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Mediation Information and Assessment Meetings (MIAMs) and mediation in private family law disputes

Quantitative research findings

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1. Summary

In 2013, the Ministry of Justice (MoJ) commissioned a broad programme of research on the use of Mediation Information and Assessment Meetings (MIAMs) and mediation in private family law disputes. Findings from qualitative interviews conducted as Phase 1 of this programme were published in April 2014.[1] This report covers the findings from two quantitative data collection exercises:

- A **survey of mediation practitioners** with a Legal Aid Agency (LAA) contract to collect data on MIAM and mediation workloads for **privately funded clients** in the snapshot months of November 2013 (wave 1) and March 2014 (wave 2). These covered 115 and 72 practitioners, with response rates of 48% and 30% respectively. This was supplemented by an in-depth survey which collected detailed case characteristics from a small number of clients.
- A **court file review** of 300 cases (150 private law children and 150 contested finance cases) started in five court locations between April 2012 and September 2013 to examine the proportion of applicants, including those publicly and privately funded, using MIAMs and mediation before applying to court. This was supplemented by short interviews with ten court staff.

Policy context

The Government has increased its focus on the use of mediation to resolve private family law disputes in recent years, as part of an emphasis on diverting appropriate cases away from court. This research was conducted against a backdrop of two key developments. Firstly, the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) removed most private law family cases from the scope of legal aid from April 2013 – although legal aid remains available for mediation and potentially available for advice and representation where there is evidence of domestic violence or child protection issues. Secondly, in April 2014 the Children and Families Act 2014 placed a statutory requirement on applicants in relevant family proceedings to first attend a MIAM before making an application to court, unless an exemption applies.

The Government anticipated that these changes to legal aid, together with the statutory requirement for applicants to attend a MIAM before making an application to court, would

[1] The Phase 1 report is available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300260/mediation-information-assessment-meetings.pdf

lead to an increase in numbers of people looking to resolve their private family law dispute through mediation. Fieldwork was conducted during the period between these two policy developments. This study was designed primarily to address the lack of available data on national use of MIAMs and mediation for privately funded clients. Secondly, it aimed to explore the proportions of parties taking part in MIAMs and mediation prior to court. These data can then be used as a baseline to allow potential follow-up research to track future trends.

Practitioner survey

MIAM and mediation caseloads

Overall, practitioners conducted an average of ten MIAMs and three mediation starts with new privately funded clients per month. On average, practitioners conducted half of all MIAMs with couples (an average of five); these included both jointly and separately attended meetings. The majority of MIAMs were conducted on a separate basis, reinforcing findings from the qualitative phase which reported a tendency for clients to prefer separate MIAMs. Comparison with LAA figures for publicly funded clients suggests that funding status does not alter the overall pattern of attendance at MIAMs. Mediations were evenly spilt between children's issues, property and finance issues and 'all issues'.[2] Compared with statistics for publicly funded cases, however, the privately funded mediation caseload is more weighted towards property and finance and all-issues cases.

Profile of privately funded MIAM and mediation clients

When only one party attends a MIAM, this means that the case cannot convert to mediation. Compared with MIAMs attended by couples, clients attending MIAMs alone tended to be younger;[3] they were also more likely to be male and of non-white ethnic origin. On average, clients attending MIAMs together tended to be older, as were clients attending mediations which related to property and finance issues. Clients attending children-only mediations were younger in profile compared with other types of mediations.

Referrals to MIAMs and mediation

Similar to the pattern found among publicly funded clients, referral routes for privately funded clients were mainly through solicitors or self-referral; self-referrals were slightly more common than solicitor referrals. Less than 10% were referred via other agencies. MIAMs conducted separately were more likely than MIAMs conducted together to be referred via a

[2] i.e. dealing with both children, and property and finance.

solicitor. Property and finance cases were more likely than other mediations to be originally referred via solicitors, while all-issues mediations were particularly likely to be self-referred.

Outcomes and conversion

The survey provides only a crude estimate of privately funded MIAM to mediation conversion, as in many cases practitioners did not yet know whether the case would convert. However, it suggests an overall conversion rate of 66–76%,[4] which supports the general direction of the qualitative findings. It also indicates that conversion is less likely when couples attend MIAMs separately, and among younger clients. For mediations, the survey suggests that full or partial agreement was reached in over two-thirds (68%) of cases. Although this figure is subject to a degree of speculation (as in many cases the outcome of mediation was not yet known) it is consistent with data from other sources in respect of publicly funded clients.

Court file review

The court file review covered 300 cases involving both publicly funded and privately funded parties, and also cases in which one or more party was unrepresented.

Attendance at MIAMs

It was difficult to establish levels of attendance at MIAMs before proceedings were started. However, it was clear that the applicant had attended a MIAM in 19% of the 300 cases and had not done so in 41%.

Exemptions from attendance at MIAMs

Of the cases in which it was clear that the applicant had not attended a MIAM, just over half involved the use of the prescribed form (Form FM1) to claim exemptions or cite other reasons for non-attendance. The most common exemption claimed was that a mediator was satisfied that mediation was not suitable because another party (or either party) was unwilling to attend a MIAM or consider mediation.

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[3] For the purpose of this analysis, 'younger' is defined as less than 35 years old and 'older' is aged 35 or more.

[4] Data from the LAA provide an indicative conversion ratio of publicly funded MIAMs to mediation starts of 67% in November 2013 and 56% in March 2014. The LAA figures are based on a ratio as the MIAMs and mediation starts may not correspond to the same case within the period.

Overall levels of MIAMs and mediation activity

In 17 cases (6%) it was clear that mediation or collaborative law had been attempted before proceedings were started.[5] Overall levels of MIAMs and mediation activity could be categorised into three main groups. The first involved attempts at mediation or collaborative law, and/or attendance at MIAMs (22%). The second comprised cases where applicants did not attend MIAMs or it was unclear if they did, but exemptions were or could clearly have been claimed (41%).[6] The third group comprised cases in which applicants did not attend MIAMs or it was unclear whether they did, and non-attendance was not explained by the claiming or clear availability of an exemption (37%).

Variation in MIAMs and mediation activity

Applicants who were legally represented had attended MIAMs and/or attempted mediation before starting proceedings more often than those who were litigants in person (i.e. who represented themselves). Among represented applicants, there did not appear to be any difference in rates of MIAMs or mediation activity according to whether they had legal aid or paid privately. Applicants in children cases appeared to attend MIAMs or attempt mediation less often than in finance cases. However, applicants in children cases could have or did claim exemptions in 53% of cases, compared to 29% for finance cases.

Profile of cases in the court file review and potential suitability for mediation

Children cases tended to involve young children, and younger parents – of whom a minority appeared to be spouses or former spouses. In many cases the circumstances suggested that proceedings were brought some time after separation. Features which might add to complexity, raise levels of potential conflict and/or raise safeguarding issues were indicated in 85% of children cases. These included domestic violence, concerns regarding one or more party's suitability to care for the children, and a history of social services involvement.

Finance cases tended to involve older parties, and often long marriages. They also often involved features which appeared to indicate complexity and/or conflict, including disputes over the assets available for division and lack of trust between the parties.

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[5] Collaborative law is a process in which the parties are represented by lawyers. It is also designed to achieve resolution out of court. Therefore one case in which it had been attempted was grouped with those in which mediation was attempted before proceedings.

Conclusions and implications

These findings suggest a need for marketing and provision of MIAMs and mediation to cater at least in part for different groups of potential litigants in children and finance cases, in terms of age and marital status. They also suggest a need for MIAMs and mediation to be promoted as an option some time after separation to deal with disputes over existing arrangements for children, as well as at the point of separation when new arrangements need to be made.

Both the survey and court file review findings also reinforce the point that for mediation to be a viable option, prospective respondents as well as prospective applicants need to be willing to engage and explore whether the process may be suitable for their cases.

The frequency with which underlying complexity and/or safeguarding issues were indicated in cases in the court file review appears to have implications for MIAMs and mediation, in children cases in particular. Of the 128 children cases where such issues were indicated, a minority involved applicants either attending MIAMs (16%) or formally claiming exemptions (20%). With the stricter requirements in place from April 2014, all applicants in relevant cases must either attend a MIAM or formally claim an exemption, demonstrating that the qualifying criteria for exemptions are met. In those circumstances, it is important that prospective applicants, their legal representatives (if represented), and mediators are aware of the relevant exemption criteria, so that cases in which mediation is unsuitable can be properly identified. Referrers and mediators also need to check for underlying issues when considering whether mediation may be appropriate, and if so, what measures might be needed to ensure parties can participate safely and effectively.

[6] This group included cases in which Form FM1 was used to cite other reasons for not attending a MIAM.

2. Context

2.1 MIAMs and mediation: overview

The Government's focus on the use of mediation in private family law disputes has increased in recent years, as part of an emphasis on diverting appropriate cases away from courts. Mediation is seen to offer a flexible, speedy and cost effective way to resolve disputes. Since 1997, subject to some exceptions, clients who have sought legal aid to fund a private family law dispute have had to attend a MIAM. The MIAM is to ensure clients understand mediation and are aware that it is available to them locally, and to receive advice as to whether it is an appropriate avenue for them to use to resolve their dispute.

In April 2011 a Pre-Application Protocol was introduced ('the protocol').[7] This set out an 'expectation' that all parties in relevant private family law cases (including those who expected to fund their case privately and those without representation) would attend a MIAM to learn about mediation as a potential alternative to court proceedings.[8] Relevant cases include most private law children cases, and most cases in which a financial order is sought on divorce or civil partnership dissolution (referred to in this report as 'children' and 'finance' cases respectively). Exceptions were made to the requirement to attend a MIAM in specified circumstances in which mediation would clearly not be appropriate. Furthermore, when parties attend a MIAM, the mediator may decide that the case is not suitable for mediation.[9]

The Family Justice Review in 2011 recommended that the use of mediation to resolve private family law disputes should be encouraged further. The Government accepted this recommendation and set out proposals to legislate to change the 'expectation' for all prospective applicants seeking an order in children and financial remedy cases to first attend a MIAM to a 'requirement', again unless exemptions applied (Ministry of Justice and Department for Education, 2012). These proposals were enacted in Section 10 of the Children and Families Act 2014, which came into force on 22 April 2014. To support this introduction, Part 3 of the Family Procedure Rules was amended and the previous Practice Direction 3A, which contained the protocol, was revoked. A new Practice Direction 3A was issued, reflecting the introduction of the statutory requirement on applicants. These changes mean that prospective applicants 'must' now attend a MIAM before making a relevant application to court, unless exempt, and prospective respondents continue to be 'expected'

7 Part 3 and Practice Direction 3A to the Family Procedure Rules 2010.
8 The primary expectation was on potential applicants. Potential respondents were expected to attend a MIAM if invited to do so.
9 The protocol, types of cases covered, and exemptions are described in Chapter 4 and Appendix B.

to attend MIAMs if asked to do so.[10] The court retains its power to adjourn proceedings in order for a MIAM to be attended by one or both parties. In circumstances where the applicant claims an exemption, and where the court subsequently finds this was invalidly claimed, it may direct the applicant or both the applicant and respondent to attend a MIAM. The role of MIAMs in assisting parties to resolve disputes has been further reinforced through the introduction of a revised private law pathway – the Child Arrangements Programme (Practice Direction 12B).

Another key recent development has been the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO), which largely removed most private law family cases from the scope of legal aid from April 2013. Exceptions to this are that legal aid remains available for obtaining injunctive orders in cases of domestic violence and potentially available for legal advice and representation in court proceedings in cases where there is evidence of domestic violence or child protection issues (subject to certain thresholds). More generally, legal aid also remains available to clients who are eligible for mediation (and associated legal advice) whether or not these issues are present. The Government anticipated that these changes to legal aid, coupled with the strengthening of the protocol, would lead to an increase in numbers of legally aided and privately paying clients looking to resolve their private family law dispute through mediation.

Legal aid statistics indicate that in 2013/14, the first full year after LASPO came into force, the number of publicly funded MIAMs fell from 30,662 to 13,354 and the number of mediations fell from 13,609 to 8,400. The number of mediations resulting in agreements also fell, from 9,076 to 6,613. However, the rate of conversion from MIAMs to mediation increased from 44% to 63%, and the proportion of mediations resulting in full or partial agreements also increased, from 67% to 79% (Ministry of Justice, 2014).

While data are available for publicly funded MIAMs and mediations, there are no comparable data for privately funded cases. A review of approximately 400 private law children court cases concluded in 2009 estimated that mediation had been attempted beforehand in 10% of cases (Cassidy and Davey, 2011). However, it was unclear whether that figure included MIAMs or cases referred only to mediation. There are no comparable data on finance court cases. The quantitative elements of this research were designed to address these gaps in the evidence.

[10] Other relevant changes from April 2014 are covered in Chapter 4.

2.2 Overview of the research

To further inform the development of policy, the Ministry of Justice commissioned a broad programme of research focused on MIAMs and mediation, with three key aims.

Aim 1 – To examine the extent to which MIAMs are encouraging publicly and privately funded parties to mediate, and to explore the choices of resolution methods that parties who are expected to attend MIAMs make to resolve their private family law dispute. The experiences, decisions and actions of clients were explored through qualitative interviews with practitioners and parties.

Aim 2 – To estimate the national use of MIAMs and mediation by privately funded parties over a given time period, to provide a baseline against which to assess future changes in uptake. This was to be achieved through a national survey of mediation practitioners.

Aim 3 – To examine the proportions of publicly and privately funded parties using MIAMs and mediation before applying to court to resolve their private family law disputes. This was to be achieved through a case file review.

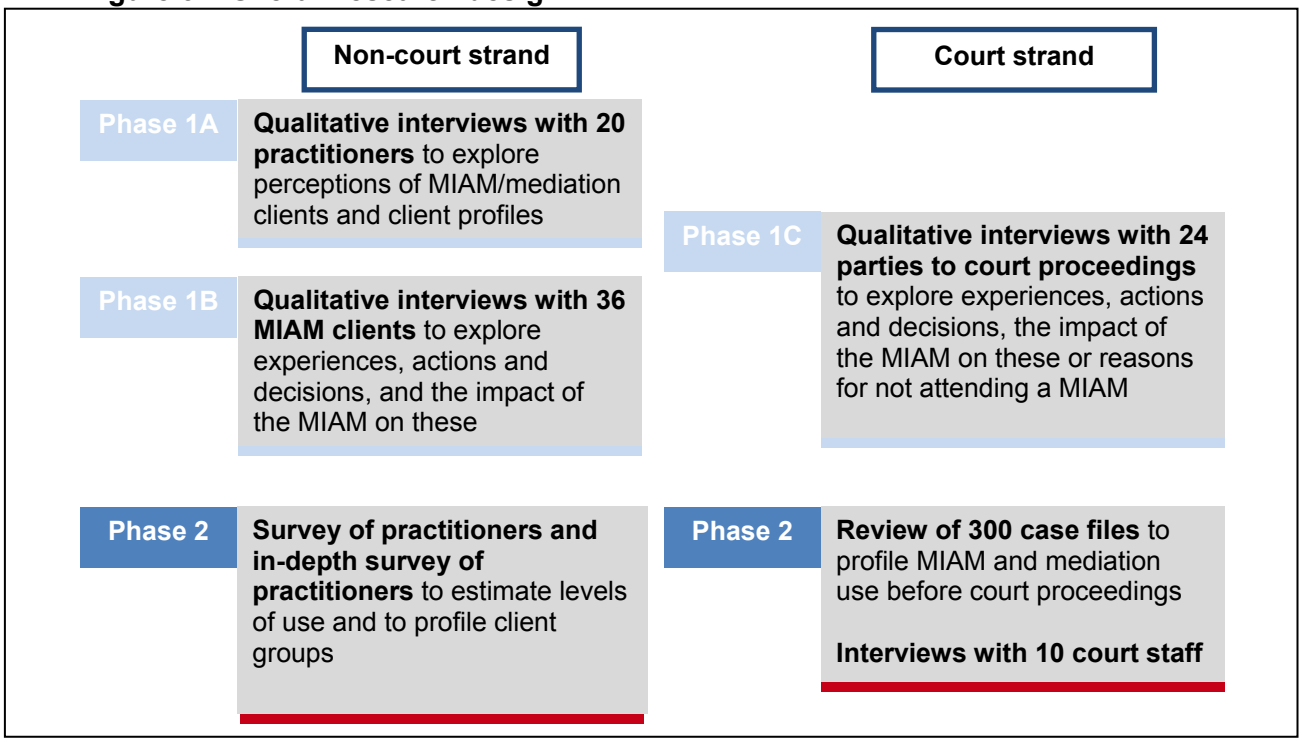
This report presents quantitative findings pertaining to Aims 2 and 3. Qualitative findings pertaining to Aim 1, which comprised Phase 1 of the research, were published earlier in 2014 (Bloch et al, 2014) and are noted at relevant points in this report.

3. Approach

3.1 Overall design

The research design comprises two strands: one focusing on MIAM clients and practitioners[11] relating to resolution outside court, and the other focusing on data relating to court proceedings. This report covers the quantitative elements of the research. These are the Phase 2 elements outlined in Figure 3.1, which summarises the overall design.[12]

Figure 3.1 Overall research design



3.2 Survey of practitioners

An overview of survey methods is provided here. A more detailed description can be found in Appendix A.

Objectives

While the Legal Aid Agency (LAA) maintains data on volumes and profiles of publicly funded MIAMs and mediations, there is no comparable source of data for privately funded clients. The core objective of the survey was to provide data on MIAM and mediation use among

[11] The term 'practitioners' refers to the professionals within mediation practices who conduct MIAMs and mediation.

privately funded clients to give a better picture of MIAM and mediation use prior to the introduction of the statutory requirement (in April 2014) that all prospective applicants in private family law cases must attend a MIAM prior to initiating court proceedings, unless certain exemptions apply. The survey was based on snapshot data provided by practitioners relating to their workloads in November 2013 (wave 1) and March 2014 (wave 2).

