

# INTERDISCIPLINARY ALLIANCE FOR CHILDREN (IAC)

## AMENDMENTS AND SUPPORTING RATIONALE

- We face a tough agenda in public services but humane standards for vulnerable parents and children in family justice are core principles in a democratic society. Given the issues and outcomes as evidenced in case studies (see, IAC Briefing Paper 2) – to sacrifice these standards is short sighted and dangerous for parents and children.
- Universal provision in access to justice and equality of arms is the hallmark of a civilised society.
- Access to justice in family issues is not an abstract concept. Rather in a civilised society it provides vulnerable families with access to a system of adjudication which is fair, just and responsive to their needs while clearly prioritising the welfare of children. The system is accountable and available to all citizens regardless of age, ethnicity or gender.
- In civilised societies parents and children are the bearers of rights and not simply the recipients of services; legal aid is the mechanism enabling the realisation of those rights.
- Rights to representation and 'equality of arms' are built on the knowledge that:
  - parties are not necessarily equal in terms of knowledge or resources
  - power relationships exist in domestic relationships
  - people do not have the knowledge, skill or capacity to handle complex relationship breakdown themselves
  - parents do not always prioritise the welfare of children
  - in a just society people need access to a fully functioning family justice system.

## IAC PROPOSES/SUPPORTS THE FOLLOWING AMENDMENTS:

### 1 ACCESS TO JUSTICE

#### Amendment 1

Clause 1, page 1, line 6

After 'Part' insert: 'for the purpose of promoting access to justice and equality of arms'.

**Objective:** To specify objectives for providing legal aid.

#### Amendment 2

Clause 1, page 2, line 1

Leave out, ' and assistance in connection with,'

**Objective:** This utilises the definition of provided services as in the Access to Justice Act 1999

#### Amendment 3

Clause 8, page 5, line 35

Before "omitting" insert "adding services or"

**Objective:** To prevent further cuts and allow for categories of need to be brought back in, or introduced into scope.

## 2 PUTTING CHILDREN FIRST

Placing children at the heart of family justice – as the Family Justice Review (2011) and the Select Committee on the Operation of the Family Courts (2011) argue we should – is not simply a matter of preference or discretion, but rather a matter of law and due process.

Children and young people must have access to independent advocacy in any administrative and legal forum in which their interests and welfare are considered:

- their views must be ascertained regarding the issues in dispute/being considered
- they must be consulted as to whether they wish to be a party to proceedings, and
- they must be asked whether, when and how they wish to participate in the process.

Family breakdown is common and mostly involves children:

- evidence demonstrates children's interests are not necessarily the same as their parents
- heavily disputed cases concerning children are a tiny minority of all cases but they frequently contain features common to proceedings where there is serious *significant harm* to children (e.g. adult mental health problems, drug and alcohol abuse, housing problems and emotional ill-treatment of children).

### Amendment 4

Exceptional cases

Clause 9, page 6, line 16, at end insert

(c) that it is appropriate to do so, in the particular circumstances of the case, having regard to the particular circumstances of the client (vulnerability, capacity to represent themselves, health or mental health issues), the actual availability of alternative sources of advice and assistance and the impact and consequences on the client, or his family, of failing to receive advice and assistance under this Part.

(d) that the individual is aged 18 years or under.

**Objective:** To ensure children automatically qualify for exceptional funding. Also requires consideration of the client's vulnerability and consequences of not providing them with legal advice as factors qualifying their case for exceptional funding

While the preservation of legal aid for children who are *parties to proceedings* is to be welcomed, it is short sighted in the extreme not to recognise the impact on children of removing whole areas of welfare and family law areas from the scope of legal aid:

- those acting for children will become responsible for the bulk of case preparation
- this will add to delay and costs as they and the courts struggle to deal with unrepresented parents (Litigants in Person - LiP)
- this will reduce, at a stroke, any savings
- cases in private law in which children are made a party to proceedings, by definition, are likely to be complex; in such circumstances it is untenable to expect parents to represent themselves
- without skilled legal representation there will be no access to justice for some, and limited/compromised access for others.



### 3 CHILD ABDUCTION

The legal complexities of domestic child abduction are frequently greater than those pertaining to international child abduction; it is therefore fundamentally irrational to remove domestic child abduction from the scope of legal aid.

#### Amendment 5

Schedule 1, Part 1, page 119:

Leave out line 13 and insert "Removal of children from their usual place of residence"

Schedule 1, Part 1, page 118, line 22:

At end insert a new sub-paragraph

"( ) Civil legal services provided to an individual in relation to the following orders and requirements where the individual is seeking to prevent the removal of a child from that child's usual place of residence, or to obtain the return of a child who has been so removed –

- (a) a prohibited steps order or specific issue order (as defined in section 8(1) of the Children Act 1989);
- (b) an order under section 33 of the Family Law Act 1986 for disclosure of the child's whereabouts;
- (c) an order under section 34 of that Act for the recovery of the child;
- (d) a requirement under section 37 of that Act to surrender a passport issued to, or containing particulars of, the child."

**Objective:** To make legal aid available to obtain emergency order to prevent the removal of a child and unilateral change of residence inside as well as outside the UK and to include provision for recovery orders.

### 4 DOMESTIC ABUSE

Legal aid is a lifeline to vulnerable adults and children, this is especially so with regard to victims of domestic abuse, however:

- the definition of domestic violence in the Bill and the timescales proposed do not reflect women's lived experiences with an abusive partner
- the proposed definition of such violence does not reflect that already adopted by government and others, and
- the proposals do not recognise the imbalance of power in relationships.

