMSB from time to time. This change must be made in a way that allows for the continued provision of 'in person' mediation for clients who choose this option or cannot access online mediation. We therefore propose that the office and location requirements are amended so that mediators need to provide:
 - At least one address within England and Wales with suitable facilities at which in-person mediation can be provided from 0900 -1700 Monday – Friday;
 - One administrative address within England and Wales, which is held by the LAA (and which may be the same as the address where mediation takes place);
 - Contact points via telephone and e-mail, serviced 0900 – 1700 Monday – Friday; and
 - A 'signposting service' to legal aid face-to-face mediation services if the mediator cannot provide such a service. If clients contact a service from an area where the mediator does not have a physical presence, there should be a requirement to inform clients of this fact, and to signpost them to services in the area that can provide face-to-face mediation services if requested by the client.
- Legal aid mediation services should also be able to open additional offices without any restriction, informing the LAA of any outreach locations. This will allow mediators to respond quickly to the needs of clients and open up new offices where and when required.

16. What do you think are the barriers with regards to using technology, for both providers and users of civil legal aid?

Lack of access to, ability to use or familiarity with relevant devices or applications can all be barriers to using technology, for both providers and users.

Most mediation services research the platforms they use carefully, and ensure mediators and other staff are trained in using these. The platforms can be accessed by mediation participants for free.

Sometimes mediation participants can't fully access the service online, either because they don't have a device, don't know how to use this generally, or because for example it is difficult to access information being shared on a mobile phone. Some participants have the technology and can use this, but cannot find a quiet space in their home where they can participate in the MIAM or the mediation session in private.

By retaining an option for a face-to-face service, these barriers needn't be faced.

Cost can be a barrier to providing in-person mediation, especially whilst legal aid rates remain at current levels. There is of course a cost to technology for providers, but this is considerably cheaper than having to maintain a full-time office presence.

16.1. Do you think there are any categories of law where the use of technology could be particularly helpful?

Our response applies only to family mediation.

16.2. Do you think there are any categories of law where the use of technology would be particularly challenging? Please provide any specific evidence or data you have that supports your response

Our response applies only to family mediation.

Early resolution

The Review aims to feed into MoJ's wider strategic objective to encourage, where appropriate, the early resolution of disputes, providing swift access to justice through early engagement where appropriate.

This question seeks views on what could be done to encourage early resolution of disputes.

17. What do you think could be done to encourage early resolution of and/or prevention of disputes through the civil legal aid system? Please provide any specific evidence or data you have that supports your response.

Mediation works to resolve cases early – see above for evidence.

To encourage early resolution, reform legal aid for family mediation so there is comprehensive funding available for the best and most effective mediation service possible, to allow people on the lowest incomes to be able to resolve issues in mediation.

It is important for mediation participants to have access to legal advice alongside mediation, particularly in finance cases. We believe that the 'Help with Mediation' aspect of legal aid which is intended to provide some legal support alongside mediation needs to be reviewed. It is rarely used and mediators cannot find solicitors who offer this service. 'Help with Mediation' is not profitable and should be addressed along with a review of all legal aid rates for mediation.

Other areas for consideration

18. Is there anything else you wish to submit to the Review for consideration? Please provide any supporting details you feel appropriate.

The existing contract refers at various points to the FMC'S Code of Practice and Guidance. It also includes standards relating to supervision and to other areas of work, such as MIAMs. The Ministry of Justice has supported the FMC'S development of professional standards through the establishment of the FMSB (which regulates FMC Registered Mediators). The FMSB is tasked with the further development of standards and implementation and assurance of those standards already in place. The FMC view is that those standards are (and will remain) adequate. If there were LAA standards which were the same, those LAA standards would be superfluous. If they were different, confusion and

uncertainty would be bound to result. Consequently, the FMC proposes that the contract stays silent on matters of professional standards other than to state that all those working under the contract must comply with the professional standards as set down by the FMSB.

About the FMC

The Family Mediation Council (FMC) is a not-for-profit organisation dedicated to promoting best practice in family mediation. Our central aim is to ensure the public can confidently access family mediation services that offer high quality mediation provided by mediators who meet our standards.

The FMC has five Member Organisations (College of Mediators, Family Mediators Association, National Family Mediation, Resolution and The Law Society) and registers individual mediators who meet the required standards. There are approximately 1000 mediators on the FMC at any one time, with 700 of those accredited and 300 working towards accreditation.

The Family Mediation Standards Board is a standing committee of the FMC and is responsible for advising the FMC Board on the content of the FMC Standards and Self-Regulatory Framework and for its implementation.

For more information contact executive@familymediationcouncil.org.uk