Using this snapshot data, the survey sought to find out:

- the approximate volume of privately funded clients attending MIAMs;
- the rate at which privately funded MIAMs are converted into mediation starts, and factors associated with non-conversion;
- the routes through which privately funded clients are referred to MIAMs;
- what proportion of privately funded mediations attended result in agreement;
- the basic profile (gender, age, ethnicity, disability) of private clients attending MIAMs and mediations during the snapshot period.

Data collection tool

To investigate the above questions, a data portal[13] was set up to allow practitioners to input their practice-level data at each wave of the survey. The data collection templates were designed to replicate the LAA data collection forms which practitioners complete on a monthly basis on their publicly funded workload. Thus, we asked practitioners to complete two sets of forms in relation to privately funded clients:

Form A: Recording all MIAM and mediation starts in the snapshot month
Form B: Recording case-level details of each MIAM and mediation close in the snapshot month.

Sample and response

The target was to conduct a survey of all mediation practices operating in England and Wales. However, at the time of the research there was no central listing of all mediation practices. Therefore, the best available solution was to focus the survey on practices with an LAA contract, using the listing of 279 services held by the LAA. This means that the survey

[12] Findings from Phase 1 which detail the qualitative findings can be found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300260/mediation-information-assessment-meetings.pdf

[13] This was an online data collection tool, which allowed practices to log into the site securely and enter their MIAM and mediation data into the relevant forms.

omitted practices which only covered clients in the private sector, and as a result may have introduced an element of bias into the survey data. This is an important caveat which should be borne in mind when interpreting the survey results. We have indicated throughout Chapter 3 how the survey data compare to data provided by the LAA and the National Family Mediation network of practitioners.[14] Although we would not necessarily always expect a close match,[15] the findings generally indicate a good level of consistency between the survey data and external data. This correspondence provides reassurance that the survey sample is representative of the wider population of practitioners.

The survey is based on a responding sample of 115 practitioners at wave 1, and 72 practitioners at wave 2. Further information on sample size and response is provided in Appendix A.

In-depth survey

In addition to the main survey, we also approached a small number of practices in order to gain a more in-depth insight into MIAM and mediation case characteristics. Data from both waves have been combined; in total this stage produced caseload-level data for 313 cases from nine practitioners. A summary of the in-depth survey methodology and findings are included in Appendix A. Due to some very small sub-sample sizes and the fact that the data derived from a small number of practitioners, who were not necessarily representative of the wider population of mediation practices, findings from this part of the survey should be interpreted as indicative only.

3.3 Court file review

Objectives

Little is currently known about the proportions of private family law cases which reach the courts in which MIAMs have been attended or mediation attempted beforehand. The main aim of the court file review was to address this gap in the evidence base, by examining the proportions of publicly and privately funded parties using MIAMs and mediation before applying to court. Key research questions were: how many publicly and privately funded applicants applied to court:

[14] Data for the National Family Mediation (NFM) network August 2012–July 2013. See http://nfm.org.uk/index.php/36-nfm-offer/305-national-family-mediation-stat

[15] The LAA figures only relate to publicly funded cases and the NFM figures relate to both public and private cases. The NFM also only represents mediation practices that are not for profit, whereas the survey data relate to privately funded cases only.

- without following the pre-application protocol (i.e. without attending a MIAM and/or without filing the prescribed form to either confirm attendance at a MIAM or explain non-attendance)?
- without attending a MIAM (or attempting mediation) because they were deemed exempt from following the protocol? For what reasons were they exempt?
- having followed the protocol and attended a MIAM (or attempted mediation)?

The review also aimed to capture party and case profiles to provide evidence about the types of situations in which MIAMs and mediation were or were not used before court proceedings.

Data collection tool and fieldwork

The data to be collected from court files included details of the parties, applications and main issues involved; data on compliance with the protocol, attendance at MIAMs and use of mediation; and (if concluded) how cases ended. Data were collected using a bespoke Access database, which was piloted on a small number of cases in each court and later exported to Excel for analysis. Data collection began at the end of September 2013 and concluded in mid-February 2014.

Sample

Five court locations were chosen for the file review. One of the main criteria for selection was geographical location, so that (except for the survey of practitioners, which was national) fieldwork for each phase of the study was conducted in the same regions. Courts also needed to have sufficient throughput of cases, and be able to take part within the timescales of the study.

Eligibility criteria for cases to be included in the review were based on limiting data collection to the types of cases subject to the protocol. Finance cases which were uncontested from the start (often referred to as ‘consent order only’ cases) were also excluded.

Two reference periods were specified, which meant that all cases would have been started after the protocol had been in force for at least a year. These were:

- for older cases, those issued between 1 April and 31 December 2012, and concluded between 1 January and 30 June 2013;
- for newer cases, those issued on or after 1 May 2013, up to 30 September 2013.

Lists of cases which met the criteria were extracted for each of the five court locations from Familyman (an HM Courts and Tribunals Service case management system) by Ministry of Justice statisticians. The aim was to collect data on 60 cases in each court, to include even numbers of children and finance cases and, within children cases, even numbers of Family Proceedings Court (FPC) and county court cases,[16] and even numbers of older and newer cases. In adopting this approach, the aim was not to be able to claim that the sample was representative of all relevant cases, nor that the findings could be necessarily generalised. Rather, the aim was to collect data on sufficient numbers of cases to be able to report according to each of the main variables.

Profile of achieved sample

The achieved sample met the most important criteria: even numbers of children and finance cases were included, and broadly similar numbers of cases were included from each court. However, it was not possible to collect even numbers of FPC and county court children cases, or even numbers of older and newer finance cases. This was due to variations in the numbers of available cases in each court. Table 3.1 provides breakdowns.

Table 3.1 Court file review: achieved sample of children and finance cases

	Children cases					Finance cases		
Court	**FPC**	**County**	**Older**	**Newer**	**Total**	**Older**	**Newer**	**Total**
A	10	20	15	15	30	21	9	30
B	20	10	15	15	30	23	12	35
C	14	16	15	15	30	23	7	30
D	15	15	15	15	30	30	0	30
E	4	26	15	15	30	14	11	25
Total	**63**	**87**	**75**	**75**	**150**	**111**	**39**	**150**

Interviews

It was agreed that the opportunity would be taken, while collecting data for the file review, to conduct brief interviews with a small number of court staff. These were intended to gauge their perceptions of levels of compliance with the protocol, and local approaches to non-compliance. Ten staff were interviewed: five administrative staff and five legal advisers.

[16] Until April 2014, when a single Family Court was established, private law children cases could be dealt with in different levels of court, the most common being FPCs and county courts. Although it was known that the distinction between levels of courts would be rendered historical, it was decided that data should be collected on both FPC and county court cases, as both types would be dealt with in the Family Court post-April 2014.

4. Practitioner survey

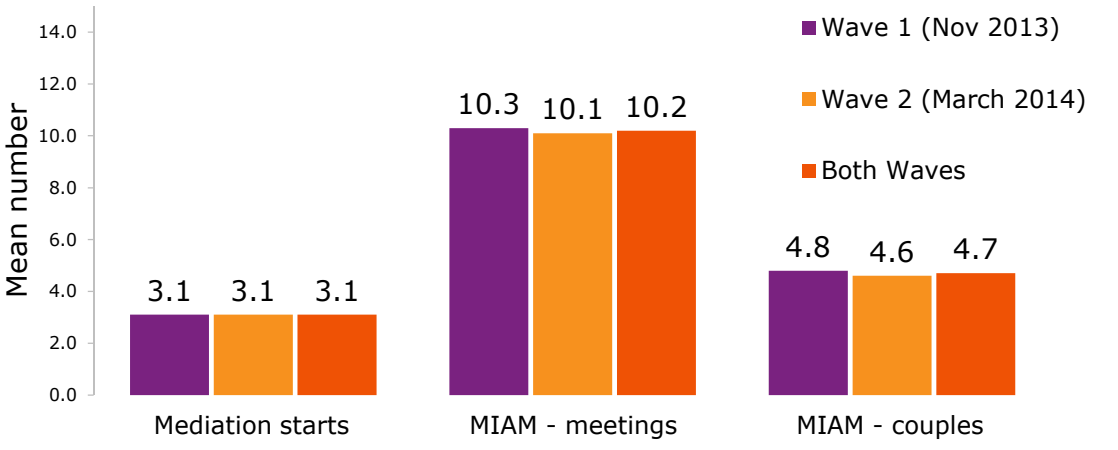
This chapter provides an overview of the survey findings including client caseloads, profile of MIAM and mediation clients, referrals to mediation, estimated MIAM to mediation conversion rates and mediation outcomes. Except where otherwise stated all differences cited have been tested for significance.[17]

4.1 MIAM and mediation caseloads

As set out in Chapter 1 the number of publicly funded MIAM and mediation starts fell considerably from April 2013, following the implementation of LASPO. There are no equivalent data on privately funded clients.

Figure 4.1 displays the average (mean) number of privately funded MIAM and mediation starts in each of the survey waves among practitioners who responded to the survey.

Figure 4.1 Summary of MIAM and mediation starts by wave: mean number of mediation starts, MIAM meetings, and couples attending MIAMs



Base sizes: Wave 1 (n=115 providers); Wave 2 (n=72 providers); Both waves (n=187 providers)

At each wave, the average (mean) number of privately funded MIAMs per practitioner was ten, while the mean number of mediation starts was three over the course of the snapshot month.[18] The ratio[19] of MIAM: mediation starts was 3.3:1.[20]

[17] In this report, tests at the 95% significance level have been applied (p-value < 0.05).
[18] These mean figures include practices reporting a zero workload.
[19] A ratio has been reported here as the MIAM and mediation starts recorded within the snapshot waves may not correspond to the same cases.

It is also possible to look at the workload on the basis of couples rather than meetings. Practitioners participating in the survey conducted a mean of 4.7 couple-MIAMs, whether together in one meeting or separately across two meetings.[21] [22] The ratio of couple-MIAMs to mediation starts provides a crude indication of conversion rates[23] and suggests that 1.5 private MIAMs are conducted for every mediation start,[24] an indicative conversion rate of 66%. Further information on MIAM to mediation conversion is provided in Section 4.4.

Nature of MIAMs

MIAMs can be conducted as a single joint meeting with both clients present; as two separate meetings where clients talk to the mediator individually; or sometimes just one party will attend a MIAM (usually because the other party did not agree to attend or failed to turn up).

The qualitative findings in the Phase 1 report, through interviews with clients, noted that flexibility and choice was key when it came to how MIAMs were conducted. Some clients preferred joint meetings as they felt this ensured a balanced process. However, more commonly, parties preferred to talk to the mediator individually as they felt this allowed them more space to tell their side of the story. For nervous clients in particular, single attendance helped them to gain confidence and establish trust with the mediator, without the potential discomfort associated with having to discuss their feelings in the presence of the other party.

MIAMS were recorded in the survey as either 'together' (both parties attending at the same time), 'separately' (both parties attending but not at the same time); or 'alone' (only one party attends).

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[20] This is not dissimilar to the ratio reported by NFM, which reported 36,000 MIAMs and 16,000 mediation starts in the period August 2012–July 2013, a ratio of 2.25:1. These NFM figures include both private and publicly funded cases so should not be regarded as directly comparable. http://nfm.org.uk/index.php/36-nfm-offer/305-national-family-mediation-stat

[21] MIAMs attended by just one party have been excluded from these figures. The number of 'separate' meetings has been divided by two and added to the number of 'together' meetings to produce the number of couples assessed through MIAMs.

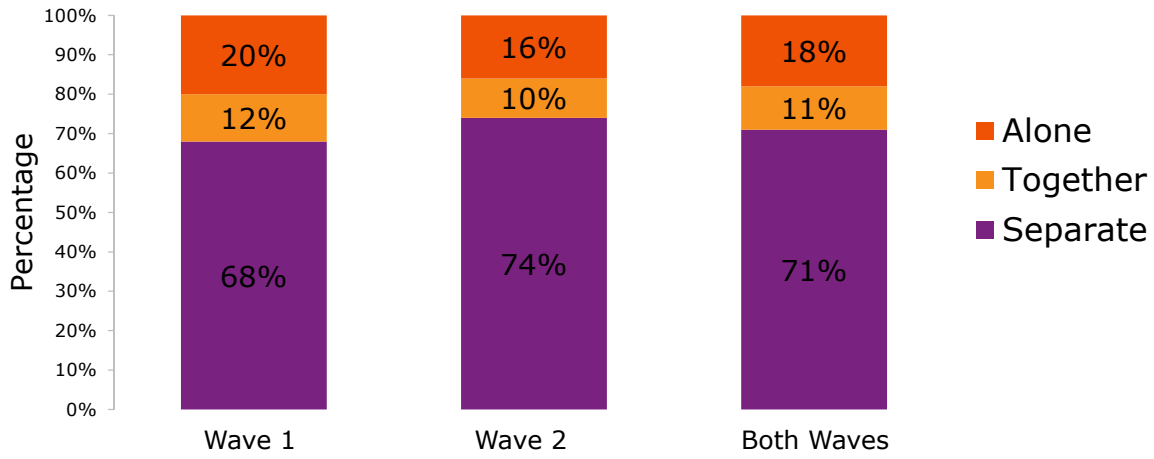
[22] The equivalent publicly funded mean figures for the equivalent time periods are: 5.6 MIAM couples and 3.5 mediation starts per practice in November 2013; and 5.6 MIAM couples and 2.8 mediation starts per practice in March 2014. The annual figures are available at www.gov.uk/government/statistics/legal-aid-statistics-april-2013-to-march-2014

[23] A conversion rate shows the percentage of a specific MIAM preceding the mediation start, whereas a ratio compares the overall number of MIAMs and mediation starts in a particular period. As the MIAM and mediation starts recorded within the snapshot survey waves may not correspond to the same cases, we can only provide an indicative conversion rate.

[24] The equivalent figures from the LAA for publicly funded MIAMs in the same periods were 1.6:1 in November 2013 and 2:1 in March 2014 (this provides an indicative conversion ratio of MIAMs to mediation starts of 67% and 56% for the two periods respectively).

The survey findings reinforced this reported tendency to prefer separate meetings. Of the MIAMs recorded at each wave, the majority were conducted on a separate basis (71%), whereas 11% were conducted together and 18% were conducted alone (where the other party did not attend a MIAM at all). See Figure 4.2. When compared with the latest available data from the LAA in relation to all publicly funded MIAMs, the distribution is very similar,[25] suggesting that funding status does not alter the overall pattern of attendance at MIAMs.

Figure 4.2 How MIAMs were conducted



Base sizes: All MIAM meetings excluding cases where meeting format unknown
Wave 1 (n=627 MIAMs); Wave 2 (n=463 MIAMs); Both waves (n=1090 MIAMs)

Nature of mediations

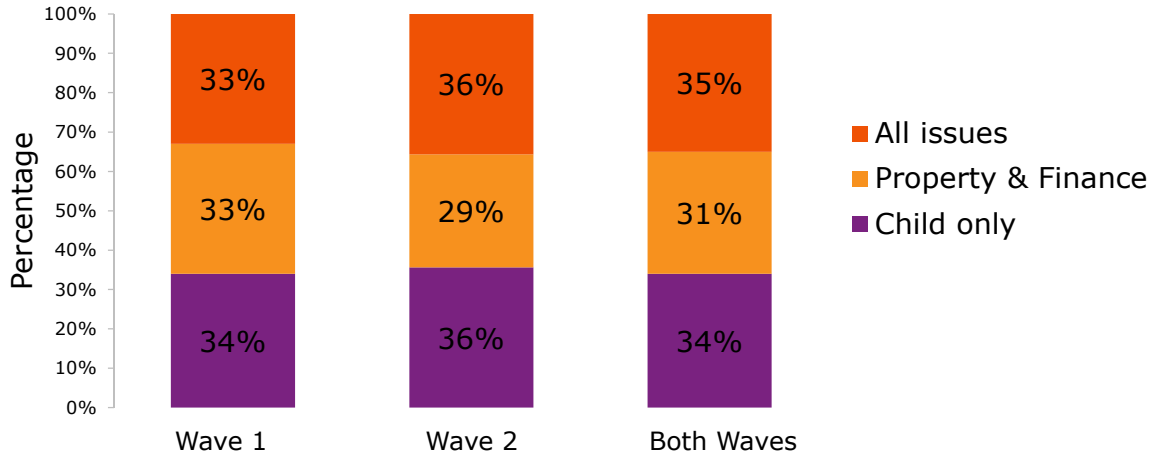
Sole mediation refers to mediation conducted by one mediator; co-mediation refers to mediation conducted by two or more. Co-mediation is generally very rare. The large majority of mediations were sole-mediated (95%) rather than co-mediated (5%).[26]

Mediations conducted during the survey snapshot months were broadly evenly split between children's issues (contact, residence,[27] school arrangements, etc.); property & finance issues (rent, mortgage, property, other assets, etc.); and all issues (children, property and

[25] In 2012–13 the distribution for LAA-funded MIAMs was: Separate (72%); Together (4%); Alone (24%)
[26] In line with the 2012–13 LAA statistics for public funded mediations (also 5%)
[27] As from April 2014 the official terminology of 'contact' and 'residence' has been replaced with that of 'child arrangements'.

finance),[28] as illustrated in Figure 4.3. Section 4.2 discusses the variation in the profile of clients across these different types of MIAMs and mediations.

