Consultation Response

Family Procedure Rule Committee

Consultation On Strengthening Existing Rules And Practice Directions To Encourage Earlier Resolution Of Private Family Law Children And Financial Remedy Arrangements

Response of the Association of Lawyers for Children

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The Association of Lawyers for Children (hereafter "ALC") is a national association of lawyers working in the field of children law. It has over 1,000 members, mainly solicitors and family law barristers who represent children, parents and other adult parties, or local authorities. Other legal practitioners and academics are also members. Its Executive Committee members are drawn from a wide range of experienced practitioners from both sides of the legal profession practicing in different areas of the country. The ALC exists to promote access to and equality of justice for children and young people within the legal system in England and Wales in the following ways:

i. lobbying in favour of establishing properly funded legal mechanisms to enable all children and young people to have access to justice;
ii. lobbying against the diminution of such mechanisms;
iii. campaigning and advocating on against any form of discrimination which may affect children within the family justice system;
iv. providing high quality legal training, focusing on the needs of lawyers and non-lawyers concerned with cases relating to the rights, welfare, health, and development of children;
v. providing a forum for the exchange of information and views on the development of the law in relation to children and young people;
vi. being a reference point for members of the profession, governmental organisations and pressure groups interested in children law and practice; and
vii. funding or co-funding research where we perceive gaps in knowledge or evidence relating to changes in policy and practice in children proceedings.

The ALC is a stakeholder in respect of all government consultations pertaining to law and practice in the field of children law and welcomes this opportunity to provide its views in respect of this consultation.

Section 1 - MIAMs

Question 1: Do you consider that there would be any specific issues that may arise as a result of the proposed amendments to Rule 3.8?

Yes.

1. Amendment to r3.8(1)(c)(ii)(ad) whilst the ALC would not oppose an amendment which made clear that the exemption relates to *financial* hardship, we do not agree that consequently it is only likely to be relevant to financial remedy cases or how that follows from the amended wording. If ineligible for legal aid, as many applicants to private law children proceedings are, considering the changes which came into force as a result of LASPO, financial hardship of attending a MIAM may well be a relevant exemption in those proceedings.
   We can foresee some circumstances where a time zone difference *may* inhibit the attendance at a MIAM, and these would not be covered if this category were changed.
2. Amendment to r3.8(1)(d)(ii) if the individual is already participating in another form of NCDR at the time of making the application, we question the benefit of requiring MIAM attendance particularly if a cost attaches. This is likely to build in delay which will not be in the interests of the child.
3. Amendment to r3.8(1)(k) it is our experience that a great many MIAMS take place by way of remote attendance and, if the practical arrangements are such that the prospective applicant is not prejudiced by this because of their disability, this seems a sensible amendment.
4. Amendment to r3.8(1)(l)(i) would lead to possible remote attendance at a MIAM by a prisoner, from prison. Mediation is a confidential process. The ALC would have concerns about the suitability of remote attendance in circumstances where private information about children could be discussed in an environment where the individual could be overheard or interrupted. We would be concerned that the removal of this exemption could lead to a wholly inappropriate environment for a mediation meeting and where highly private information about children could be overheard.
5. Amendment to r3.8(1)(m) we can foresee some circumstances where a time zone difference *may* inhibit the attendance at a MIAM especially if r3.8(1)(c)(ii)(ad) is limited to 'financial' hardship.

Question 2: Do you consider there are further amendments which could be made to Rule 3.8 to increase attendance at MIAMs (in the appropriate cases)?

No

Question 3: Do you consider that there are benefits to applicants attending a pre-application standalone MIAM (in instances where the respondent doesn't engage or is not contactable, for example), as opposed to both parties attending post-application when ordered by the court?

No.

The ALC consider that there is very limited benefit to an applicant attending a MIAM in the circumstances outlined. For those not legally aided, it is a cost many can ill afford and places an unfair burden on parents. For those legally aided, it will have little practical effect if the respondent is not similarly engaged. The court's power to direct both parties to attend a MIAM once the case reaches court, if appropriate, provides the appropriate balance.

Conduct of MIAMs r3.9

Question 4: Do you consider that there would be any specific issues that may arise as a result of the proposals relating to Rule 3.9?

Yes

In principle the ALC has no concern about a MIAM provider giving information, as now, as to other types of NCDR as long as MIAM providers i) are properly equipped to provide that information (ie receive appropriate training) ii) make clear that the information is advisory only and does not have the effect of ruling out parties' different preferences regarding NCDR, and iii) have time to undertake this additional work without comprising their other responsibilities. It may be that a standard document is made available to providers to disseminate. This would allow for uniformity in the information provided.

