

What will be the impact of compulsory mediation?

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Family analysis: Following the issue of the Ministry of Justice consultation earlier this year, Rachel Chisholm, barrister at 4PB, considers the implications of compulsory participation in mediation, including potential benefits, disadvantages and the proposed 'reasonable attempts' criteria.

What is the background to the proposals?

Earlier this year, the Ministry of Justice launched a consultation on ['Supporting earlier resolution of private family law arrangements'](#), which closes on 15 June 2023. The consultation set out its aims for supporting families to find ways of reaching agreements 'more quickly and without the need to apply to court sometimes on multiple occasions'. The emphasis is on compulsory participation in mediation.

The proposed measures set out in the consultation are that:

- save for stated exceptions, for mediation to be made compulsory before an application can be made to court for most private children cases and contested financial remedy cases
- matters where there are allegations or findings of domestic abuse, as well as child protection or urgent matters, will remain exempt from the mediation requirement
- parties be required to make a 'reasonable attempt to mediate' by ensuring that the right evidence for an exemption is provided
- the court is empowered early in the process to direct parties to make a reasonable attempt at mediation
- the court is empowered to make costs orders against those who do not make reasonable mediation attempts or act in a way that unnecessarily prolongs court proceedings, and
- usage of the mediation voucher scheme be extended

Key considerations are the impact of making mediation compulsory on the mediation process itself and its likely outcomes and the requirement for 'reasonable attempts' to mediate and the court's powers to enforce this criteria.

Greater access to mediation and support to engage with the process in an effective manner are only to be encouraged. Mediation offers a supportive setting for families to reach agreements that work for their particular situation and to focus on improving their communication. The benefits of mediation are that participants can explore solutions freely while the mediator models positive ways of relating. It is without doubt in the best interests of children for their parents to resolve their disputes amicably and without resort to lengthy, entrenched court proceedings and any reduction in court delays and use of the court process as a result of increased mediation attendance is welcome. However, making mediation compulsory is not the answer. The government's proposal is too simplistic. It relies heavily on 'the stick' to compel and punish errant litigants rather than to provide relevant support and resources to families who are in crisis. Sustainable outcomes are reached because those involved feel they have contributed towards an agreed solution without duress. The government's proposal runs the risk of further delays and expense for those who attempt mediation without appropriate support and a genuine desire to reach agreement only to end up back in the court system. What is needed is greater education and support for those involved in the process, whether as participant or mediator.

Are there any benefits to compulsory mediation?

One benefit of compulsory mediation could be a widening of the pool of people attempting to mediate outside of court proceedings. Those who would not ordinarily have attended mediation, save for those who are exempt, may find themselves pleasantly surprised at what they are able to achieve with the help of a skilled mediator. Compulsory exposure to the mediation process along with mediation becoming part of the normal court process is positive. It may serve to reduce anxiety around attempting mediation and instil in participants the importance of giving mediation their best effort.

The costs risks of not mediating may also act as an incentive to take mediation seriously as part of the process of resolving disputes. However, it is unclear what evidence is relied upon to support a proposal that costs risks will achieve the desired result.

The compulsory nature may serve to reinforce the importance of participating meaningfully in mediation. The President of the Family Division rightly raised concerns about the current mediation information and assessment meeting (MIAM) process being too easily sidestepped in his ['Relaunching Family Mediation'](#) address, saying:

'The requirement for the applicant to attend a MIAM unless validly exempt is a statutory requirement. Exposure to advice about mediation before active engagement in the court process has a proven track-record of allowing a proportion of parties to resolve their disputes swiftly and by consent.'

However, there is a difference between compulsory attendance at an initial meeting which is designed to provide information as to other options available to litigants and compulsory attendance at mediation sessions where parties are required to negotiate on matters which impact theirs and their children's lives.

A sensible way forward could be to adopt an 'opt out' system, as proposed by the Bar Council in its [response](#) to the Ministry of Justice consultation on increasing the use of mediation in the civil justice system. This approach preserves the gains of broadening access and exposure to mediation alongside positive endorsement of the process, while ensuring the fundamental tenants of mediation remain observed for the benefit of all involved.