Figure 4.3 Nature of mediation starts



Base sizes: All mediations excluding cases where type unknown
Wave 1 (n=153 mediations); Wave 2 (n=135 mediations); Both waves (n=288 mediations)

4.2 Profile of MIAM and mediation clients

For each closed MIAM and mediation case within the snapshot months (November 2013 and March 2014), practitioners were asked to provide basic demographic information on the privately funded clients involved. The profile of MIAMs and mediations in relation to each of these characteristics is discussed below. Figures are based on all clients attending MIAMs and mediations.

Gender

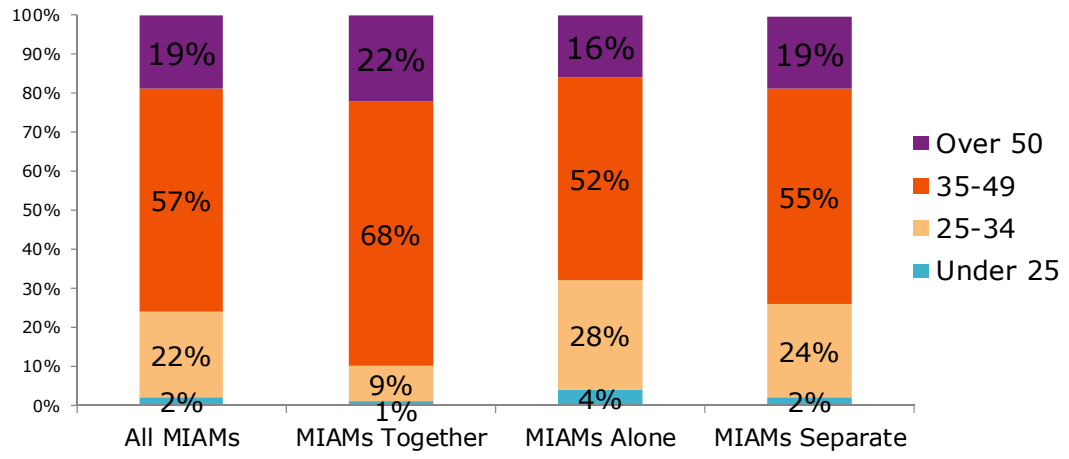
When MIAMs are conducted in couples, either together or separately, it is expected that the gender profile will be split more or less equally. In general the survey findings reflect this assumption. However, for MIAMs attended by just one party (MIAM alone) there is bias toward males, with 62% of non-couple MIAMs attended by men and 38% by women. The proportion of men and women attending mediation is, as expected, evenly divided (51% men and 49% women).

[28] This is different to the figures provided by NFM for 2012–13 public and private cases (56% children, 26% property & finance, 24% all issues). It is also different to the profile provided by the 2012–13 LAA statistics (54% children, 19% property & finance, 27% all issues). This is likely to be due to the different financial profile of public and private clients – the in-depth data provide some indicative evidence of financial profile differences between private and publicly funded clients (see Appendix A).

Age

The age profile of clients attending MIAMs and mediations (Figure 4.4 and Figure 4.5) is broadly similar. However there is some variation by the context in which the MIAM or mediation is conducted. Clients attending MIAMs alone, without the other party being involved, tended to be younger in profile (32% were aged under 35, compared with 10% of clients attending a MIAM together). There is also significant variation in age by type of mediation. Compared with other mediation types, children-only mediations were attended by younger clients (48% of clients were aged below 35 compared with 5% of property and finance and 12% of all-issues mediations). Conversely, property and finance mediations were biased towards an older clientele (nearly half were over 50). Very small proportions of clients were aged under 25. This difference in age profiles was generally consistent with findings from the court file review, in which the median ages of parties in children and finance cases were 31 and 48 respectively. However, in children cases in the court file review, one-fifth of all parties were under 25.[29] Figures 4.4 and 4.5 display the age profile of those attending all types of MIAMS and mediations within the survey period.

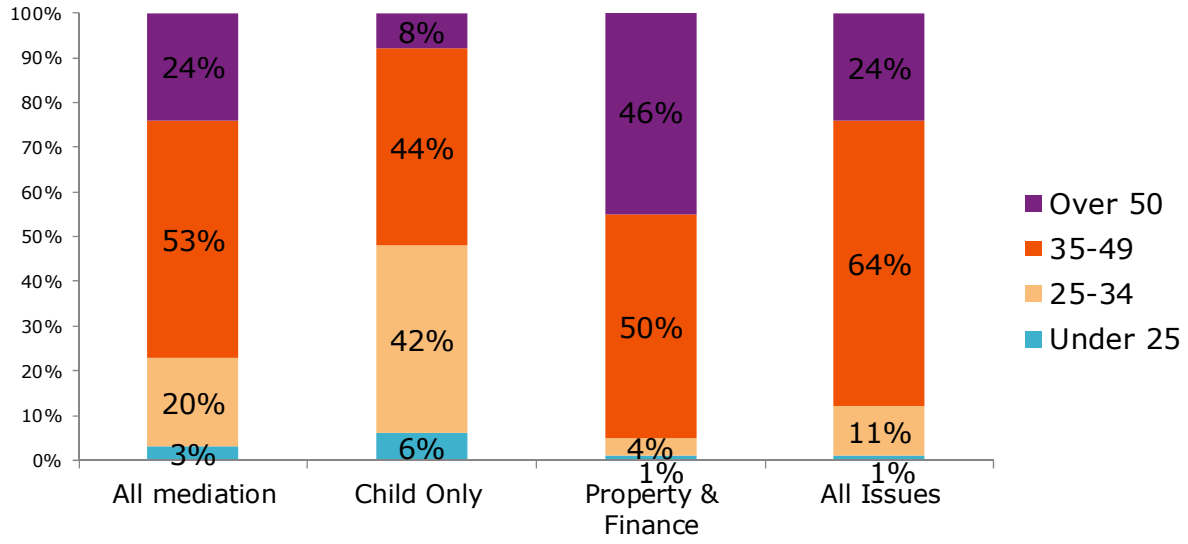
Figure 4.4 Age profile by MIAM type



Base: All MIAM meetings excluding age unknown (n=1240)
Together (n=230); Separate (n=743); Alone (n=186)

[29] These age profiles appear to indicate that whether attempting mediation, or involved in contested court proceedings, parents seeking to resolve disputes over arrangements for children may often be younger, and former partners seeking to resolve disputes over finances may often be somewhat older.

Figure 4.5 Age profile by type of mediation



Base: All mediations excluding age unknown (n=528)
Child only (n=185), Property & Finance (n=166), All Issues (n=177)

Ethnicity and disability

Overall 8% of clients attending both MIAMs and mediations were of non-white ethnic origin. This figure remains stable across most MIAM and mediation types, although clients attending MIAMs alone were more likely than average (17%) to be of non-white ethnic origin. Two per cent of all MIAM and mediation clients were recorded as having a disability, a figure which did not vary by type of contact with practitioners.

Profile of clients attending MIAMs alone

Non-attendance of one party to a MIAM is an indicator of non-conversion to mediation and therefore this group is of particular interest. The qualitative findings noted that reluctance of one party to engage in the mediation process was often associated with lack of affordability, a desire to seek resolution through courts, or not feeling emotionally ready to start the resolution process. The findings discussed above suggest that single-attendance MIAMs are disproportionately attended by younger clients, by non-white clients, and by men more than women. Although we do not know the profile of the non-attending party it can be assumed from the above findings that non-attendees are more likely to be female than male.

Further information on the different nature of clients attending MIAMs together, alone or separately, based on analysis of the in-depth survey covered in Appendix A, suggests that:

- Jointly attended MIAMs might be associated with clients on higher incomes, with assets in contention, with younger children, who are privately funded[30] and who self-refer.
- MIAMs attended alone, without the second party, might be associated with higher levels of conflict, more complex circumstances/previous issues in dispute and older children.
- MIAMs attended separately might be associated with lower incomes, high levels of conflict, more complex issues, younger children and solicitor referrals.

Although only indicative in nature, in general these associations support the findings from Phase 1 which suggest that separate MIAMs are often more appropriate when issues are more complex and conflict levels are high. The in-depth survey data suggest that public funding is more prevalent among female and younger clients, when there are special circumstances involved, previous issues in dispute, and when younger children are involved.

4.3 Referrals to mediation

How clients were referred into mediation

The Phase 1 report discussed how mediators interviewed felt that referral routes into mediation had changed since the introduction of LASPO in April 2013. Pre-LASPO, mediators recalled mainly relying on solicitors for privately (as well as publicly) funded clients. However, post-LASPO, mediators felt that they had observed a substantial fall in the number of solicitor referrals to MIAMs, and mediators were beginning to increase their marketing activities to bring in more clients through self-referral as well as through third-party organisations such as Citizens Advice.

Some mediators in the qualitative study expressed concern about this shift in referral route. Solicitor referral was generally regarded by mediators as a positive route into the system, as solicitors helped set clients' expectations and filtered out private clients who were thought to be unsuited for mediation. Without this assessment, they perceived that there were increasing numbers of clients who were less knowledgeable and perhaps unsuitable for mediation.

The survey found that in both waves, referrals to MIAMs and mediations were mainly through either solicitor or self-referral, with less than 10% being referred through other agencies,

[30] The in-depth survey included both publicly and privately funded clients.

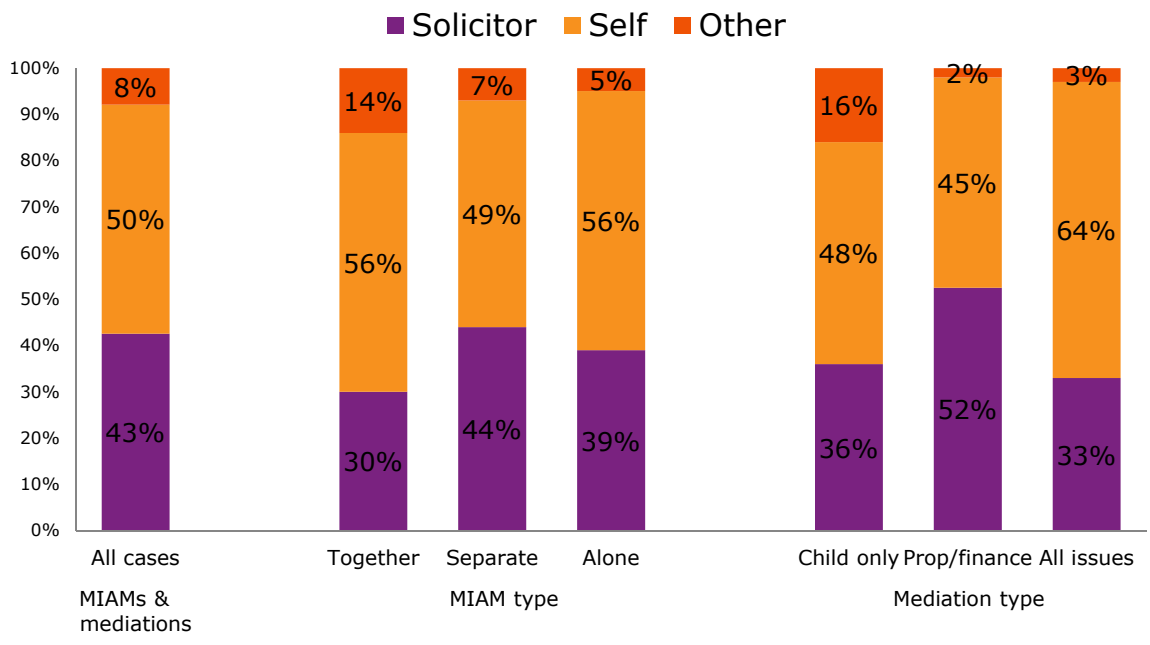
including court and Citizens Advice.[31] Overall self-referral was slightly more common than solicitor referral (49% compared with 43% for MIAMs, and 53% compared with 40% for those who went on to mediation).[32] There are no historical data to compare the findings in 2013/14 with pre-LASPO arrangements.

Referral by type of contact with mediators

There was some variation in referral route by type of MIAM or mediation. Referral via other external agencies was more common for MIAMs conducted together (14%) compared with MIAMs conducted separately (7%) or alone (5%). Solicitor referral was most common when MIAMs were conducted separately (44% vs. 30% when MIAMs were conducted together).

Property and finance mediations were much more likely than other mediation types to be referred via solicitors (52% vs. 36% of child-only and 33% of all-issues mediations). On the other hand, self-referrals were a particularly common route for all-issues mediation (64% vs. 48% of child-only and 45% of property and finance mediations).

Figure 4.6 Referral routes for MIAMs and mediations by type of contact



Base: All MIAMs and mediations (both waves) excluding referral route unknown (n=1439)
MIAMs: Together (n=122); Separate (n=762); Alone (n=191)
Mediations: Child only (n=100); Property & finance (n=86); All issues (n=98)

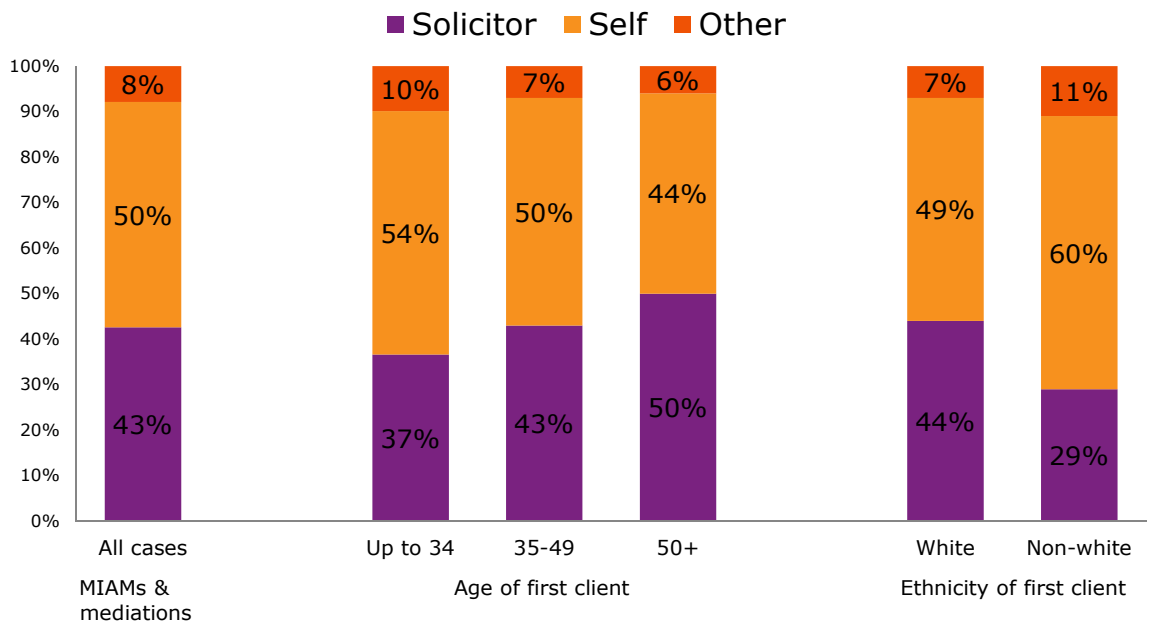
[31] Other routes included relationship counselling services, other advice agency/helpline and GPs.

Referral by profile of client

How cases were referred to practices also varied by nature of client (see Figure 4.7). Older clients (aged 50+) were most likely to come into contact with mediation services via solicitors (50% were referred in this way). On the other hand, younger clients and those aged 35–49 were most likely to contact practices directly (54% and 50% self-referred respectively).

There is also a clear difference by ethnicity, with self-referral higher among non-white clients (60% vs. 49% for white clients). Conversely, solicitor referral is higher among white clients (44% vs. 29% for non-white clients). Further information on referral route by the additional characteristics in the in-depth survey suggests that self-referral may also be more likely when clients have higher incomes and when children are involved.

Figure 4.7 Referral routes for MIAMs and mediations by profile of client



Base: All MIAMs and mediations (both waves) excluding referral route unknown (n=1439)
Age <35 (n=326); 35-49 (n=754); n=50+ (n=265); White (n=1238); Non-white (n=119)

4.4 Outcomes and conversion

MIAM to mediation conversion

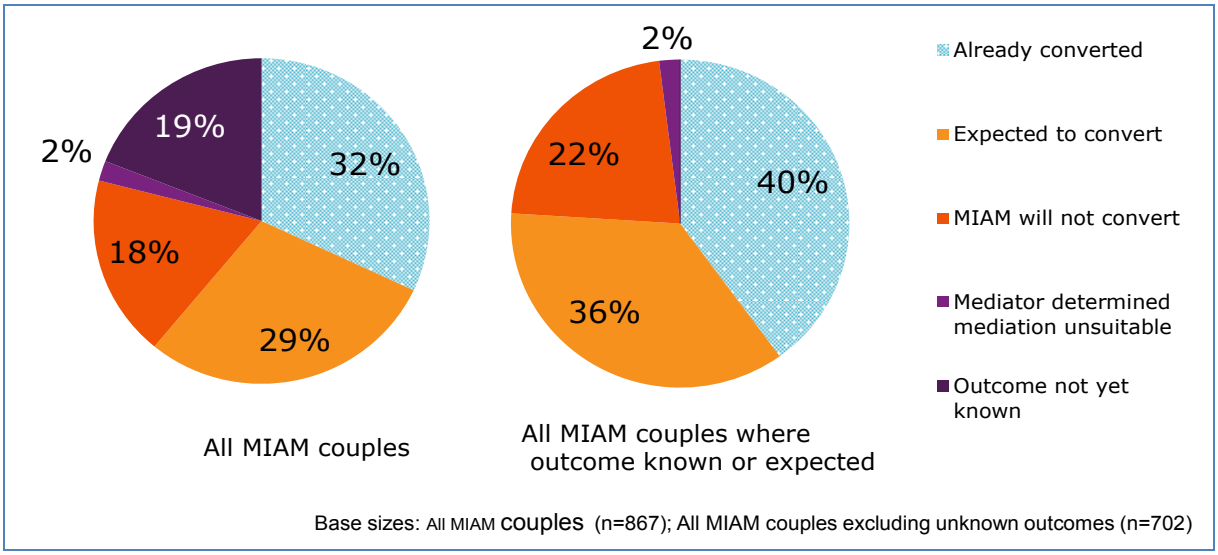
The Phase 1 report noted that most MIAM clients interviewed as part of this qualitative stage proceeded to mediation. For many clients the MIAM was regarded as the first stage in the

[32] Data from the LAA on publicly funded clients indicate that referrals to MIAMs are also most commonly via solicitors or self-referral. In November 2013, 36% MIAMs were referred via a solicitor and 42% were self-referred. The figures for March 2014 were 32% and 45% respectively.

mediation process. For others, mediation was considered to be the only option available – this was especially the case among clients on low incomes who had no recourse to legal aid funding. For all MIAMs recorded in the survey, practitioners were asked to indicate the outcome, in terms of whether or not the MIAM had converted to mediation. If this stage had not yet been reached, practitioners were asked to state whether or not the MIAM was *expected* to convert to mediation. In this analysis, only couple-MIAMs are included, as MIAMs attended by only one party would not be expected to progress to mediation.