#### Amendment 6

Schedule 1, Part 1, page 119

Leave out lines 42 to 45 and insert " 'abuse' means any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality;"

Insert a new sub-paragraph (10): For the purposes of this paragraph, evidence that abuse has occurred may consist of one or more of the following (without limitation):

1. A relevant criminal conviction or police caution for a domestic violence offence;
2. A relevant court order (including without notice, ex parte, interim or final orders) including a non-molestation order, occupation order, forced marriage protection order or other protective injunction;

3. An undertaking given to a court under the Family Law Act 1996 that the other party will not approach the applicant for civil legal services who is the victim of the abuse;
4. Evidence of relevant and ongoing criminal proceedings for a domestic violence offence concerning domestic violence or a relevant police report confirming attendance at an incident resulting from domestic violence;
5. Evidence that the victim has been referred to a Multi-Agency Risk Assessment Conference (as a high risk victim of domestic violence) and a plan has been put in place to protect them from violence by the other party;
6. A finding of fact in the family courts of domestic violence by the other party giving rise to the risk of harm to the victim;
7. A report in a prescribed form from a General Medical Council registered general practitioner confirming the incident complained of, that he or she has examined the applicant for civil legal services, and is satisfied that the applicant had injuries consistent with those of a victim of domestic violence likely to have been caused by the incident complained of;
8. A local authority letter before care proceedings raising the need for the applicant for funding to be protected from domestic violence by the other party as part of the concerns about a child's safety.

Insert a new sub-paragraph (11): For the avoidance of doubt, no time limit shall operate in relation to any evidence supporting an application for civil legal services under this paragraph 10.

**Objective:** To align the definition of abuse for the purposes of the gateway to legal aid for victims of domestic abuse in private law matters to that adopted by the Association of Chief Police Officers, the cross party government strategy on domestic violence and others.

#### **Amendment 7**

Schedule 1, Part 1, page 120, line 11:

At end insert a new sub-paragraph

“( ) Civil legal services provided to an adult (“B”) in relation to a court hearing in a matter arising out of a family relationship between B and another individual (“A”) where B has abused A or there is the risk of such abuse and where the court certifies the need for B to be represented at that hearing.”

**Objective:** To make legal aid available for the other party in private family law cases for the purposes of a court hearing where the victim would otherwise be cross-examined by them in person in order to protect victims and vulnerable witnesses in the proceedings.

## **5 MEDIATION**

Mediation is not appropriate for all separating couples: research evidence demonstrates it is not appropriate for victims of domestic abuse;

- in a civilised society we should not ask victims of abuse to sit in a room with their abuser in a ‘mediation’ process, nor should victims be subject to cross examination in court by an alleged abuser.

#### **Amendment 8**

Schedule 1, Part 1, page 102, line 14

At end insert new sub-paragraphs

- ( ) Civil legal services provided in relation to a family dispute where the LSC competent mediator certifies that -
- (a) there is a point of law, pivotal issue of fact of significant difficulty or an issue of unusual complexity that requires adjudication and the particular case is unsuitable for mediation;
  - (b) one or both individuals has serious medical or mental health issues and the particular case is unsuitable for mediation;
  - (c) there are serious allegations of domestic violence which are not capable of being resolved and the particular case is unsuitable for mediation;
  - (d) there are serious allegations of physical, sexual or other abuse in relation to the child who is or would be the subject of the order and the particular case is unsuitable for mediation; or
  - (e) both individuals participated in mediation in good faith but the mediation failed and the matter will not be resolved without adjudication.
- ( ) Civil legal services provided to an adult (“A”) in connection with a private children dispute between A and another individual (“B”), where the LSC competent mediator certifies that where the child who is or would be the subject of the order has no contact with A, A attended the mediation but B did not so, the mediation failed and the matter will not be resolved without civil legal services.”

**Objective:** To make legal aid available for both parties in defined circumstances where, on the basis of a consideration of adult disputes and the welfare of relevant children, mediation is deemed by a LSC competent mediator to be unsuitable or unsuccessful, including so that an individual at risk is not refused both publically funded mediation and legal aid.

## 6 FACE-TO-FACE SERVICES FOR VULNERABLE CHILDREN AND ADULTS

There are circumstances where the telephone gateway is not an appropriate mechanism to ensure access to justice and safeguarding for children or adults and where face to face advice is thus essential.

### Amendment 9

Clause 26

In clause 26, page 20, line 34, delete sub-clauses (1) (2) and (3) and insert:

(1) In discharging his duty under section 1(1) and in making arrangements under section 2(1) the Lord Chancellor shall endeavour to secure that services are available from a range of providers.

(2) In discharging his duty under section 1(1) and in making arrangements under section 2(1) the Lord Chancellor shall endeavour to secure that services are made available both by electronic means and in person.

(2A) In discharging that duty and making those arrangements, the Lord Chancellor shall in particular satisfy himself that services are made available in ways which address the needs of those who are likely to use the services in question.

(2B) The Lord Chancellor shall publish his assessment indicating how he is satisfied as described in subsection (2A).

(3) Subject to subsections (4) to (10), nothing in this section requires the Lord Chancellor to secure that, where services are made available to an individual under this Part, they are made available by a person selected by the individual where that person has not entered into contracting or other arrangements which the Lord Chancellor has put in place for the delivery of such services.

**Objective:** To remove the power to establish a telephone gateway to legal aid replacing it with duty to provide services through a range of channels from range of providers.