The ALC consider it inappropriate for MIAM providers to assess the 'suitability' of any type of NCDR. Our members have mixed experience from those they represent as to the utility of the SPIP, and at time of writing the new Planning Together for Children course is only just being implemented.

Those initiatives are court ordered. The proposal as to suitability being determined by the MIAM provider is a wholesale change without evidence base.

We are concerned that parties who have experienced domestic abuse may be forced to attend such a programme in circumstances where they have not appreciated that certain behaviours were abusive and/or have insufficient evidence of the same. The MIAM provider may not have identified domestic abuse as being an issue. Similarly with issues as to the welfare of a child. Our members have varied experience of MIAMS some being conducted with very little opportunity to explore the existence of domestic abuse and /or welfare concerns in any given case. There is no means of challenging the assessment of suitability for the programme. As the gateway to the court, this leaves the individual with no redress with significant article 6 considerations.

The rigour and flexibility of the current framework whether under PD 12J or more generally under the Child Arrangements Programme in PD12B provides for the potential for harm to the parties and individual child of any given initiative to be evaluated, with advice from CAFCASS, at the first hearing. That protective mechanism with court oversight as to the appropriateness of any given programme is removed by this proposal.

The ALC consider that there needs to be a much clearer evidence base to establish safe practice for referral outside of court. By way of example, where will the courses take place, who is providing the training, what recourse will there be for individuals who consider they have been wrongly selected for the course?

If views on suitability were expressed, again, they should be understood to be advisory only.

Question 5: Do you agree that the person conducting the MIAM should "assess" the suitability of different forms of NCDR at the MIAM?

The ALC have reservations about this as set out above. It would lead to satellite disputes as to whether the person conducting the MIAM fairly or properly assessed suitability. It is liable to undermine confidence in the MIAM process and cause further delay. It is also unclear what information will be available to carry out the proposed 'assessment'.

When MIAM Evidence Should be Provided to the Court

Question 6: Do you consider that there would be any specific issues that may arise as a result of the proposal that any required evidence of a MIAM exemption should be provided with the application to court?

Yes. Requiring evidence at the point of application rather than at first hearing could lead to unnecessary and undesirable delay in issuing an application. Some evidence may not be easy to obtain. This is particularly relevant to domestic abuse exemptions. Evidence is difficult to obtain often exacerbated by the time taken to receive it. By way of example, it may not be easy or quick for the applicant, who knows the existence of a conviction, to obtain evidence of it. A failure to do so denies access to the court for the most vulnerable. The ALC would be very concerned about stringent pre-application evidence requirements delaying commencement of even non-urgent proceedings which are necessary to safeguard a child's welfare.

There will be other cases where the private law dispute arises because of contact arrangements breaking down. Creating a further barrier to proceedings being issued and building in delay whilst evidence is obtained does not in our view consider the needs of the child and the statutory presumption (section 11 CFA 2014), unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare.

Question 7: Do you consider that there would be any specific issues that may arise as a result of the proposed amendments to bring forward the point at which the court must review the MIAM exemption and any supporting evidence to the gatekeeping stage for private family law children cases?

Yes . The court will have limited information to decide whether, in the case of a doubtful or wrong claim of exemption, the parties should be directed to attempt to mediate per r3.10(2). Under that rule where a MIAM is incorrectly claimed the court must order the applicant or parties to attend a MIAM unless considering 'all the circumstances of the case' it decides a MIAM is inappropriate.
At first hearing when considering MIAM exemption issues the court will have benefit of hearing from all parties (including the respondent who until that point will not have had the full opportunity to respond) and a Cafcass safeguarding letter which independently may raise additional risk issues/matters relevant to MIAM attendance. At gatekeeping the court will not have this information and may therefore decide on MIAM suitability unfairly and on inadequate information. The court

will have prejudged the issue without the benefit of the fullest of information; and undermined the confidence parties should be able to place in the family court system. It has the potential to have a chilling effect on, particularly, victims of domestic abuse which may prevent them seeking to access the court at all .

A decision to inappropriately require attendance at MIAM at best will cause unnecessary delay and at worst could cause/exacerbate risk to a party and/or a child.