Figure 3.8 displays the breakdown in two different formats: firstly the breakdown for all MIAM couples; and secondly the breakdown excluding those cases where the outcome is neither known nor expected. When unknown outcomes are included, 32% of MIAMs were recorded as already converted and a further 29% were expected to convert; a total expected conversion rate of 61%. However, based on known or expected outcomes only, these figures rise to 40% and 36% respectively, a total expected conversion rate of 76%. Clearly this figure is a crude estimate as it is partially based on predicted outcomes; this estimate is also higher than the estimated conversion rate calculated in Section 3.1 (66%), which is based on the ratio of MIAM couples to mediation starts. It is therefore likely that the true conversion rate for privately funded MIAMS in the snapshot periods will have fallen in the range 66–76%.[33] This supports the general direction of the Phase 1 findings, which also noted a tendency for most MIAMs to proceed to mediation.

Figure 4.8 MIAM to mediation conversion among couples attending MIAMs



Base sizes: All MIAM couples (n=867); All MIAM couples excluding unknown outcomes (n=702)

[33] Based on numbers of MIAM and mediation starts, LAA data suggest that the conversion ratio among publicly funded clients for the equivalent periods was 67% in November 2013 and 56% in March 2014.

Although there are some caveats associated with the estimated conversion rate, it is useful to compare this metric across different subgroups. This provides an indication of the factors associated with higher or lower conversion rates, and helps expand on the findings reported in Phase 1. The Phase 1 report noted that the MIAM had more influence in decisions about progression among those clients with less clarity on the value of mediation. Qualitative interviews with clients and mediators found that factors influencing non-progression to mediation included:

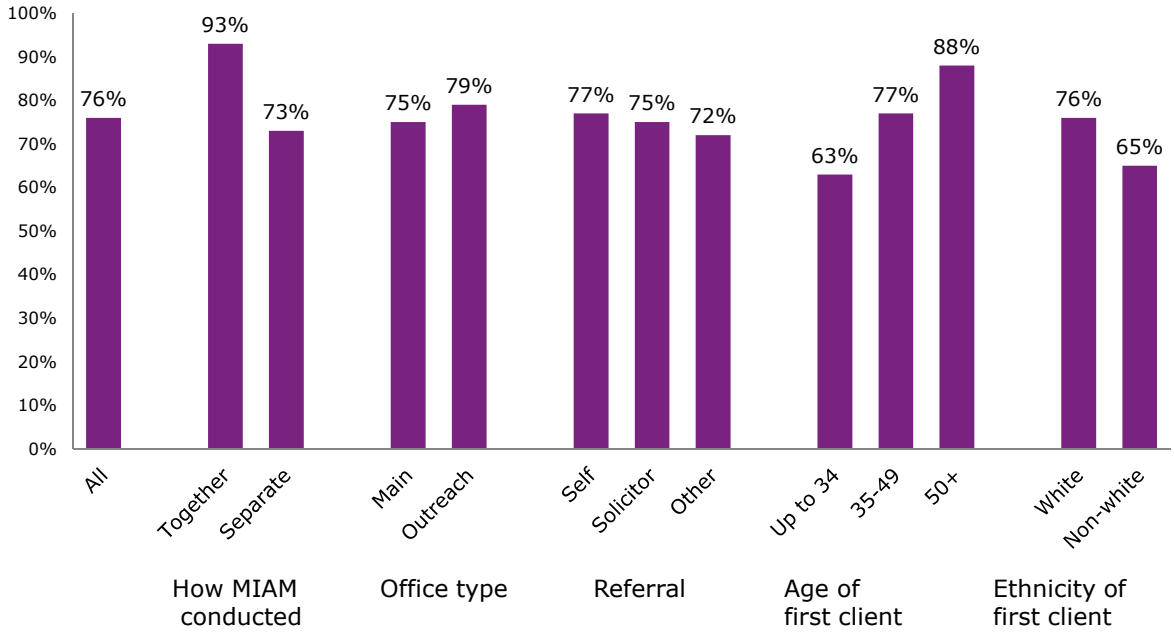
- dissatisfaction with the mediator who conducted the MIAM, or with the way the MIAM was conducted;
- when clients did not feel emotionally ready to start the dispute resolution process;
- when court was seen as a more effective and faster way to achieve the desired outcomes;
- when there was unwillingness to pay by one or both parties.

Building on these findings, Figure 4.9 shows that successful conversion from MIAM to mediation in the survey was more likely in the following situations.

- When MIAMs were conducted together (93%) rather than separately (73%). Although this appears to run counter to the discussion in Section 3.2, which reported a tendency among clients to prefer separate mediation to resolve differences, this finding is likely to reflect the nature of the clients who are content to undertake couple-MIAMs; it is likely that these are clients with lower levels of conflict and easier-to-resolve issues.
- Among older clients compared to younger clients (88% of clients aged 50+ compared with 63% of clients aged under 35).
- Among white (76%) as opposed to non-white (65%) clients.[34]

[34] This finding is non-significant due to small base size of non-white clients.

Figure 4.9 Estimated MIAM to mediation conversion among couples attending MIAMs by case characteristics



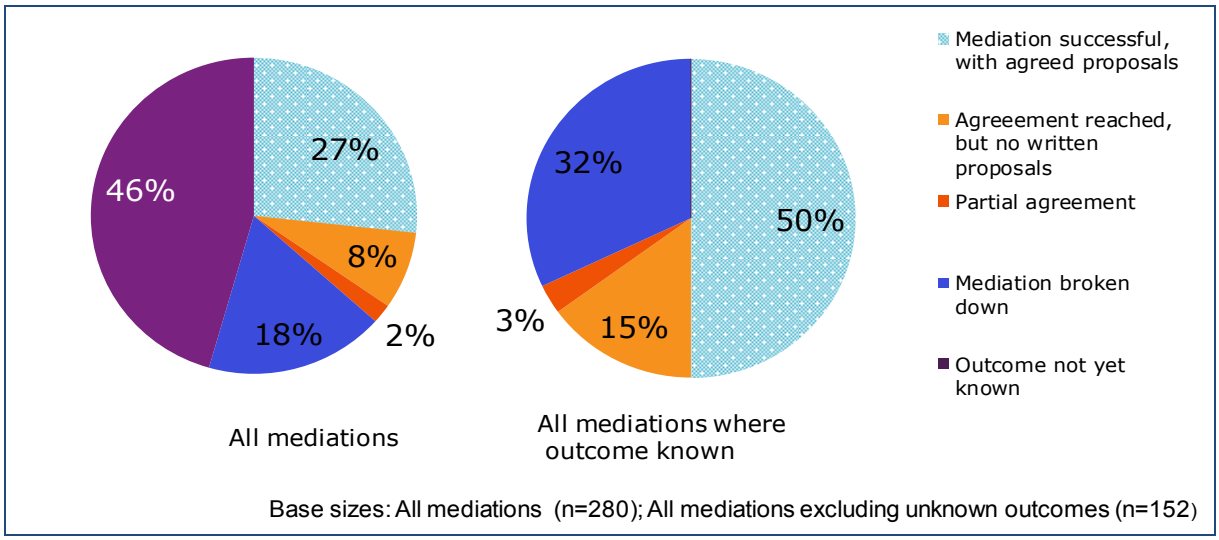
Base: All MIAM couples where outcome known or expected (n=702)
Together (n=114); Separate (n=582); Main office(n=424); outreach (n=250);
Self-referral (n=296); Solicitor referral (n=348); Other referral (n=54);
<35 (n=142); 35-49 (n=373); n=50+ (n=128); White (n=597); Non-white (n=51)

Outcome of mediations

In nearly half of all cases, the outcome of the mediation was not yet known. Figure 4.10 shows the distribution of mediation outcomes both including and excluding the unknown outcomes. When the unknown outcomes are removed, the rate of successful mediations was 68%. This figure is made up of: mediations reaching agreement with a written proposal (50%); mediations reaching agreement without a written proposal (15%); and partial agreements (3%).[35]

[35] These figures are very similar to the breakdowns for mediation outcomes recorded in the 2012–13 LAA figures for publicly funded mediations. In 2012–13 65% reached agreement on some or all issues: 52% with written proposals, 9% without written proposals and 3% reached partial agreement.

Figure 4.10: Mediation outcomes among couples attending mediations



Base sizes: All mediations (n=280); All mediations excluding unknown outcomes (n=152)

There was relatively little variation in this metric across subgroups, although mediation was slightly less likely to reach a positive conclusion when the mediation related to property and finance (65%) compared with those involving children (70%) or all issues (71%). Further information on MIAM outcome by some of the additional characteristics collected in the in-depth survey suggests that conversion may be less likely when there are complex issues involved (such as previous issues in dispute or domestic violence/child protection issues), when children are older and when there are no assets in dispute.

Although these findings are only indicative, the association between breakdown of mediation and previous issues in dispute or more complex cases supports the findings from Phase 1 which noted that recurrent returns to mediation and more complex issues were often associated with resolution breakdown.

5. Court file review

This chapter presents findings from the court file review, supplemented with data from interviews with court staff. It begins by describing the main features of the pre-application protocol. Evidence from court files regarding attempts at mediation before proceedings were started is then noted, followed by evidence on compliance with the protocol, including attendance at MIAMs, and the courts' responses to non-compliance. The profiles of the children and finance cases in the sample are also discussed. Results are reported in terms of percentages. Differences between groups have not been tested for statistical significance, i.e. the possibility that they may be due to chance has not been ruled out. This is due to the large proportion of cases in which the data were missing or unclear.[36]

All findings in this chapter relate to cases started before April 2014, when there were a number of important changes to the family justice system. Reporting is therefore based on the framework and terminology as they were previously, rather than as they are now. However, findings are relevant to the new landscape for two main reasons. Firstly, they indicate levels of compliance with the protocol before it was strengthened, and so provide an indicative baseline against which compliance in the future may be measured. Secondly, they provide data on the profile of relevant cases and scenarios. This ought to further inform efforts to increase the take-up of MIAMs and mediation before proceedings are started, and aid understanding of the proportions of cases in which mediation may or may not be suitable, or in which particular safeguards may be needed if mediation is to be attempted.

5.1 The Pre-Application Protocol

Since April 2011, the protocol has applied to most types of private law children and finance cases. With regard to children, in practice this most often means applications in respect of contact and/or residence, and for prohibited steps orders or specific issue orders.[37] Relevant finance cases usually involve the division of property and other assets and/or income on divorce or civil partnership dissolution. Certain types of private law children and finance cases were not covered by the protocol during the period covered by the study; these included applications to enforce orders already made in proceedings.

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[36] As discussed in Section 4.3, in 122 of the 300 cases in the sample (41%) it was not entirely clear whether the applicant had attended a MIAM.

[37] Until April 2014 a contact order was an order requiring the person with whom a child lived, to allow that child to have contact with another person. A residence order was an order making arrangements for with whom a child was to live. In April 2014 these two types of orders were replaced with 'child arrangements orders'. A prohibited steps order is an order prohibiting certain actions in respect of a child without the consent of the

In cases subject to the protocol, there were several aspects to compliance. There was no requirement to actually attempt mediation, but there was an expectation that before starting court proceedings, prospective applicants should attend a MIAM to explore the potential for mediation. A prospective respondent was also expected to attend a MIAM – if invited to.

Attendance at a MIAM was not expected in certain circumstances, in which exemptions could be claimed. These included where a mediator was satisfied that mediation was not suitable because another party was unwilling to attend a MIAM and consider mediation, or was satisfied that the case was not suitable for a MIAM. Other exemptions, which applicants or their representatives could self-certify entitlement to, included: if there was no dispute to mediate because the parties were in agreement;[38] if there was domestic violence or the risk of domestic violence (subject to certain criteria);[39] if there was current social services involvement due to child protection concerns; urgent cases (subject to certain thresholds); and in finance cases, if a prospective party was bankrupt.[40]

The protocol required the applicant, if starting court proceedings, to file a completed Form 'FM1' – a prescribed form on which either attendance at a MIAM would be confirmed, or one or more exemptions claimed.[41] The protocol also stated that if proceedings were started, the court would wish to know at the first hearing whether mediation had been considered by the parties, and may refer them to a MIAM before the proceedings continued further.

Key changes since fieldwork include that now, prospective applicants in relevant family proceedings 'must', unless exempt, attend a MIAM before making an application to court.[42] Prospective respondents continue to be 'expected' to attend. Some of the exemptions have been amended and additional ones have been added. The main court forms used to start private law children and finance cases have been revised to incorporate the matters which

court. A specific issue order is an order to decide what should happen in respect of a specific aspect of a child's upbringing. The terminology of prohibited steps orders and specific issue orders remains in use.

38 A court order might still be considered necessary in certain situations not involving ongoing disputes.

39 The requirement in respect of domestic violence was amended in April 2013 to mirror the position under legal aid legislation, so that an applicant claiming domestic violence as a ground for exemption has to certify the existence of one or more forms of evidence of domestic violence.

40 This list is not exhaustive. There were 13 exemptions in all; they are set out at Appendix B.

41 New versions of Form FM1 were introduced in December 2012 and April 2013. In April 2013 the protocol was also amended; this was primarily to further define the requirements in respect of the domestic violence exemption, so that they replicated the criteria which had to be fulfilled under LASPO for legal aid to be available for court proceedings in children and finance cases

42 The statutory requirement of the applicant to attend a MIAM does not apply to enforcement or consent orders in private law children and finance cases. NB. Enforcement of an order relating to children is not included as relevant family proceedings for compulsory MIAM purposes, and enforcement of financial orders is specifically excluded from the MIAM provisions under the definition of private law proceedings (see paragraphs 12 and 13 of the new Practice Direction 3A to the Family Procedure Rules).

used to be covered by Form FM1.[43] The court's role has also been strengthened. The Family Procedure Rules now provide that the court should check, no later than the first hearing, whether an exemption has been validly claimed; and if it has not, the court will direct attendance at a MIAM, unless it considers the circumstances of the case are such that the MIAM requirement should not apply.

5.2 Attempts at mediation before proceedings started

There was clear evidence that mediation had been started before proceedings were issued in 16 cases (2 children and 14 finance). Collaborative law had been attempted in one other finance case.[44] Taken together, these 17 cases equated to 6% of cases overall.

It is possible that this figure slightly under-estimates the number of cases in which mediation had been started. This is partly because out of 56 cases in which it was clear that MIAMs had been attended (discussed in Section 5.3) there were 25 where it was not entirely clear whether the MIAM had converted to mediation before proceedings. However, any such under-estimate appeared likely to be small as in only six of these cases was there any evidence on file to suggest that mediation *might* have started before proceedings.

5.3 Compliance with the protocol prior to 22 April 2014

This section focuses on whether applicants had:

- attended a MIAM before starting proceedings, or
- claimed an exemption from the expectation that they should do so, and
- filed Form FM1 when starting proceedings, to either confirm attendance at a MIAM or give reasons for not attending.[45]

During the period covered by the study, the primary source of information about MIAMs and exemptions should have been Form FM1. The proportions of cases in which Form FM1 was filed are therefore reported on first, to provide context for findings on MIAMs and exemptions.

[43] A revised version of Form FM1 is however still in use for certain types of private law children cases.

[44] Collaborative law is a process in which the parties are represented by their own lawyers and negotiations are conducted face to face in four-way meetings. A key feature is that all involved agree not to start contested court proceedings; if any party subsequently wishes to do so they will need to employ new lawyers. In view of this emphasis on achieving resolution out of court, the case in which collaborative law had been attempted is grouped together with those in which mediation had started before proceedings.

[45] Several of the tables in this section include the cases in which mediation or collaborative law was attempted before proceedings were started. This is to place the figures regarding MIAMs in context.

Whether Form FM1 was filed

Out of the 300 cases in the review (150 children, 150 finance) 122 files contained a completed Form FM1 (41% overall).[46] This varied between the courts, types of proceedings, and reference periods involved (see Appendix C).

FM1s were present more often in finance cases (50%) than children cases (31%), and within children cases more often in those which started in FPCs (41%) than in county courts (23%). FM1s were also found more often in newer cases (47%) than older ones (37%).