What are the downsides of compulsory mediation?

There is good reason why the Family Mediation Council [Code of Practice](#) states that mediation 'must be the free choice of each participant at all times' (para 6.1) The voluntary nature of mediation plays a significant role in achieving sustainable outcomes that work for families. Participants are asked to come to mediation with an open mind and a willingness to take on board the other person's point of view. An element of trust and good faith is an important ingredient in any mediation progressing. There needs to be a genuine wish to try to resolve the matter along with an absence of duress or coercion before any meaningful discussions can take place.

The government's proposals are unlikely to produce the required results. The proposals run the real risk of resolution being further delayed by unsuccessful mediation attempts, where parties are going through the motions, which have cost more time and money for those involved.

Families in separation are in a time of crisis and distress. Compulsory mediation does not address the roots of people's inability or unwillingness to resolve their disputes without a decision being imposed upon them. Couples bring with them their relationship dynamic as well as their own personal history which can act as obstacles to settlement. The proposal ignores the complexities of human behaviour and the need for more tailored support for separating families in resolving conflicts. A more effective way forward would be to expand upon the proposal that parents attend the new ['Planning Together for Children'](#) course prior to proceedings. The availability of courses or support focusing on conflict reduction and improving communication prior to any mediation would create greater opportunities for separating families to work together outside of the court system (see the Family Solutions Group report, ['What about me?'](#)).

A compulsory mediation system does not address the risks of an ongoing power imbalance being enacted in mediation. This is particularly relevant as currently people do not always have access to legal advice. Mediators are trained to monitor for power imbalances, however these dynamics can be subtle and not always easy to pinpoint without sufficient training or expertise. The compulsory nature of any mediation runs the very real risk of exacerbating power imbalances by placing pressure on participants to settle due to fear of costs or fear of being blamed for the breakdown of discussions.

What may be the impact of the ‘reasonable attempts’ criteria?

The proposals come into further difficulty when introducing the concept of ‘reasonable attempts’ to mediate and cost consequences. This concept raises the questions of what constitutes a reasonable attempt and who is the arbiter of that reasonable attempt.

Reasonable attempts will be different for each person. There will be mediations in which no proposals are reached but the mediation was successful for other reasons, which are harder to quantify. For example, the couple may have been able to start a conversation after years of not speaking, or they may find some common ground on issues that had previously felt unbridgeable. Progress may not have been in relation to the dispute itself but the mediation may have assisted in reducing conflict between the couple.

The need to demonstrate a reasonable attempt undermines the confidentiality of mediation. The benefit of mediation is that it is a privileged environment to explore different options for settlement which may not have been possible in court for fear of losing ground. There will need to be a way of evidencing the attempts made by the parties, beyond physical attendance. In order to do so, it is likely that material from the mediation would need to be provided or an assessment made by the mediator of the parties’ efforts. The mediator is then placed in an inappropriate position whereby their role is no longer as a neutral participant. They have an enforcement role, which requires them to provide their subjective opinion of the parties’ engagement. The proposal creates an imbalance of power from the position of the mediator and undermines the benefit that the confidential nature of mediation lends towards settlement.

The link between ‘reasonable attempts’ and costs consequences raises concerns around the impact of duress on those participating in mediation. The threat of costs is an unhelpful tool in mediation as it can serve to act as a coercive measure which looms in the background. The threat of costs has the real potential to impact on whether genuine consent has been given to proposals. An agreement that parties do not feel they truly consented to is not an agreement and does not provide a sustainable long-term outcome for the family.

What is needed?

Greater access to and understanding of the mediation process is a welcome initiative. However, it is the provision of appropriate support and resources for mediators and participants that will give families the best opportunity of resolving their disputes themselves. Giving people the tools to better understand how to resolve their conflicts would be a preferable approach. The underlying concern around the government’s proposal is that it seeks to shift the blame on to those who use the court system. While there are those cases where the system is misused, the court serves an important function in achieving fair outcomes and resolving family disputes. It is a necessary resource that should be available to those who need it. The proposal for compulsory mediation appears more in line with a government’s attempt to save costs rather than to properly fund a court service and to provide adequate support to separating families in their time of need.