Association of **Lawyers for Children**

Promoting justice for children and young people

Consultation response:

SUPPORTING EARLIER RESOLUTION OF PRIVATE LAW ARRANGEMENTS

Response dated 9 June 2023

Response of the Association of Lawyers for Children

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Chapter 2

1. **Are you in favour of a mandatory requirement for separating parents (and others such as grandparents) to attend a shared parenting programme, if they and their circumstances are considered suitable and subject to the same exemptions as for the mediation requirement (see chapter 3), before they can make an application to the court for a child arrangement or other children's order?**
No

The ALC are supportive of any safe initiative which helps parents and carers minimise conflict for them and their children and which encourages and supports them to act cooperatively and collaboratively. We welcome the inclusion of family members closely involved in the care of a child. In suitable cases we are supportive of attendance on a shared parenting programme.

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 proposals now made introduce three changes at the same time (a) taking place pre application and therefore not court ordered; (b) being mandatory; and (c) suitability being determined outwith the court arena.

We note that such attendance would be subject to the same exemptions as the mediation requirement. Chapter 3 anticipates exemptions for 'evidence of domestic abuse', and 'certain child protection circumstances.

As regards domestic abuse, the anticipated self-certification for exemption fails to take account of those who may not be fully cognisant of the abusive nature of the behaviours they have experienced in a relationship. The MOJ's Harm report panel's call for evidence *"...received submissions from women who did not initially fully appreciate that certain behaviours were abusive, particularly so with sexual and coercive and controlling behaviours."* The ALC submitted to the panel, and maintain today, that at times "*…it requires skilled professionals (domestic abuse professionals, therapists or solicitors) to assist these victims to recognise the abusive relationship and to raise and evidence it at court*"(Section 5.2.1 of The 'Harm Report'-

Assessing Risk of Harm to Children and Parents in Private Law Children Cases Final Report dated June 2020, MOJ.)

A mandatory pre application attendance by its nature removes the protection inherent in Practice Direction 12J §9 *"[w]here any information provided to the court before the FHDRA or other first hearing (whether as a result of initial safeguarding enquiries by Cafcass or CAFCASS Cymru or on form C1A or otherwise) indicates that there are issues of domestic abuse which may be relevant to the court's determination, the court must ensure that the issues are addressed at the hearing, and that the parties are not expected to engage in conciliation or other forms of dispute resolution which are not suitable and/or safe"* [our emphasis].

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 (if determining attendance) may not have identified domestic abuse as being an issue. Our members have varied experience of MIAMS some being conducted with very little opportunity to explore the existence of domestic abuse in any given case.

In the alternative, there is a risk that a party does not make a court application because of this precondition and remains in a harmful situation rather than making a court application to safeguard a child's welfare.

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.

Equally, it is unclear what threshold will be applied for 'child protection' exemptions. Drug and/or alcohol misuse and/or mental illness are currently likely to prevent couples making safe use of mediation or similar services (PD12B 5.2); it is likely also to make inappropriate the mandatory attendance on a shared parenting programme. If the same criteria are used as currently exist for a MIAM exemption (section 47 enquiries or subject of a child protection plan) that excludes a significant swathe of cases where a parent has identified a welfare concern but where the local authority may not yet have instituted child protection measures.

The rigour and flexibility of the current framework whether under PD 12J and 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 the imposition of mandatory programmes in advance of application without a full understanding of the issues in the case.

To mandate this process without even trialling *voluntary* pre proceedings attendance is deeply troubling.

We are unclear of the content of the proposed shared parenting programme. Courses in the current from do not serve to educate the parents on safe relationships in order to permit identification of risky and potentially abusive behaviours at a pre action stage. We note that the MOJ Harm Panel, on a clear evidence base, identified the need for parents at a very early stage to receive, separately, psycho-educational work on domestic abuse in all its forms [paragraph 11.5] we have seen no progress on this advice. This requires investment and will need to be devised and separate to any shared parenting programme – it may necessitate parents attending more than one course of work. We note that the Harm Panel stated at paragraph 11.9 [page 182] "Educational and therapeutic provision relating to domestic abuse for parents in private law children's proceedings – both at the early/investigation stage of proceedings (aimed at identifying abusive behaviours and understanding available behaviour change interventions), as well as for victim-survivors post-court to assist in recovery. Like DAPPs and supervised contact services it would be appropriate for these services to be commissioned by Cafcass and Cafcass Cymru". This should precede any separated/shared parenting programme which will need to embed references back to the psychoeducational work on safe relationships. Following the work and courses a screening tool after that work (perhaps based on the CAFCASS Domestic abuse tool) will be far better placed to identify cases of domestic abuse or where risk to children and/or an adult is present.