These figures appear consistent with the limited published evidence available regarding the use of Form FM1.[47] Whilst the apparent increase in use among newer cases offers some encouragement, the overall picture was still one of Form FM1 being filed in a little under half of cases, more than two years after its introduction.[48]

In the 122 cases in which Form FM1 was on file, it was used to confirm that mediation had been started but had broken down or concluded with issues unresolved in 5 cases (4%) and to confirm attendance at a MIAM in 50 cases (41%). Exemptions were claimed or other reasons cited for not attending a MIAM in 67 cases (55%).[49]

Attendance at MIAMs

Establishing clear levels of attendance at MIAMs was difficult. This was partly because only a minority of files contained Form FM1. In the absence of an FM1, the main potential sources of information on MIAMs were the application forms used for starting proceedings. However, the way in which relevant questions on those forms were framed at the time, and how they were answered, meant that interpretation of the data was often problematic.[50]

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[46] This includes two cases in which the FM1 was only filed after a request by the court. There were a further two cases in which an FM1 appeared to have been completed but could not be found in the file. Adding those two cases in would not affect the overall percentage. Reporting is therefore based on the 122 cases in which FM1s were available to extract data from. There were also a further two cases in which an FM1 was not filed but the applicant's solicitor filed Form CLSAPP7, a form used to satisfy legal aid requirements which contained some of the same information as Form FM1. These cases have also been excluded from the figures.

[47] A study of finance cases conducted in four courts found that files in 11 of 33 relevant cases contained an FM1: Hitchings et al (2013).

[48] Older cases in the sample were started on or after 1 April 2012, and newer cases were started on or after 1 May 2013, when the protocol had been in force for a little over two years.

[49] A majority of the FM1s on file were the 2011 version, which did not contain space to report that mediation had started. However, 2012 and 2013 versions were used to indicate that mediation had started in five cases.

[50] Prior to April 2014 the main forms for starting proceedings (Form C100 in children cases and Form A in finance cases) each asked a double-barrelled question: '*Have you attended a [MIAM]…**and/or** attached form FM1?*' (emphasis supplied). Options for responses were '*Yes*' or '*No*'. The C100 also contained space to give an explanation if the applicant did not use mediation or attend a MIAM. This space was often filled in, which

Form FM1 clearly indicated that the applicant had attended a MIAM in 50 cases and that they had not done so in 67 cases. Application forms or other documents clearly indicated attendance at MIAMs in a further six cases and non-attendance in a further 55. Overall therefore, it was clear that the applicant had attended a MIAM in 56 cases (19%) and had not done so in 122 cases (41%). In the remaining 122 cases (41% overall) it was not entirely clear whether or not the applicant had attended a MIAM. These figures are based on cases in which the data regarding MIAMs were clear. As such, they are likely to under-estimate the numbers of cases in which the applicant did attend a MIAM.[51]

Claimed exemptions from the expectation of attendance at MIAMs

Exemptions under the protocol were formally claimed using Form FM1 in 45 cases. Prior to April 2014, Form FM1 also provided space for applicants or their representatives to give other reasons for non-attendance at MIAMs. Such reasons were given in a further 22 cases in which exemptions were not claimed, meaning that, overall, non-attendance at a MIAM was explained on Form FM1 in a total of 67 cases.[52] This was equal to 55% of those in which there was clearly no MIAM, and 22% of cases overall.

As indicated in Table 4.1 the exemption most commonly claimed, by some distance, was that a mediator was satisfied that mediation was not suitable because another party (or either party) to the dispute was unwilling to attend a MIAM and consider mediation.[53] This reason was advanced in 44% of cases in which an exemption was claimed, and accounted for 39% of all formal exemptions. This was consistent with evidence from the qualitative strand of the study, which indicated that non-attendance or rejection by one party was the principal reason for non-conversions from MIAMs to mediation. As Table 5.1 also indicates, most other available exemptions were claimed relatively infrequently.

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provided clarity in a number of children cases. However, Form A did not contain space for explanation in finance cases. Where there was no FM1 and no explanation, it did not appear safe to assume that 'Yes' on either the C100 or Form A necessarily referred to attendance at a MIAM. Conversely, it did not appear safe to assume that 'No' meant that a MIAM had not been attended, as applicants might have only been referring to the lack of an FM1.

51 Further analysis, which includes whether or not it appeared likely that the applicant had attended a MIAM, is at Appendix D.

52 There were 43 cases in which only exemptions were claimed, two cases in which exemptions were claimed and other reasons were also given, and 22 cases in which only other reasons were given. Strictly speaking, cases in which only 'other reasons' were cited for not attending a MIAM involved non-compliance with the protocol. However, as an FM1 was filed in these cases, and as the versions in use at the time included space to give other reasons, these cases are grouped together with those in which exemptions were claimed.

53 The 2011 and 2013 versions of Form FM1 referred to 'another party'; the 2012 version referred to 'either party'.

Table 5.1 Exemptions claimed

Exemption claimed[54]	Number of cases in which this exemption was claimed
Mediator satisfied mediation not suitable because another (either) party unwilling to attend a MIAM & consider mediation	20
Application urgent	9
Domestic abuse/violence	7
Social services involvement, child protection concerns	4
Mediator determines case unsuitable for a MIAM	3
Mediator has made determination of unsuitability within previous four months	2
Parties in agreement, no dispute to mediate	2
Whereabouts of the other party unknown	2
Application to be made without notice	2
Dispute concerns finances and a party is bankrupt	1

Base: 45 cases in which exemptions were claimed, including 2 in which other reasons were also cited. Totals not provided because there were some cases in which multiple exemptions were claimed.

Of the 24 cases in which other reasons for not attending a MIAM were given on Form FM1, the majority (19) were finance cases. Reasons cited included: the other party's behaviour; entrenched positions; the other party's lack of engagement and/or lack of full and frank disclosure in finance cases; unsuccessful attempts at mediation or negotiations; that a framework of court proceedings was needed to resolve the dispute; and practical reasons. The extracts below from the FM1 in some of these cases provide some illustration.

> *The Respondent has delayed a mediation meeting for over 3 months and is acting in bad faith. Also, the Respondent has informed the Applicant that she is not prepared to negotiate a settlement in respect of* [asset] *and intends keeping it and so any negotiations would be meaningless.* (Finance, Applicant Husband)

> *The parties have previously agreed to exchange financial disclosure on a voluntary basis. However, the process has become protracted and the Respondent has failed to provide information at all or in a timely fashion. There are a number of assets…and without disclosure, it is not considered that mediation would be meaningful and productive.* (Finance, Applicant Wife)

[54] Appendix B provides the full wording for the exemptions in this table.

> [The Respondent] *is refusing any contact whatsoever. I am not allowed to contact* [the Respondent] *in any way. Have tried on numerous occasions to get access… I feel that the Respondent would not turn up or give access unless ordered by the court.* (Children, Applicant Father)

Cases in which exemptions from MIAMs could have been claimed

There were 56 cases in which an FM1 was not filed but it was clear that an exemption could have been claimed. This was equal to 23% of cases where it was either clear that the applicant did not attend a MIAM or it was unclear whether they did, and equal to 19% of cases overall. In these cases, it appeared that the applicant or their representative either thought a brief explanation on Form C100 sufficient (in children cases) or relied on the facts speaking for themselves, and did not feel a need to complete an FM1. Most were children cases issued without notice (31 cases, 10% overall), or cases where an exemption could have been claimed due to the involvement of social services (9 cases, 3% overall). There were also five children cases and five finance cases where an exemption could have been claimed on the basis of domestic violence (3% overall).[55] In the other six cases either the parties were not in dispute, or the respondent's whereabouts were unknown (2% overall).

Highest levels of MIAMs and mediation activity

Table 5.2 summarises the overall position according to the highest level of MIAMs and mediation activity, leaving aside whether or not an FM1 was filed. It indicates that cases could be categorised into three main groups. The first group, represented by the first two rows, clearly involved attempts at mediation or collaborative law, and/or attendance at MIAMs. This group accounted for 22% of cases. The second group, in the middle row, comprised cases where applicants clearly did not attend MIAMs or it was unclear whether they did, but formal explanations for non-attendance were or could clearly have been given. This accounted for 41% of cases. The third group, represented by the last two rows, comprised those in which applicants did not attend MIAMs or it was unclear whether they did, and non-attendance was not explained by the claiming or clear availability of an exemption. This group included 37% of cases.

[55] The exemptions under the protocol in respect of domestic violence or social services involvement were quite strict, and cases have only been included here if it appeared clear that they would have met the relevant criteria at the time. There were many other cases in which domestic violence and/or social services involvement was indicated; these are discussed later on under the profiles of children and finance cases.

Table 5.2 Highest levels of MIAM and mediation activity: all cases

Highest level of MIAM and mediation activity by applicants	Number of cases	Percentage
Mediation or Collaborative Law[56]	17	6%
MIAM	48	16%
No MIAM or unclear whether MIAM – Exemption claimed/other reason cited, or could have claimed exemption	123	41%
No MIAM	24	8%
Unclear whether MIAM	88	29%
Total	**300**	**100%**

Base: 300 cases.

Overall, at least some contact with a mediation provider before proceedings were started was clearly indicated in 106 cases (35%). These included cases in which mediation was attempted; applicants attended MIAMs; mediators certified that exemptions applied; and referrals to mediators were made but did not lead to MIAMs. There were a further 22 cases (7% overall) in which files indicated that mediation had been proposed but it was not clear that contact had been made with a mediator. In these cases, at least one party had been unwilling or (in one case) said they were unable to afford mediation.

5.4 Compliance according to representation and funding status

Cases in which applicants were represented and litigants in person[57]

The full configuration in terms of parties in children and finance cases is reported in Appendices D and E respectively. When proceedings were started, applicants were represented in 259 cases (86% overall), and litigants in person (LiPs) in 41 cases (14%).[58] Overall, Form FM1 was filed in 44% of cases where applicants were represented, compared to 22% where they were LiPs.

Applicants who were represented had also clearly attempted mediation or collaborative law, and/or attended a MIAM, more often than applicants who were LiPs at the start (23% compared to 15%). The percentages which had clearly not attended a MIAM were closer (44% for LiPs and 40% where represented). A degree of caution is necessary in interpreting

[56] Includes eight cases in which it was clear that the applicant had also attended a MIAM.

[57] A litigant in person is a party who acts on their own behalf in proceedings, without having a solicitor represent them. Parties' representation status may change during the course of cases. Reporting focuses on status at the start of proceedings, as that was the most important stage in terms of the research aims.

[58] There were seven children cases in which there were two applicants. In six of these, both were either represented or LiPs. In the seventh, the first applicant was represented but it was unclear whether the second was. Technically therefore the second applicant could have been a LiP. However they appeared to play no part in the case. This case has therefore been categorised simply as involving a represented applicant.

these figures given the relatively small numbers of LiPs involved and their lower levels of use of Form FM1. However, they were consistent with findings from the other strands of this study, which have highlighted the important role of solicitors as referrers to MIAMs.

Represented applicants also claimed exemptions or cited other reasons on Form FM1 for non-attendance at MIAMs more often than LiPs (24% overall compared to 12%). Again, this reflected the higher levels of use of FM1s by represented applicants; a higher proportion of those who were LiPs could have claimed exemptions but did not file an FM1 (32% compared to 17% of represented applicants). Overall therefore, the proportions who either claimed exemptions or clearly could have claimed exemptions were similar, at 41% for represented applicants and 44% for those who were LiPs.

Cases in which represented applicants had legal aid and paid privately

Of the 259 cases in which applicants were represented, the data indicated that they had legal aid in 101 cases (39%) and were paying privately in 144 cases (56%).[59] In terms of formal compliance with the protocol, Form FM1 was filed more often when applicants were paying privately than when they had legal aid (49% compared to 39%). However, the overall proportions who had clearly attempted mediation or collaborative law, and/or attended a MIAM were similar (24% for privately paying applicants and 23% for those who had legal aid). The proportions who had clearly not attended a MIAM were also similar (39% for privately paying applicants and 42% of those with legal aid).

Privately paying applicants used Form FM1 to claim an exemption or give other reasons for not attending a MIAM more often (28% compared to 20% of those who had legal aid). However, 26% of applicants with legal aid could have claimed an exemption from attending a MIAM but did not file an FM1, compared to 10% of those who paid privately. Overall therefore, 46% of applicants who had legal aid and 38% of those who paid privately either claimed or clearly could have claimed exemptions.[60]

5.5 Courts' responses to non-compliance with the protocol

This section discusses the extent to which opportunities to address non-compliance appeared to be taken, based on the file review and interviews with court staff.

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[59] There were two further cases in which other funding arrangements were indicated (assistance from local authority social services). In 12 cases the position as regards funding of representation was unclear. These 14 cases have been excluded from the analysis in this section, which is therefore based on 245 cases.

[60] Further information is presented in tabular form at Appendix C.

When applications were issued

There were a total of 176 cases (102 children and 74 finance) in which there was no FM1 on file, and no indication that one had been filed. This equated to 59% of cases overall. There was evidence on the court file in only one of these cases which showed that the lack of an FM1 had been challenged at or around the time of issue. The file review may have under-estimated the frequency of challenges to lack of FM1s, particularly in cases where applications were submitted at court counters, which may have involved verbal requests.[61] It is also possible that there were cases in which non-compliance with the protocol was challenged but correspondence had not been placed on the file. However, interviews with court staff suggested that if so, that would only apply in few cases.

On gatekeeping in children cases

Gatekeeping[62] was the term given to the process of assessing whether the FPC or County Court was the most appropriate forum for children cases. It involved court staff referring applications to legal advisers and/or District Judges on receipt, to allocate cases and if need be give other directions. This provided a further opportunity for non-compliance with the protocol to be addressed. It was possible to identify from files how gatekeeping had been conducted in 49 of 102 children cases issued without an FM1. The lack of an FM1 was clearly flagged in the referral notes in only two of these cases, and neither of the files indicated that this had been taken up with the applicant or their representative. This was consistent with interviews with court staff and legal advisers, who said that lack of FM1s tended not to be something which was focused on during the gatekeeping process; legal advisers interviewed explained that until recently, the focus was on whether applications indicated the presence of potential safeguarding or other issues, in order to allocate cases to the appropriate level.

At first hearings

One of the initial objectives of the file review was to capture data on cases in which the parties were referred to a MIAM by a judicial officer at the first hearing, as envisaged by the protocol. No cases were identified where orders on the file indicated that this had happened. There were also no more than a handful of cases in which it was possible to identify that

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[61] There were two other cases in which an FM1 was on file and it was clear that it had only been provided after a request by the court.

[62] At the time of fieldwork, 'gatekeeping' as described here operated in the courts visited, in advance of the need to allocate cases to different levels of judicial officers with the establishment of the single family court.

MIAMs or mediation had been discussed at the first hearing.[63] As with other aspects of the file review, it is possible that this did not accurately reflect the true position. In particular, there were many finance cases where there were no separate notes of first hearings at all on the files, and there may therefore have been cases where MIAMs or mediation were discussed but that fact was not identifiable.[64]

Children cases were different, in that they were subject to the Revised Private Law Programme, which provided for Cafcass to check in advance of first hearings whether there were any safeguarding issues which needed to be taken into account, and also for a Cafcass officer to attend court at first hearings to help the parties explore the potential for resolving matters.[65] This had two implications for whether a referral to a MIAM or mediation might be raised by judiciary at first hearings. Firstly, it might already be apparent that there were safeguarding issues which meant that cases appeared unsuitable for mediation. Secondly, if there was potential for agreement, that might be facilitated by a Cafcass officer rather than by a referral to an external mediator. However, the overall situation in children cases was also one of a lack of clear evidence as to whether MIAMs or mediation had been discussed.

Legal advisers interviewed indicated that at first hearings in children cases, they would consider whether there was potential for mediation. However, they also said that with these hearings usually taking place between four and six weeks after proceedings were started (and sometimes later) the focus by the time the parties came to court tended to be on progressing cases. They were also mindful of the role which Cafcass could play, and it seemed that overall, as indicated above, if there appeared to be potential for agreement, there was likely to be reliance on Cafcass in the first instance rather than a referral to external mediation. Legal advisers also pointed out that many children cases raised issues of safeguarding, and that often even if one party was willing to consider mediation the other was not; these factors made it difficult to refer many children cases to MIAMs.

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63 An example of an exception to this was a children case in which there was a note indicating that the mother was at the 'mediation intake' stage and the order included a recital that the parties agreed to attend mediation.

64 Both parties were represented at the start of proceedings in two-thirds of finance cases. It appeared that very often, what happened at first hearings in these cases was that a set of agreed draft directions were submitted by the representatives and annotated by the district judge or deputy as appropriate, so that an order could be drawn up. In such cases, there were rarely separate notes to indicate what had been discussed at the hearing.

65 Family Procedure Rules 2010 Part 12B. Now replaced by the Child Arrangements Programme. Cafcass is the Children and Family Court Advisory and Support Service. Safeguarding enquiries routinely involved contacting local police forces and social services departments, as well as telephone interviews with the parties.

Overall approaches and recent changes

In four of the five courts visited, the overall approach until quite recently (in relation to the timing of fieldwork) appeared to have been one of not 'policing' compliance with the protocol very strictly, and this was consistent with the figures for the proportions of cases in which FM1s were filed. However, it appeared that in each court practices were under review in anticipation of the changes which took place in April 2014. For example, in one court a decision had been taken that if an FM1 was not filed, cases could be stayed and not given a hearing date until it was. In another, some cases were reported in which directions had been given at the gatekeeping stage for parents to attend a MIAM prior to the first hearing.

5.6 Children cases: MIAMs and mediation activity and possible indicators regarding suitability for mediation

A fuller discussion of the children cases in the sample is at Appendix D. This section focuses on key findings relevant to potential for increasing take-up of MIAMs and mediation.