Question 8: Do you consider that there would be any specific issues that may arise as a result of the proposal that where a claimed exemption is no longer relevant, the court has the power to order both parties to attend a MIAM, where appropriate?

Yes. The ALC strongly believes that early resolution of disputes between parents through mediation, avoiding court proceedings, is in the interests of children subject to those disputes and the family justice system. It is not in the interests of children to be subject to extended and protracted proceedings. If matters can be appropriately -and safely- resolved out of court, then this is welcomed.

However, when considering the need to divert parents to a MIAM, there are distinctions to be made to situations where proceedings are just starting and when they are well underway.

While the ALC would not oppose the court having a power to order attendance at a MIAM if circumstances that had enabled an exemption changed, we consider that it will often be inappropriate to attempt further diversion from court to a MIAM at a late stage in proceedings when, for instance, the court has directed the preparation of a s7 report or other expert evidence which may raise issues or concerns that do not form part of either party's case but may form part of a court's welfare determination.

Section 2 – Dispute Resolution

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

Our overarching point is that NCDR works most effectively when accompanied by legal advice and/or representation. The ALC considers that the provision of early free legal advice for those who could not otherwise afford it, would improve the take-up of NCDR.

We note that the proposed amendment to the rules do not mandate NCDR, but rather it is an option for the court to consider. To that end, we agree. However, the voluntary nature of NCDR to date has been integral to its success; it promotes sustainable proposals and subsequent agreements. If one party is reluctant to engage in NCDR and the court still adjourns the hearing, there could be significant delay in the resolution of the case (often to the tactical advantage of one party) which in turn will be detrimental to the interests of the subject child.

We are also concerned about the prospect of ongoing coercion or control by a party, and one party using or proposing NCDR to delay resolution (to their advantage). There is a risk of unfairness if one party to the NCDR has access to legal representation and one does not.

More broadly and of concern to the ALC is that much NCDR does not provide explicitly for consultation with the subject children. This is particularly relevant to competent children whose wishes and feelings are considered in the court process. Mediation which involves the children is available, albeit not widely, but it is not emotionally safe for a child in all cases.

There has been considerable research on the wish of children and young people to have their voices heard and for them to participate in decisions that concern them (see for example, The Nuffield Family Justice Observatory, *Children's experience of private law proceedings: Six key messages from research* (2021), and The Family Solutions Group Report What About me - https://www.judiciary.uk/wp-content/uploads/2020/11/FamilySolutionsGroupReport_WhatAboutMe_12November2020.pdf-final.pdf

The obligation to ensure children are heard in respect of decisions which affect them is set out in Article 12 of the UNCRC *"1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."
Domestically, the language of the CA 1989, section 1(3)(a) provides the means for the court to consider the ascertainable wishes and feelings of the subject child considered in light of his age and understanding.

The court in Mabon v Mabon [2005] EWCA Civ 634 recognised the need to ensure that the procedures and practice adopted by the Family Court should reflect a *"…keener appreciation of the autonomy of the child and the child's consequential right to participate in decision making processes that fundamentally affect his family life"*

It is difficult to see how a system in which a child's voice is essentially excluded can be said to be respecting the essential tenets of the Convention.

The ALC have considerable concerns about a process which excludes the possibility of hearing the views of the subject children in cases where their voice would have been heard within court proceedings. The possible exclusion of the voice of the child may lead to any agreements reached during any NCDR breaking down.

Question 10: Do you have any views on the appropriate timing for the court to adjourn proceedings in private family law children cases and/or financial remedy cases, in response to the issues raised in Paragraph 34(e)(i) and (ii)?

Yes.

Children proceedings do not easily replicate other civil proceedings where diversion to ADR may be entirely benign. The Family Court is an investigative jurisdiction which is well equipped to establish the child's safety and that of the primary carer when considering how to determine the application. The diversion of such a case from that process to mediated dispute resolution brings with it safeguarding issues that require judicial risk assessment advised by CAFCASS whether in their safeguarding report (which may not have the fullest of information if one party has not engaged), or at a later point likely through a section 7 report. We consider that the court requires that information prior to any decision abut adjournment for NCDR.

If the court proceedings are quite far advanced, there could be considerable delay to the resolution of the dispute in adjourning cases where both parties are not amenable to NCDR. We also consider that it will often be inappropriate to attempt further diversion from court to NCDR at a late stage in proceedings when, for instance, the court has directed the preparation of a s7 report which may raise issues or concerns that do not form part of either party's case but may form part of a court's welfare determination. In many cases the ALC think that cases approaching readiness for determination would be better listed for final hearing than delayed for an attempt at mediation by unwilling parents.