Only after a staged process which is psycho-educative can mediation and/or shared parenting courses be accurately assessed as safe.

The ALC consider that there needs to be a much clearer evidence base to establish safe practice for referral outside of court before the process is made mandatory. 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?

The general principle of the Children Act is that delay in determining the question is likely to prejudice the welfare of the subject child. The ALC would be very concerned about mandatory pre-application attendance delaying commencement of even non-urgent proceedings which are necessary to safeguard a child's welfare.

2.If yes, are you in favour of this being required before mediation can start

Yes

No

Don't know

If attendance on such a programme is considered appropriate, the ALC anticipate that mediation stands the best prospect of success if, in an appropriate case, it commences after the parties have completed the course. However, the ALC would be concerned if respondents could strategically delay any application to court by failing to sign up to a course in a timely way.

It is also unclear whether SPIP providers have the capacity to undertake programmes within fixed times or on a 'quick turnaround' basis.

However, and as above, we note that the recommendations have failed to engage with the Harm panel's evidence-based advice regarding psycho educative work for parents about all forms of domestic abuse. This is precursor to a separated/shared parenting programme and/ or mediation. We would be concerned about such work being an afterthought tagged on to a pre-established course. The harm panel recommendations should form the base of any course.

3. Should information on the court process (non-tailored legal information) be provided to those with a private family law dispute at the mediation information and assessment meeting (MIAM), at the parenting programme or via an online resource or any other means (please specify)?

At the mediation information and assessment meeting (MIAM) x

At the parenting programme x

Via an online resource x

By any other means (please specify)

We agree that family court users need to be better informed and that there should be accessible information that is clear and written in plain English in order that they are understandable to the large number of litigants in person. We also consider that those who do not speak English need information on the court process. We consider that just as there should be clear information as to methods of non-court resolution at every opportunity, so too should information be transparently and consistently provided about the court process. Similarly, we consider there ought to be clear information available for children subject to disputes.

4. Based on current online resources, what are your views on an online tool being provided by the government to help parents, carers and possibly children involved in child arrangement cases? What information and resources should any such tool prioritise to support families to resolve their issues earlier?

The ALC support any initiative which provides those involved in child arrangement cases with information both as to the court process and alternatives. It is fundamental that anyone considering embarking on court proceedings is both aware of their legal rights, and the opportunities and ways in which they can resolve their dispute. This will be particularly important for those who are unable to access legal representation. Information as to options available is fundamental; the benefits of an out of court resolution can be explained. Some litigants may lack digital literacy. Others will not have access to technology. Consideration needs to be given to what facilities are available in court buildings in order that such information could be imparted. The ALC consider there ought to be an appropriate equivalent online tool available for children.

However, children proceedings do not easily replicate other civil proceedings. 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 ALC are very clear therefore that nothing is a substitute for Early Legal Help. Whist online tools can be helpful, they will be difficult to navigate for many and will inevitably be insufficiently detailed for individual situations. It is advice from a lawyer that will provide proper and fact specific advice to help litigants understand the court process, their prospects, the pro and cons of proceedings and what the court will require from them.

The Harm Panel identified dangers in what it found to be the pro contact culture of the family court and the absence of trauma informed work. Victims of domestic abuse particularly where the behaviours are coercive and controlling are exquisitely vulnerable to following a pathway towards agreeing that which may run contrary to their safeguarding instincts. Online tools which educate and inform are helpful but provide no support for someone triggered or traumatised by its contents and fears about an imperative towards what they perceive to be unsafe contact. We consider that the online information should involve educative resources on safe relationships and all forms of domestic abuse for these issues to be identified at an early stage. They must be devised with a trauma informed focus.