MIAMs and mediation activity in children cases

Out of 150 children cases, there were only two in which mediation had clearly been attempted before proceedings started and a further 22 where it was clear that applicants had attended MIAMs. Taken together, these cases amounted to 16%. The largest grouping was those in which applicants did not attend MIAMs or it was unclear whether they did, but formal explanations for non-attendance were or could clearly have been given. This group comprised 79 cases: 53% of all children cases.[66]

In view of the small number of cases which clearly involved MIAMs or mediation, and the proportion in which the data were not entirely clear, no attempt was made to check for differences between groups of cases. However, it appeared that in a majority of the 22 involving MIAMs, the potential for conversion to mediation was low. It was clear that both parties had attended MIAMs in only two of these cases,[67] and in ten it was stated that the respondent had refused and/or failed to attend. The remaining ten cases included one in which the respondent's whereabouts were unknown, one in which the mediator certified that mediation was unsuitable, and one where mediation did not proceed because the parties could not agree on arrangements which would fit with their work commitments.

[66] Overall, applicants clearly did not attend a MIAM in 82 children cases (55%) and it was not clear whether they did so in 44 cases (29%).

Profile of children cases

Children cases tended to involve one or two children, and young children; of all the children involved, 41% were aged under five and 40% were between five and nine. Children cases also tended to involve younger parties than finance cases (20% were aged under 25, and 61% were under 35). The median age was 31. Most children cases involved one father and one mother, with the father as applicant in 53% and the mother as applicant in 28%. However, almost a fifth (19%) involved other party configurations (including 14% which involved one or more grandparents). Of those which involved only one father and one mother, a minority (29%) appeared to involve spouses or former spouses.

It was not possible to routinely identify how long parents had been separated in these cases. However, the circumstances suggested that in many, proceedings were being brought some time after separation. For example, in 80% of cases in which contact orders were applied for, some contact was already taking place, or there had previously been contact which had broken down. These features appear to have implications for the marketing and provision of MIAMs and mediation in children cases, which are summarised in Chapter 5.

Many of the children cases in the sample appeared to involve a degree of complexity, conflict, and/or safeguarding issues, indicated by features such as multiple applications, applications issued without notice, previous private law children proceedings in respect of the same child or children, and the ordering of welfare reports. Of 119 concluded cases, almost a third (32%) reached a final hearing, and 35% were adjudicated or part adjudicated.

One or more other underlying features which might add to complexity and levels of potential conflict and/or raise safeguarding issues were indicated in most children cases. These features could be classified according to three main groupings. The first was cases in which a risk and/or history of domestic violence was indicated. Overall, 65% of cases involved such indications. In the second group, concerns were raised over one or more party's suitability to have care of the children, and/or to have certain levels of contact without some safeguards being put in place. This also involved 65% of cases. The third group included cases where there was evidence that children and/or parties involved were known to social services, or had been at some point; this was indicated in 58% of cases overall.

[67] In one of these the applicant did not wish to pursue mediation, in the other it was unclear whether mediation had followed but it appeared possible that it had.

There was much overlap between the above main groups (19% of cases involved only one group, 30% involved two, and 36% involved all three). This meant that overall, 85% of children cases involved one or more of these features. For reasons discussed at Appendix D, a degree of caution is needed in interpreting these figures. The implications are discussed in Chapter 6.

5.7 Finance cases: MIAMs and mediation activity and possible indicators regarding suitability for mediation

A fuller discussion of the finance cases in the sample is at Appendix E. This section focuses on key findings relevant to potential for increasing take-up of MIAMs and mediation.

MIAMs and mediation activity in finance cases

Out of 150 finance cases, there were 15 in which it was clear that mediation or collaborative law had been attempted before proceedings started and a further 26 where it was clear that applicants had attended MIAMs. Taken together, these cases amounted to 27%. Cases in which applicants did not attend MIAMs or it was unclear whether they did, but where formal explanations for non-attendance were or clearly could have been given, comprised a similar proportion (29%, 44 cases).[68]

In view of the relatively small number of cases which clearly involved MIAMs, mediation or collaborative law, and the proportion in which the data were not entirely clear, no attempt was made to check for differences between groups of cases. However, MIAMs appeared a little more instrumental in finance cases in terms of conversion to mediation: of the 26 cases involving MIAMs there were five in which mediation was clearly attempted. Of these five, mediation clearly started after proceedings were issued in one case, and in the other four it was not entirely clear when mediation started, but it may have been after issue. There was also one other case in which it appeared that mediation might have been attempted, but at what stage was unclear. However, in eight MIAMs cases it was clear that there had been no conversion to mediation and in the remaining 12 it appeared unlikely that there had been.

Profile of finance cases

The age profile of the parties in finance cases was older than in children cases: 74% were in the 35 to 44 and 45 to 54 age groups, and the median age for all parties was 48. The median

[68] Overall, applicants clearly did not attend a MIAM in 40 finance cases (27%) and it was not clear whether they did so in 69 cases (46%).

duration of the marriages involved was 15 years; however, 41% had lasted for 20 years or more.

As with children cases, finance cases often involved features which appeared to indicate a degree of complexity and/or conflict. These included: disputes over how pensions should in principle be dealt with; disputes around whether certain matters should be taken into account when defining the 'matrimonial pot', i.e. the assets available for division between the parties; conflict arising from one or both parties' involvement in a business, including self-employment; lack of trust between the parties in respect of financial matters; and where one or both parties cited conduct of the other as a factor to be taken into account. Each of the above features were indicated in between one-fifth and approximately one-third of finance cases. In addition, a risk and/or history of domestic violence was indicated in 43%.

On the face of it, these figures suggest that issues of complexity and conflict were present less frequently in finance cases than in children cases. It was not possible to identify how many of the finance cases overall might have been suitable for mediation. However, the findings were consistent with those from Phase 1, which indicated that proceedings may be considered necessary in cases in which there are, for example, problems with disclosure, a lack of trust, or where the financial intricacies are complex. Hitchings et al (2013) have noted that in contested finance cases, 'initiating proceedings may encourage and provide a framework for negotiation between individuals who had previously failed to settle'. The frequency with which finance cases settled, and the stage at which they did so would be consistent with that: of 127 cases which were concluded 90% were settled by consent and of those, 25% settled before or at the first hearing.

6. Conclusions and implications

MIAM and mediation workload

The practitioner survey indicates that practices are conducting an average of ten privately funded MIAMs and three mediation starts each month. There is a tendency for clients to prefer separate MIAMs meetings, with 78% of all privately funded MIAMs being conducted separately. This reinforces findings from the Phase one qualitative findings. The survey also indicates that privately funded mediation caseloads are weighted more towards property and finance and all-issues cases, compared to publicly funded mediation cases. This is likely to reflect the greater financial means among privately funded clients compared to publicly funded clients.

The practitioner survey indicated that referrals to MIAMs and mediations were mainly through solicitors or self-referral, with self-referrals slightly more common. The Phase one report discussed how mediators interviewed felt routes into mediation had changed post-LASPO and indicated that they had observed a substantial fall in the number of solicitor referrals. Although there are no historical data to compare the current findings with, given the qualitative evidence that mediators were relying mainly on solicitors pre-LASPO, the higher proportion of self-referrals than solicitor referrals lends support to the conclusion drawn in the Phase one report.

Although the practitioner survey only provides crude estimates of conversion rates between a MIAM and mediation, it indicates an overall conversion of around 66–76% which supports the general direction of the Phase one findings. The survey suggests that this conversion rate is affected by certain characteristics of the clients involved, such as conversion being less likely when couples attend MIAMs separately compared to together, and among younger rather than older clients.

Compliance with the protocol before starting court proceedings

The court file review indicated that where proceedings were started, the protocol was complied with in a minority of cases, and levels of compliance and responses to non-compliance varied between courts. It also indicated that where proceedings were started, applicants appeared to have attended MIAMs and/or to have attempted mediation beforehand, in a minority of cases. Often, exemptions were claimed or could have been claimed, particularly in children cases. However, there was also a substantial minority of cases in which either the applicant had not attended a MIAM, or it was unclear whether they

had done so, and the non-attendance was not explained. Since the period covered by the file review, the prescribed court forms have been revised to support the strengthening of the protocol, and this ought to improve the data available on compliance.

Marketing and provision of MIAMs and mediation

The findings indicated that parents in children cases tended to be younger than parties in finance cases. Also, where court proceedings were started a minority of parents in children cases appeared to have been spouses or ex-spouses, but in finance cases marriages tended to have been of long duration. The court file review also highlighted the involvement of grandparents in children cases, and that proceedings were often brought some time after separation. These findings suggest a need for marketing and provision of MIAMs and mediation to cater at least in part for different groups of potential litigants in children and finance cases. For example to younger (under 35), unmarried as well as married couples in children cases, and to somewhat older (over 35), divorcing couples in finance cases (though there may be overlaps between the two types of cases). They also suggest a need for MIAMs and mediation to be promoted as options some time after separation to deal with disputes over existing arrangements for children, as well as at the point of separation when new arrangements may need to be made.

Both the survey (in which almost a fifth of MIAMs were attended by only one party) and the court file review (in which the most frequent exemption claimed involved at least one party who was unwilling to attend a MIAM and consider mediation) also reinforce the point that for mediation to be a viable option, prospective respondents as well as prospective applicants need to be willing to engage and explore whether the process may be suitable for their cases.

Suitability of cases for mediation

The frequency with which underlying issues of domestic violence and other safeguarding concerns were evident in cases in the court file review appears to have implications for MIAMs and mediation in children cases in particular. Of the 128 children cases in which such issues were indicated, a minority involved applicants either attending MIAMs (16%) or formally claiming exemptions (20%). With the stricter requirements in place from April 2014, all applicants in relevant cases must either attend a MIAM, or formally claim an exemption, demonstrating that the qualifying criteria are met. In those circumstances, prospective parties, their legal representatives (if they are represented), and mediators need to be aware of the relevant criteria, so that cases in which mediation is unsuitable can be properly identified. The frequency of complicating and/or safeguarding issues also highlights the need

for referrers and mediators to check for underlying issues, to consider whether mediation may be appropriate, and if so, what measures might be needed to ensure that parties can participate safely and effectively.[69]

[69] See also a recent report of the Mapping Paths to Family Justice project by Barlow et al (2014) in which the suitability of cases and parties for mediation and other dispute resolution processes is discussed.

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Appendix A
Methodology

Practitioner Survey

The survey was based on snapshot data provided by practitioners relating to their workloads in the months of November 2013 (wave 1) and March 2014 (wave 2). This appendix contains further details of the methods employed to conduct the survey of practitioners.

Data collection tool and fieldwork

A data portal was set up to allow practices to input their workload data for each wave of data collection. Practices were asked to complete two sets of forms in relation to private clients:

Form A: Recording all MIAM and mediation starts in the snapshot month, comprising:

- All MIAMs started in the snapshot month, broken down by whether these were completed by the parties together, separately or alone.
- All mediations started in the snapshot month, broken down by type of mediation (children, property & finance, all issues) and whether sole or co-mediated (i.e. whether mediated by one mediator or more than one).

Form B: Recording case-level details of each MIAM and mediation close in the snapshot month, comprising:

- date case started (i.e. when MIAM was held or date of first mediation session)
- client gender, age, ethnicity, presence of disability
- type of MIAM (together, separate, alone) or mediation (children, property & finance, all issues; sole or co)
- outcome of MIAM or mediation (if known)
- whether case dealt with at main office or outreach
- referral route.

Each practice contacted was asked to provide one Form A and as many Form Bs as applied for the snapshot month. As a MIAM is a one-off occurrence,[70] it was expected that the number of MIAM starts should equal the number of MIAM completions, although the numbers did not always correspond exactly.

[70] We include within this definition MIAMs conducted together, separately or alone.

Each form collected information in relation to private mediation clients only. The definition of private funding was as follows:

- For MIAMs, if one party is eligible for legal aid funding then both parties are eligible. Therefore MIAMs recorded in the survey only included cases where both parties were privately funded.
- For mediations, which are always conducted on the basis of couples, these would have been picked up in the survey if *either* party was privately funded.

Sample

The target was to conduct a survey of all mediation practices operating in England and Wales. However, there is no central listing of all mediation services. Therefore, the best available solution was to focus the survey on practices with a Legal Aid Agency (LAA) contract, using the listing of services held by the LAA. This means that the survey omitted practices which only covered clients in the private sector, and as a result may have introduced an element of bias into the survey data. This is an important caveat which should be borne in mind when interpreting the survey results.

The LAA provided TNS BMRB with an initial listing of 279 practices with an LAA mediation contract. At each wave, practitioners were contacted on several occasions, as indicated in Table A.1. After each of the various contact stages, the sampling frame was cleaned to remove cases which were found to be ineligible, for example where we were informed that practices no longer offered mediation services, had closed down, or where the telephone number was found to be unobtainable as a result of attempting to call them via the telephone chaser. The final in-scope sample was assumed to be 240 practices.

A small number of cases (around 8) were removed where we were informed that the practice did not wish to participate, although these have been included in the sample base for the purposes of calculating response.

Table A.1 Timetable of contact with practitioners

Step	Contact	Purpose	Wave 1 (Data for November 2013)	Wave 2 (Data for March 2014)
1	Initial pre-notification letter to all 279 practices on LAA database	To provide an early indication (prior to Wave 1 only) that the survey was going ahead	21 October 2013	
2	First email with login details & instructions	To provide individual login details to access the survey portal, together with full instructions for completion	30 October 2013	10 March 2014
3	Reminder email	To provide a reminder to all practices to complete the survey	19 November 2013	28 March 2014
4	Telephone 'chaser' survey to track progress	To check the status of survey completion, and to collect details of practices that have experienced problems with completion (to target assistance)	26 November	22 April 2014
5	Email with login details sent to those who said via CATI survey that they had not received the initial email	Mop-up emails to cover those cases where email had initially been mis-directed	4 December	(not required)
6	Thank you email to all responders + mop-up email to non-responders asking for basic Form A stats	To thank those who have participated and for those who have not, to supplement our data with some basic Form A statistics	29 Jan 2014	19 May 2014

Response

At the initial close of wave 1 fieldwork, 61 mediator practitioners had responded to the survey at least for Form A (not everyone completed data at both Form A and Form B – in many cases this was because they had no cases to provide more detailed case-level information

on at Form B). Following the 'mop-up' email stage in January, this number rose to 115 practitioners, which represents a response rate of 48%.[71]

At wave 2, the response was lower. After the 'mop up' stage, only 72 practitioners had returned forms – a response rate of 30%. Anecdotally, we had feedback that practices were a lot busier when we tried to contact them again in March/April 2014 which is likely to have contributed to this lower response rate.

The analysis in this report is based on the following numbers. The Form B numbers below refer to the number of completed cases (MIAMs and mediations) in the snapshot months. In some places within Chapter 3 we report on couples only, excluding any cases where only one partner was in attendance. In these situations, base sizes are lower.

Table A.2 Number of cases per survey wave

	November 2013 (Wave 1)	March 2014 (Wave 2)	Total
Form A – number of practitioners	115	72	187*
Form B – number of completed cases	848	616	1,464
Form B – number of clients involved in completed cases	1,058	796	1,854

* This figure includes all Form As across waves, and as such includes some duplicate practices.

Most responding practitioners completed a form at both waves. The sample included 130 unique practitioners who returned a Form A for at least one wave.

Profile of achieved sample

To assess how well the achieved sample represents the original sample of LAA practitioners, we have compared the issued and achieved sample on profile characteristics we had available – that is region and structure of the practice. Structure of practice refers to whether the practice was based at just one location or whether there was a main office and one or more outreach locations. As displayed in Table A.3, the profile matches closely for these characteristics.

[71] This response rate has been calculated on a total of 240 mediation practices, which represents the original sample of mediation practices minus those identified as out of scope, either as a result of being out of business or no longer offering privately funded mediation.

Table A.3 Regional profile of all practitioners vs. responding practitioners

Region	ALL LAA practitioners	Practitioners responding to the survey at either Wave
	(n=281)	(n=130)
Birmingham	6%	6%
Brighton	6%	6%
Bristol	12%	15%
Cambridge	11%	13%
Cardiff	6%	4%
Leeds	11%	9%
Liverpool	2%	2%
London	14%	13%
Manchester	6%	6%
Newcastle	6%	9%
Nottingham	11%	11%
Reading	7%	6%
Total	98%	100%

*Percentages may not sum to 100 due to rounding

Table A.4 Whether practitioners had outreach offices: all practitioners vs. responding practitioners

	All LAA practitioners	Practitioners responding to the survey at either Wave
	(n=281)	(n=130)
With outreach offices	83%	84%
Without outreach offices	17%	16%
Total	100%	100%

In-depth survey

The in-depth survey collected details of both private and public MIAMs and mediations, which also allowed for an indicative exploration of the differences between clients entering the system through the different funding routes. Form A was the same as the main survey, but also collected details of public MIAM and mediation starts. Form B collected caseload statistics, again for public as well as private clients. The information collected expanded on the information collected within the main survey to also include:

- employment status
- income

- assets
- number/ages of dependent children
- involvement of additional parties
- special circumstances
- conflict level (subjective mediator assessment)
- previous issues in dispute.

Indicative evidence from the in-depth survey

The in-depth survey was a supplementary survey which aimed to collect more detailed information on case characteristics from a small number of practitioners – this is because it would have been impractical to collect this level of data from the main sample of practitioners due to the extra workload involved. Details of the methods employed are described above.

The in-depth datafile contains further information on profile of cases including: details of number and ages of children, previous issues in dispute, income and working status, assets in dispute, conflict level, and special circumstances (such as domestic violence or child protection issues).