We question whether it is necessary, in all cases, for the case to be adjourned to allow for NCDR rather than encouraging, in an appropriate case, NCDR to take place during inevitable delays in listing cases Any adjournment inevitably exacerbates delay in determination of the case by the court if that is necessary.

The ALC have already expressed their concern at a process which adjourns a case for NCDR where the voice of the child has not been heard.

Section 3 – Costs Orders

Question 11: Do you consider that there would be any specific issues which would arise from amending the Rules to include an express provision for the court in financial remedy proceedings to factor in as a matter of "conduct" any failure to undertake a MIAM, if parties are ordered to attend a MIAM post-application, when considering costs orders against a given party?

n/a to the ALC

Question 12: Do you consider that there would be any specific issues which would arise in respect of the proposal that where the court determines that a financial remedy case is suitable for NCDR and encourages the parties to attempt it, but it is clear that one party has not attempted to engage with NCDR (without good reason), that the court should factor this in as a matter of "conduct" when considering costs orders against that party?

n/a to the ALC

Question 13: Do you think that attendance at NCDR should be determined through factual questions asked of the NCDR provider, or should the provider be asked to give subjective views as to whether an individual 'engaged' with NCDR (noting the satellite litigation and subjective determination concerns noted by the Committee)?

In so far as this applies to private law proceedings the ALC would be very concerned at a process which involved the subjective view of the NCDR provider as to whether the individual engaged in the process and consider that any information provided should be factual and limited to their attendance at NDCR.

Any requirement for an NCDR provider to disclose their opinion as to whether a party has adequately engaged inevitably compromises the confidentiality of the process and opens the view up to challenge and ancillary arguments which will inevitably delay ultimate resolution of the proceedings.

The parties could provide information as to whether they attended the session and on what date. This can be independently verified. The ALC consider that anything beyond this places the NCDR provider in a quasi-judicial role. In turn this may lead to complaints of unfairness with limited redress. We also consider that it is liable to prevent parties engaging with the provider.

Question 14: Do you consider that there would be any specific issues which would arise from having a pro-forma provided to the court which asks the parties to:

1. ***a) set out their position in relation to NCDR at the first hearing, and;***
2. ***b) set out their reasoning following any non-attendance at NCDR (where this has been recommended by the court) or at other later stages in proceedings?***

This could be dealt with on the application form or by way of a response (if respondent) prior to the first hearing.

The ALC agree that a free text box is liable to increase conflict between the parties however the court will need sufficient information to understand why it is asserted that NCDR is unsuitable. For victims of abuse, and/or where there are wider welfare concerns it will be important that the court has sufficient detail in order that a case is not improperly diverted.

It is unclear what reasoning is required following any non-attendance at NCDR. Is it proposed that detailed reasons are given here for non-attendance? If so, this is liable to raise the issues §52 seeks to guard against. However, the ALC consider, as above, that sufficient information is required in order that the matter be properly and fairly determined.

Question 15: Do you consider that the pro-forma should be required by the court via an "Ungley-style" order, or should it be a request by the judge rather than a standard requirement? If a requirement, at what stage(s) in the proceedings should it be made?

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Question 16: Do you have any suggestions for what the pro-forma should look like or should include?

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Question 17: Do you consider that there is a way to ensure that this pro- forma is not requested from victims of domestic abuse?

This could be dealt with on the application form (if the victim of domestic abuse is the applicant) or by way of a response (if respondent) and there should be a provision for the respondent to respond to the application/MIAM exemption prior to the first hearing.

Section 4 – Single Lawyer Models and Early Neutral Evaluation (ENE)

We are aware of at least one initiative which uses the single lawyer model in respect of coparenting. That initiative provides for parties to attend separate meeting to determine the suitability of the case of a joint advice session. The welfare of the child is at the heart of decision making in private law proceedings; there will be a variety of reasons why parties will have their own perspective on what is in the interests of their child and will want separate independent legal advice.

A single lawyer model is plainly going to be wholly inappropriate for cases involving DA or where there are other welfare concerns about a child.

ENE is also being used by some parties to resolve private law cases but in a very small number of cases. Without legal advice this is unlikely to be suitable for parties.

The ALC reiterate its concern as set out elsewhere in this response about processes which fail to take account of the child's wishes and feelings and pay lip service to their participation in a process which is centrally about them.

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