However, the base sizes are very small and cases are drawn from only nine practitioners which do not represent the practitioner base as a whole. A total of 313 cases were included in the survey, which means that sub-sample sizes are often very small. The in-depth cases also include public as well as private funded clients.

Therefore the findings described in this section are indicative only and should not be regarded as statistically valid findings. We present some indicative findings below under a number of sub-headings which have been sign-posted in the main body of the report.

Profile of clients attending different types of MIAM and mediation meetings

The in-depth data suggest the following further associations with attendance at different types of MIAM and mediation meetings:

MIAMs attended alone might be more common when:

- there are older children involved
- there are no assets in dispute
- conflict level is high

- there are special circumstances involved (such as domestic violence or child protection issues)
- there are previous issues in dispute.

MIAMs attended together might be more common when:

- clients are privately as opposed to publicly funded
- clients are in work/ have higher incomes/ have assets in dispute
- there are two or more children involved
- children are younger
- clients self-refer to MIAM.

MIAMs attended separately might be more common when:

- clients are unemployed/on low incomes
- conflict levels are perceived to be high
- there are special circumstances involved (such as domestic violence or child protection)
- there are previous issues in dispute
- younger children are involved
- clients are referred via a solicitor.

These indicative findings are based on the following data. As explained in the note below the table, some very small base sizes should be noted and results should be interpreted with a considerable degree of caution.

Table A.5 Indicative findings from the in-depth casefile data: Type of MIAM by additional case characteristics

	Number of children			Age of youngest child			Assets in dispute		Funding		Working status	
	None	One	Two+	<4	5–7	8+	No	Yes	Private	Public	In employment	Unemployed/ Other
	%	%	%	%	%	%	%	%	%	%	%	%
MIAM together	20	13	27	21	23	15	12	32	25	10	23	9
MIAM alone	27	18	26	13	18	35	29	13	21	26	23	20
MIAM	54	70	47	66	59	51	59	55	54	64	54	70

separate												
	100%	100%	100 %	100%	100%	100%	100%	100%	100%	100%	100%	100%
Base*	(41)	(103)	(74)	(62)	(61)	(55)	(106)	(82)	(127)	(90)	(150)	(64)

*Note small base sizes – findings should be interpreted with caution

Table A.5: Continued

	Income			Conflict level		Special circumstances		Previous issues in dispute		Referral	
	<£10K	£10K <£30K	£30K+	High	Aver-age/ low	Yes	No	No	Yes	Solicitor	Self
	%	%	%	%	%	%	%	%	%	%	%
MIAM together	7	21	32	21	21	17	20	28	-	-	28
MIAM alone	20	28	21	11	31	13	24	20	57	21	24
MIAM separate	74	52	46	68	49	70	56	52	43	79	48
	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%
Base*	(61)	(83)	(56)	(72)	(107)	(47)	(148)	(128)	(14)	(48)	(147)

* Note small base sizes – findings should be interpreted with caution

Profile of client by funding status

The main survey covered private clients only, whereas the in-depth survey covered private and public clients. Although the in-depth data are only indicative, this does provide some opportunity to explore the potential differences between clients who are funded privately and those funded publicly.

The link between public funding and low incomes/absence of assets/non-working status is in line with expectations. Looking at other non-financial metrics, the in-depth casefile data suggest that public funding is more prevalent:

- among female partners
- among younger clients
- when there are special circumstances involved
- when younger children are involved
- when there are previous issues in dispute.

These indicative findings are based on the following data.

Table A.6 Funding status by additional case characteristics

	Gender		Age			Ethnicity	
	Male	Female	<35	35–49	50+	White	Non-white
	%	%	%	%	%	%	%
Private	67	53	36	70	77	60	61
Public	33	47	64	30	23	40	39
	100%	100%	100%	100%	100%	100%	100%
Base*	(151)	(161)	(103)	(165)	(44)	(271)	(41)

*Note small base sizes in places – findings should be interpreted with caution

Table A.6: continued

	Special circumstances		Presence/Age of youngest child				Previous issues in dispute		Working status	
	Yes	No	None	<4	5-7	8+	No	Yes	In employment	Unemployed/ Other
	%	%	%	%	%	%	%	%	%	%
Private	49	65	65	44	61	73	70	50	75	18
Public	51	35	35	57	39	28	30	50	25	83
	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%
Base*	(71)	(207)	(52)	(85)	(94)	(80)	(181)	(30)	(226)	(80)

* Note small base sizes in places – findings should be interpreted with caution

Table A.6: continued

	Assets in dispute			Income			
	None	< £100K	£100K+	<£10K	£10K<£20K	£20K<£30K	£30K+
	%	%	%	%	%	%	%
Private	44	63	89	14	54	76	99
Public	56	37	11	86	47	24	1
	100%	100%	100%	100%	100%	100%	100%
Base*	(151)	(37)	(84)	(78)	(71)	(54)	(85)

* Note small base sizes in places – findings should be interpreted with caution

Referral route

The in-depth casefile data indicate that solicitor referral might be more common when:

- clients are not in work
- there are no children involved
- the case was dealt with by a main site office.

On the other hand, the in-depth casefile data indicate that self-referral might be more common when:

- clients have higher incomes/are in work
- children are involved
- the case was dealt with at an outreach office.

There are no clear differences in referral routes between private and public funded clients.

These indicative findings are based on the data shown in Table A7.

Table A.7 Referrals to MIAMs and mediations by additional case characteristics

	Main or outreach		**Children involved**		**Income**			**Working status**		**Funding**	
	Main	Out-reach	Yes	No	<£10K	£10K <£30K	£30K+	Working	Unemployed/ other	Priv.	Pub.
	%	%	%	%	%	%	%	%	%	%	%
Solicitor	33	24	27	43	32	24	28	26	34	29	29
Self	59	73	68	58	59	74	69	70	57	69	62
Other	8	3	6	-	9	2	2	4	9	3	9
Base*	(147)	(141)	(255)	(40)	(68)	(119)	(85)	(216)	(74)	(182)	(113)

* Note small base sizes in places – findings should be interpreted with caution

MIAM and mediation outcomes

It is useful to look at the level of MIAM–mediation conversion by some of these additional characteristics. The in-depth casefile data indicate that MIAM to mediation conversion rates might be lower when:

- there have been previous issues in dispute
- there are special circumstances involved such as domestic violence or child protection issues
- children are older
- there were no assets in dispute.

Although only indicative, the association between breakdown of mediation and previous issues in dispute/more complex cases supports the findings from Phase 1 which noted that recurrent returns to mediation and more complex issues were often associated with resolution breakdown.

The in-depth casefile indicates no difference by public/private funding in terms of level of conversion.

These indicative findings are based on the data shown in Table A.8. As explained in the footnote to the table, some very small base sizes should be noted and results should be interpreted with caution.

Table A.8 Indicative findings from the in-depth casefile data: Proportion of successful* MIAM to mediation conversions by additional case characteristics

	Previous issues in dispute		**Special circumstances**		**Age of youngest child**				**Assets in dispute**		**Funding**	
	No	Yes	Yes	No	None	<4	5-7	8+	No	Yes	Priv.	Pub.
% successful	72	50	57	71	60	73	68	59	60	79	68	64
Base**	(74)	(14)	(30)	(93)	(25)	(40)	(38)	(34)	(73)	(43)	(80)	(56)

* Successful is defined as MIAM already converted or MIAM expected to convert

** All couples attending MIAMs excluding outcome unknown; Note small base sizes – findings should be interpreted with caution

There was no opportunity to investigate the level of success of mediations by additional characteristics as, once the high proportion of unknown outcomes are removed from the base, the base sizes become too low to conduct even an indicative analysis.

Appendix B

Exemptions under the pre-application protocol 2011 and 2013

The text below sets out the exemptions in full as they appeared in the 2011 and 2013 versions of the protocol.

A person considering making an application to the court in relevant family proceedings is not expected to attend a [MIAM] before doing so if any of the following circumstances applies:

1. The mediator is satisfied that mediation is not suitable because another party to the dispute is unwilling to attend a [MIAM] and consider mediation.
2. The mediator determines that the case is not suitable for a [MIAM].
3. A mediator has made a determination within the previous four months that the case is not suitable for a [MIAM] or for mediation.
4. Domestic abuse ***(from April 2011)***
   Any party has, to the applicant's knowledge, made an allegation of domestic violence against another party and this has resulted in a police investigation or the issuing of civil proceedings for the protection of any party within the last 12 months.
4. Domestic violence ***(from April 2013)***
   The following applies –
   (a) there has been, or is a risk of, domestic violence between parties to the dispute; and
   (b) the person considering making the application –
   (i) confirms on the Form FM1 that evidence of the domestic violence, or of the risk of domestic violence, exists in one or more of the forms listed in Annex D; and
   (ii) specifies on the Form FM1 which of those forms of evidence exists.
5. The dispute concerns financial issues and the applicant or another party is bankrupt.
6. The parties are in agreement and there is no dispute to mediate.
7. The whereabouts of the other party are unknown to the applicant.
8. The prospective application is for an order in relevant family proceedings which are already in existence and are continuing.
9. The prospective application is to be made without notice to the other party.
10. The prospective application is urgent, meaning:
    (a) there is a risk to the life, liberty or physical safety of the applicant or his or her family or his or her home; or

(b) any delay caused by attending a [MIAM] would cause a risk of significant harm to a child, a significant risk of a miscarriage of justice, unreasonable hardship to the applicant or irretrievable problems in dealing with the dispute (such as an irretrievable loss of significant evidence).

11. There is current social services involvement as a result of child protection concerns in respect of any child who would be the subject of the prospective application.
12. A child would be a party to the prospective application by virtue of Rule 12.3(1).
13. The applicant (or the applicant's legal representative) contacts three mediators within 15 miles of the applicant's home and none is able to conduct a [MIAM] within 15 working days of the date of contact.

Appendix C
Further data from court file review

The presence of a completed FM1 varied between the courts, types of proceedings and reference period involved. FM1s were present more often in finance cases (50%) than children cases (31%), and within children cases more often in those which started in FPCs (41%) than in county courts (23%). FM1s were also found more often in newer cases (47%) than older ones (37%). However, these overall figures were bolstered by those from one court, in which 63% of all files contained an FM1, compared to an average of 35% for the other 4. If Court C's figures were excluded, the totals in Table C.1 would be between 3% and 7% lower.

Table C.1 Whether Form FM1 was filed by court, case type and tranche

Court	Percentages of cases with Form FM1 on file						
	Finance	Children	Children FPC	Children County	Older	Newer	Total
A	47%	23%	40%	15%	28%	46%	**35%**
B	40%	30%	35%	20%	34%	37%	**35%**
C	77%	50%	57%	38%	58%	73%	**63%**
D	33%	27%	40%	13%	31%	27%	**30%**
E	56%	27%	25%	27%	31%	50%	**40%**
Total	**50%**	**31%**	**41%**	**23%**	**37%**	**47%**	**41%**

Bases: Finance 150 cases, Children 150, Children FPC 63, Children County 87, Older 186, Newer 114, Total 300 cases.

As reported at Section 5.3, establishing clear levels of attendance at MIAMs was difficult. In view of this, an attempt was made to assess whether it appeared more likely that applicants had or had not attended a MIAM before starting proceedings. Tables C.2 and C.3 present the results of that analysis, which suggested it was likely that MIAMs were attended in up to 91 cases (30% overall) and likely that they were not attended in up to 198 cases (66% overall). The figures in these tables for attendance at MIAMs are upper estimates, which should be treated with a degree of caution. It is however hoped that they will help with placing any future measurement of levels of attendance at MIAMs in context.

Table C.2 Whether MIAM attended before proceedings started

Whether MIAM attended	Number of cases	Percentage
Yes[72]	56	19%
Not entirely clear but appeared more likely yes[73]	35	12%
No	122	41%
Not entirely clear but appeared more likely no	76	25%
Unclear	11	4%
Total	**300**	**101%**

Base: 300 cases. Percentages do not sum to 100 due to rounding.

Table C.3 Highest apparent level of MIAM and mediation activity before proceedings

Highest level of MIAM and mediation activity by applicants	Number of cases	Percentage
Mediation or Collaborative Law	17	6%
MIAM	48	16%
MIAM likely[74]	27	7%
No MIAM – Exemption claimed/other reason cited or could have claimed exemption	98	33%
MIAM unlikely/unclear – Could have claimed exemption	20	7%
No MIAM	24	8%
MIAM unlikely	59	20%
Otherwise unclear	7	2%
Total	**300**	**99%**

Base: 300 cases. Percentages do not sum to 100 due to rounding.

[72] Includes eight cases in which mediation was started.
[73] Includes eight cases in which mediation was started.
[74] Includes five cases in which exemption could have been claimed.

Appendix D
Profile of children cases in the court file review[75]

Applications involved

Children cases frequently involved multiple applications; only 51% involved only one application. Table D.1 provides a breakdown of cases by the main types of applications involved. Table D.2 provides a breakdown of applications.[76]

Table D.1 Children cases by main types of applications

Main type(s) of application	Cases	
	Number	Percentage
Contact only	44	29%
Residence only	21	14%
Contact and residence	18	12%
Contact, residence and other	11	7%
Contact and other, not residence	17	11%
Residence and other, not contact	27	18%
Other, not contact or residence	12	8%
Total	**150**	**99%**

Base: 150 cases. Percentages do not sum to 100 due to rounding.

Table D.2 Types of applications involved in children cases[77]

Type of application	Cases in which featured	
	Number	Percentage
Contact	90	60%
Residence	77	51%
Prohibited Steps	33	22%
Specific Issue	22	15%
Parental Responsibility	14	9%
Financial Provision	1	< 1%
Special Guardianship	4	3%
Non-molestation order	4	3%
Occupation order	3	2%

Base: 150 cases. Numbers sum to more than 150 because cases could involve multiple applications.

[75] The profile of these cases was consistent in most key respects with findings from a study which involved approximately 400 private law children cases concluded in 2009: Cassidy and Davey (2011).

[76] Figures include applications made by both applicants and respondents. Contact applications include a small number of cases in which one party applied to vary or suspend an existing order for contact with another.

[77] The non-molestation and occupation order applications only include those made within the children proceedings.

Children involved

Cases in the sample tended to involve one child, and young children. The majority (65%) involved one child. A further 27% involved two children, and 8% involved three or more. There were 222 children involved overall, of whom 41% were aged under 5 when proceedings were started, 40% were aged between 5 and 9, and 19% were 10 or older. In terms of cases, the youngest child was under 5 in 53%, aged between 5 and 9 in 37%, and aged 10 or older in 9%. The most common scenario was that one child aged under 5 was involved; this was so in 35% of cases.

Table D.3 Ages of children involved in children cases

Age of children	Number	Percentage
< 1	17	8%
1	13	6%
2	18	8%
3	25	11%
4	19	9%
5 to 9	88	40%
10 and older	42	19%
Total	**222**	**101%**

Base: 150 cases. Numbers sum to more than 150 because cases could involve multiple children. Percentages do not sum to 100 due to rounding.

Table D.4 Children cases by age of youngest child involved

Age of youngest child	Cases	
	Number	Percentage
Under 5	80	53%
5 to 9	56	37%
10 and older	14	9%
Total	**150**	**99%**

Base: 150 cases. Percentages do not sum to 100 due to rounding.

Parties involved

Most children cases (84%) involved only two parties, and most (81%) involved one father and one mother. The most common scenario, which featured in 53% of cases, involved an applicant father and a respondent mother. However, 16% of cases involved three or four parties, making for a total of 328 parties, and overall 19% of cases involved configurations other than one father and one mother. The majority of other configurations (14% overall)

involved grandparents. Table D.5 shows the main configurations involved. Table D.6 shows the types of parties involved.[78]

Table D.5 Main party configurations in children cases

Configuration	Cases	
	Number	Percentage
One Applicant Father and One Respondent Mother	79	53%
One Applicant Mother and One Respondent Father	42	28%
Other configuration	29	19%
Total	**150**	**100%**

Table D.6 Parties in children cases[79]

Parties involved	Number	Percentage
Father as applicant	*82*	*52%*
Father as respondent	*65*	*38%*
Father total	**147**	**45%**
Mother as applicant	*48*	*31%*
Mother as respondent	*99*	*58%*
Mother total	**147**	**45%**
Grandparent as applicant	*21*	*13%*
Grandparent as respondent	*6*	*4%*
Grandparent total	**27**	**8%**
Other family (including step-parents)	**6**	**2%**
Non-family	**1**	**< 1%**
Total	**328**	**100%**

Base: 150 cases.

An attempt was made to quantify the types of relationships between applicants and respondents. This was partially successful. Of 121 cases which involved only one father and one mother, it was clear that they were married or formerly married in 29%, cohabitants or former cohabitants in 28%, and neither in 7%. In a further 28% of these cases, it was not clear whether the parties had ever cohabited, but there was no indication that they had ever been married. In 8%, there was no strong evidence pointing to the nature of the relationship. Whilst these findings need to be treated with a degree of caution, they suggest that a minority of the private law children cases in the sample involved disputes between couples who were divorced or were divorcing.

[78] Fathers in these and other tables include two putative fathers who were applicants.
[79] Percentages in italics refer to percentages of applicants or respondents, percentages in bold refer to percentages of all parties.

Ages of parties in children cases

The ages of all parties were available in 138 children cases; these involved a total of 297 individuals. Their age profile was generally younger than in the sample of finance cases. A fifth were aged under 25, and most others were in the 25 to 34 and 35 to 44 age groups. Median ages were 32 for applicants, 30 for respondents, and 31 overall.

Table D.7 Ages of parties in children cases

Age band	Applicants	Respondents	All parties
	Percentage	Percentage	Percentage
Under 18	1%	1%	1%
18 to 24	16%	22%	19%
25 to 34	41%	42%	41%
35 to 44	24%	26%	25%
45 to 54	15%	8%	12%
55 to 64	1%	0%	0%
65 and over	3%	1%	2%
Total	**101%**	**100%**	**100%**

Base: 297 parties involved in 138 children cases. Percentages do not sum to 100% due to rounding.

Representation status and funding in children cases

Representation status at the start of proceedings was clear for all parties in 142 children cases. Overall, 68% of these involved at least one party who was a litigant in person (LiP) at the start of proceedings. Most often, it was respondents who were unrepresented.

Table D.8 Whether children cases included litigants in person

Whether any parties were litigants in person	Cases	
	Number	Percentage
Applicant(s) only	6	4%
Respondent(s) only	62	44%
Both applicant(s) and respondent(s)	28	20%
Neither	46	32%
Total	**142**	**100%**

Base: 142 children cases in which representation status was clear for all parties

There were 109 cases in which it was clear that all applicants were represented at the start of proceedings, and also how their representation was funded.[80] Of these cases, the

[80] This figure excludes two cases in which the local authority was helping to fund the applicant's representation.

applicant(s) had legal aid in 73 cases (67%), and were paying privately in 35 cases (32%). There was one further case in which one applicant had legal aid and one paid privately.

Contact applications

These applications included several cases in which contact was already taking place, but it had become problematic and/or one party wanted to change or extend the arrangements (for example by moving from supervised to unsupervised, or from daytime to overnight contact). However, in a majority of cases contact had either broken down and/or had not happened for some time, and the applicant was seeking to re-establish contact. Often, the parties cited conflicting reasons for contact having broken down, including different interpretations regarding how children had been treated when contact took place and whether it was beneficial for them. There were also often underlying issues of domestic violence in these cases; in several, contact had stopped after a particular incident.

Residence applications

These cases tended to involve two main scenarios. One was that the parent with care sought a residence order when the non-resident parent had not returned a child after contact, and was refusing to do so. In these cases the application for a residence order was sought to protect the position of the parent with care, and was coupled with an application for either a specific issue order requiring the child to be returned, and/or a prohibited steps order to prevent the same thing happening again. Another main scenario involved a parent or grandparent seeking a residence order because it was alleged that the parent who had been the main carer was unable or unsuitable to care for the children. In several of these cases, it appeared that the applicant's position was supported by social services. Issues tended to include concerns regarding one or more of: mental health problems, drug or alcohol abuse, involvement in violent relationships, concern about children coming into contact with wider family, neglect on the part of the main carer, and in some cases their imprisonment. In some of these cases the child was already living with the applicant, who sought to regularise and protect their position, and in some a residence order would have involved the child moving.

Prohibited steps and specific issues

As well as being sought to deal with situations in which children had not been returned after contact, applications for prohibited steps and specific issue orders involved a small number of relocation cases (including proposed moves within the UK and abroad). There were also some cases in which fear of abduction was cited, and others which involved short trips abroad, applications to change a child's name, and disputes over children's schooling.

Indicators of complexity and conflict in children cases

As noted earlier, many of the children cases in the sample involved multiple applications. In 23% of cases, applications were issued without notice to the respondent, indicating a degree of urgency. In 30%, there was evidence that there had been previous private law children proceedings in respect of the same child or children. A further measure of complexity was that the court ordered welfare reports in 52% of cases.[81]

One or more other underlying features which might add to complexity, levels of potential conflict and/or raise safeguarding issues were indicated in most children cases. These could be classified according to three main groupings. The first was cases in which a risk and/or history of domestic violence between the parties, and/or involving the children being subjected to or exposed to such violence, was indicated.[82] Overall, 65% of cases involved such indications. In half of these, the file did not contain a Form C1a[83] from the applicant (who in these cases was most often but not always the father) but the evidence for domestic violence came from other sources, such as another party, correspondence, and/or Cafcass safeguarding enquiries.

In the second group, which also involved 65% of cases, there were concerns raised regarding one or more party's suitability to have care of the children, and/or to have certain levels of contact without some safeguards being put in place. In 38%, this appeared due at least in part to alleged misuse of drugs or alcohol, or one or more parties having mental health problems. In a further 16%, concerns were raised that the children were or would be at risk of neglect, abuse or violence if in the care of or having contact with one of the parties (this included risks involving wider family members). This second main grouping also included 23% of cases overall in which fears of child abduction were cited.

The third main group involved contact with social services, which was indicated in 58% of cases overall. This was based on there being evidence that children and/or parties involved were known to social services, or had been at some point. Much of this evidence came from Cafcass safeguarding reports, but in some cases it came from the parties.

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81 This included standard welfare reports as well as a variety of other reports from Cafcass or social services.

82 The definition of domestic violence used was that under LASPO: 'any incident, or pattern of incidents, of controlling, coercive or threatening behaviour, violence or abuse (whether psychological, physical, sexual, financial or emotional) between individuals who are associated with each other'.

83 Form C1a is a court form, used to give supplementary information in cases in which harm is alleged.

There was much overlap between the above main groups: whilst 19% of cases involved only one group, 30% involved two, and 36% involved all three. This meant that overall, 85% of children cases involved one of more of these features.

A degree of caution is needed in interpreting these figures. Allegations of domestic violence often appeared to be corroborated by Cafcass enquiries made of police and social services, and/or other evidence such as there having been domestic violence proceedings or it being admitted. However, it was not possible for the file review to assess overall levels of veracity of allegations. Similar considerations applied to corroboration regarding alleged drug or alcohol abuse, or other risks to children if in the care of or having contact with a party. Also, whilst in a number of cases social services involvement was recent and/or involved child protection concerns which led to local authorities being in support of applications, their involvement in some cases appeared to be quite historical, and some involved single reports which did not appear to have led to social services taking further action.

How children cases concluded

There were 119 children cases which had concluded by the time of data collection.[84] Higher proportions of these cases proceeded as far as a final hearing, and were adjudicated, than in finance cases. However, notwithstanding the apparent levels of complexity and conflict noted earlier, the majority still concluded before a final hearing, and a minority required adjudication. Tables D.9 and D.10 provide breakdowns.

Table D.10 shows that in 54% of cases, the last hearing was an interim or review hearing. Often, this reflected progress made at first hearings, coupled with a concern on the part of the court to see whether that progress appeared sustainable whilst ensuring that any welfare issues were addressed. A quite common trajectory appeared to be for a certain level of interim contact to be agreed at the first hearing, perhaps with assistance from Cafcass; a welfare report or other evidence to be ordered; and for the case to be brought back at a later date for review and any further directions needed, at which point the case would conclude.

[84] There were 28 children cases which were ongoing and three in which it was unclear whether the case had concluded.

Table D.9 How children cases concluded

How children cases concluded	Number	Percentage
Application withdrawn	3	3%
By consent	57	48%
Adjudicated	33	28%
Partially adjudicated	9	8%
Unclear[85]	17	14%
Total	**119**	**101%**

Base: 119 concluded cases. Percentages do not sum to 100% due to rounding.

Table D.10 Last hearing before children cases concluded

Last hearing before children cases concluded	Number	Percentage
First hearing	13	11%
Interim hearing or review[86]	64	54%
Final hearing	38	32%
Unclear	4	3%
Total	**119**	**100%**

Base: 119 concluded cases

Orders made in children cases

In most concluded cases, one or more orders were made which matched those applied for. Table D.11 provides a breakdown.

Table D.11 Main types of orders made in concluded children cases

Type of order	Cases in which order applied for	Cases in which order made
	Percentage	Percentage
Contact	58%	51%
Residence	51%	46%
Prohibited steps	22%	12%
Specific Issue	13%	8%
Parental responsibility	9%	5%

Base: 119 concluded cases

[85] Orders in children cases did not always specify whether they were by consent. These cases included a number in which it appeared that there was agreement between the parties at the time of the final order, but it was not clear that the order was entirely by consent.

[86] Including one fact finding hearing.

Appendix E
Profile of finance cases in the court file review

Parties involved

All the finance cases[87] in the sample involved only two parties: the wife and the husband. In 73% of cases the applicant was the wife and in 27% it was the husband.

The age profile of the parties was generally older than in the sample of children cases. Ages of both parties when proceedings were started were available in 147 finance cases. In contrast to children cases, these parties were predominantly in the 35 to 44 and 45 to 54 age groups. Median ages were 46 for applicants, 48 for respondents and 48 overall.

Table E.1 Ages of parties in finance cases

Age band	Applicants	Respondents	All parties
	Percentage	Percentage	Percentage
25 to 34	10%	6%	8%
35 to 44	29%	29%	29%
45 to 54	46%	46%	46%
55 to 64	12%	17%	15%
65 and over	3%	3%	3%
Total	**100%**	**101%**	**101%**

Base: 294 parties involved in 147 finance cases. Percentages do not sum to 100% due to rounding.

Duration of marriage and basis of divorce

The median duration of marriages was 15 years.[88] This was longer than that for all divorces granted in England and Wales, which in 2012 was 11.5 years. Also, the proportion of marriages which had lasted for 20 years or more was higher: 41% compared to 24% for divorces nationally (ONS, 2014). However, these figures are in line with other recent studies, which suggest that marriages in finance cases tend to be longer on average than those in all divorces (Hitchings et al, 2013).

[87] This section does not include a breakdown for the types of applications made in finance cases. This was partly because often, applicants' representatives simply ticked everything on Form A (this appeared to be to keep all the applicant's potential options open). It was also because other documents which might identify the orders sought were often either not on file, or were inconclusive because the applicant said that they could not say what orders they would be seeking until they had seen the respondent's financial disclosure.

[88] Measured in whole years to the date on which Form A was issued by the court.

In 78% of cases, the fact relied on to prove entitlement to a divorce was behaviour. Adultery was relied on in 13%. Two years separation and consent, and five years separation, were relied on in 7% and 3% of cases respectively. This was different to the picture for divorces nationally in 2012, in which behaviour was relied on in 48%, and two years separation and consent in 26% (ONS, 2014). Again, the pattern in the court file review was consistent with other studies of finance cases.[89]

Representation status and funding in finance cases

Overall, 33% of these cases involved at least one LiP at the start of proceedings. This was much lower than in children cases in the sample. However, in common with the children cases, it was respondents who were unrepresented more often, as indicated in Table E.2.

Table E.2 Whether finance cases included litigants in person

Whether any parties were litigants in person	Cases	
	Number	Percentage
Applicant only	4	3%
Respondent only	42	28%
Both applicant and respondent	3	2%
Neither	100	67%
Unclear but applicant represented	1	1%
Total	**150**	**101%**

Base: 150 cases. Percentages do not sum to 100 due to rounding.

The most common configuration in finance cases involved wife vs. husband with both being represented (45%). This was followed by a represented wife vs. a LiP husband (23%), and husband vs. wife with both being represented (21%). Other configurations were uncommon.

Table E.3 Main party configurations in finance cases

Configuration	Cases	
	Number	Percentage
Wife vs Husband, both represented	68	45%
Represented Wife vs LiP Husband	35	23%
Husband vs Wife, both represented	32	21%
Other	15	10%
Total	**150**	**99%**

Base 150 cases. Percentages do not sum to 100 due to rounding.

[89] Hitchings et al (2013) reported that of 139 contested cases in their sample, behaviour was relied on in 73% of the divorces involved, and two years separation and consent was relied on in 7%.

Overall, there were 143 finance cases in which the applicant was represented at the start of proceedings. How these applicants were funding their representation could be ascertained in 135 cases, of which 21% had legal aid and 79% were paying privately.

Issues involved in finance cases

As it was difficult in finance cases to identify clearly what orders were being sought at the outset, this section focuses on issues which most clearly appeared to be in dispute.[90]

One identifier of a perceived need for the assistance of the court was an application for maintenance pending suit (MPS).[91] Such applications were made in 15% of cases (although it appeared that orders for MPS were made in a minority of these).

In 13% of cases, there appeared to be a dispute over how the former matrimonial home (FMH) should in principle be dealt with. This figure was based on cases in which disagreement was indicated as to whether the FMH should be sold, or should be transferred to one of the parties. It is likely to under-estimate the frequency with which there were disputes over the FMH. This is partly because it was often not clear what order one or both parties sought, and partly because the 13% figure does not take account of whether there were differences between the parties regarding the value of the FMH, their respective interests in it, or how those interests should treated when looking at the finances as a whole.

There appeared to be disputes over how pensions should in principle be dealt with in 27% of cases. This was based on cases in which there was disagreement as to whether a pension sharing order should be made, and/or an argument by one or other party that all or part of their pension should be ring-fenced and not taken into account when calculating the size of the 'matrimonial pot', i.e. the total assets available for division between the parties.

In 34% of finance cases, there were disputes around whether certain issues, assets or liabilities should be taken into account when defining the 'matrimonial pot'. These included:

- whether a third party (usually a relative of one of the parties) either had a share in an asset or was owed money which should be repaid first (this would depend on whether a loan or a gift was involved);

[90] This section does not cover the size of the assets/incomes involved. This is because often there were indications that either the parties' calculations were wrong or that information was incomplete.

[91] MPS involves the interim payment of maintenance, until a final order dealing with the finances is made.

- how ‘contributions’ should be treated (this mainly related to whether assets owned prior to marriage should be treated as matrimonial assets, but also included how compensation payments for injury received by one party should be treated);
- whether pensions should be ring-fenced on the basis of contributions made before the marriage;
- whether both parties were responsible for debts incurred by one of them;
- whether assets acquired after separation should be taken into account;
- whether inheritance prospects should be taken into account.

These cases also included a small number in which one of the parties sought to rely on the provisions of a previous agreement, which the other argued was invalid.

A further potentially complicating factor was that in 31% of cases overall, one or both parties were self-employed or otherwise had business interests (in 11% of cases they had been in business together). Not all of these appeared to involve conflict arising from this, but there were indications that 20% of cases overall did. These included cases in which one party had had to leave the business in acrimonious circumstances, cases in which there was disbelief regarding disclosure of business assets and/or the income they produced, and situations in which there was strong disagreement about valuations of businesses.

General levels of mistrust and conflict

More generally, in 33% of cases there were clear indications that there was a lack of trust between the parties in terms of financial matters. As well as general complaints about lack of disclosure or the quality of disclosure, this was characterised by accusations of deliberate non-disclosure of assets or income streams, deliberate attempts to hide assets (e.g. by transferring them to third parties) or dissipating assets after separation. There were also a very small number of cases in which allegations of fraud or perjury were made.

A measure of general levels of conflict in finance cases was provided by the frequency with which conduct was cited as a factor to be taken into account: one or both parties cited the other’s conduct in 29% of cases.[92] In a majority of these, at least some of the conduct cited was linked to the finances in some way. A range of other behaviour, including domestic

[92] Conduct of each of the parties is one of the factors which the Matrimonial Causes Act 1973 requires the court to have regard to, if it would be inequitable to disregard it.

violence, affairs, drug or alcohol misuse, dishonesty, making false allegations, and conduct of the case was also cited in a majority of these cases.

Domestic violence

In 35% of finance cases, the divorce petition was based on behaviour and included allegations of domestic violence. Overall, there were allegations of domestic violence in 43% of finance cases.

How finance cases concluded

At the time of data collection, 127 of the finance cases had concluded.[93] Notwithstanding the levels of complexity and/or conflict indicated earlier, a small minority of these ultimately required adjudication. The vast majority of finance cases ended with a consent order, and of those which did so, most settled either in the early stages of proceedings, or at or around the time of the FDR.[94] However, 21 cases (17%) went all the way to the day of a trial (and of these 8 (6%) only settled 'at the door of the court'. Tables E.4 and E.5 provide breakdowns.

Table E.4 How finance cases concluded

How cases concluded	Number	Percentage
By consent	114	90%
Adjudicated	9	7%
Partially adjudicated	2	2%
Unclear – possibly adjudicated	2	2%
Total	**127**	**101%**

Base: 127 cases. Percentages do not sum to 100% due to rounding.

Table E.5 Stage at which finance cases settled

Stage at which cases settled	Number	Percentage
Before or at FDA or adjourned FDA	28	25%
Between FDA and FDR	17	15%
At or around FDR or adjourned FDR	50	44%
After listed for final hearing[95]	7	6%
At final hearing	8	7%
Unclear	4	4%
Total	**114**	**101%**

Base: 114 cases. Percentages do not sum to 100% due to rounding.

[93] A further 21 cases were still ongoing, and it was unclear whether two cases had concluded.

A common scenario in finance cases was for the parties to send in a draft consent order for approval on paper in advance of the next date set for a hearing; 41 of the concluded cases (32%) were settled in this way. Draft consent orders had to be accompanied by a Form D81 which, among other things, contained space to say how the case had settled. In most of these cases, the settlement was reported to have been arrived at via negotiations between solicitors and/or discussions between the parties. There were six cases in which it was reported that mediation had been instrumental; in four of these it was said to have been in conjunction with solicitor negotiation or assistance with implementation of the agreement.

Orders made in finance cases

Table E.6 provides a breakdown for the main orders which were made in concluded cases. Most cases involved more than one type of order, therefore the totals sum to more than the number of cases. Property adjustment orders in the table will have mostly involved the former matrimonial home (whether it was to be sold or transferred, and division of proceeds if sold) but also covered second and other properties.

Table E.6 Main orders made in finance cases

Order made	Number	Percentage
Property adjustment	110	87%
Lump sum	66	52%
Periodical payments ('maintenance') for spouse	29	23%
Periodical payments ('maintenance') for children	27	21%
Pension sharing	35	28%
Maintenance pending suit	8	6%

Base: 127 cases

[94] The FDR (financial dispute resolution) hearing is the second hearing in the standard pathway for contested finance cases and is designed to facilitate settlement.

[95] Six of these cases settled less than a week before the date set for a final hearing.