5. Do you think it is appropriate for mediator to determine suitability for co-parenting programmes at the information meeting?

No

Please see our answer to question 1. The MIAM provider may not have identified domestic abuse as being an issue. Our members have varied experience of MIAMS some being conducted with very little opportunity to explore the existence of domestic abuse 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.

In principle the ALC has no concern about a mediator giving information as to parenting programmes as long as they i) are properly equipped to provide that information (i.e. receive proper training) ii) make clear that their information is advisory only and does not have the effect of ruling out parties' different preferences, and iii) have time to undertake this additional work without comprising their other responsibilities.

The ALC have real concern as to mediators determining the ‘suitability’ of any particular programme. Often not all the relevant issues are apparent at the MIAM stage. Suitability should be the province of a judge, properly informed. Any assessment of suitability, if not accepted, will likely lead to satellite disputes as to whether the mediator fairly or properly

assessed suitability, and /or had the relevant information to do so. It could undermine confidence in mediator and cause further delay.

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

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. We have made a proposal for how the Government might minimise this risk. It involves devising and investing in the sort of psycho educative work recommended by the Harm Panel. There may be a place for this pre action and out of court and in conjunction with the separated/shared parenting information programme, although do not consider this should be mandatory pre proceedings if it prevents applications being made in the interests of a child. We reiterate that any course should be trauma informed and psycho-educative about domestic abuse in all forms with safe separated parenting relationships addressed following the Harm Panel advice .

Chapter 3

6. Can you share any experience or further evidence of pre-court compulsory mediation in other countries and the lessons learned from this?

No

7. How should the 'MIAM' pre-mediation meeting under this proposed model differ from the current MIAM?

The ALC consider that the pre-mediation meeting under the proposed model would in essence become a 'triage' meeting for private law disputes. This would place mediators in a 'gatekeeping' function to decide if matters should lead to proceedings. Such a decision is likely to be made with incomplete information. The consequences of this are significantly greater than the current MIAM process. On our proposals there would have been psycho-educative work where abuse in all forms is addressed. If this is undertaken the pre mediation meeting might be a suitable place for a suitably trained professional to undertake a risk screening tool for domestic abuse, but the emphasis would very much be on being 'suitably trained'.

We note the observation of the Harm Panel at [3.1.9 page 31] "Many individuals who do attend mediation may not have previously disclosed their domestic abuse, or indeed, may not have been aware that their experiences constituted domestic abuse. Current policy and practice guidelines therefore make clear that professionals must be well trained in identifying the signs of domestic abuse, and be able to deal with this appropriately, not mistaking domestic abuse with parental conflict, and ensuring the protection of vulnerable survivors is paramount." It is not our members experience that the expertise is always present and the training of the assessors are not sufficient. The MOJ will need a mandatory programme of domestic abuse and trauma informed training for the providers before any of this could be implemented, we submit.

Further it is unclear whether the voice of the child will factor into such meetings and how this will be obtained and recorded. This is particularly relevant to competent children who will have clear views on disputes that directly impact them. We note the powerful observations of the Harm Panel about the voice of the child which appear not to have been incorporated into the mediation model suggested here.

8. What should "a reasonable attempt to mediate" look like? Should this focus on the number of mediation sessions, time taken, a person's approach to mediation or other possibilities?

Mediation works where there is a will to negotiate and compromise; it assumes both parties are willing to negotiate. It proceeds on a presumption of equal bargaining power. Where domestic abuse is a feature that is not a safe position from which to proceed. As set out in the consultation narrative the mediator works with the family to come to a shared agreement. Importantly, it is said, mediation allows people involved to stay in control of the outcome and that neither will be forced to do anything against their wishes. Integral to the process of mediation is that it is voluntary. Introducing a compulsory element undermines that central tenet.

Confidentiality too is central to the mediation process; the mediator impartial. The ALC opposes any change that would require a mediator to disclose their opinion as to whether a party to the mediation has engaged sufficiently 'reasonably' in the process. This undermines mediation as confidential process. It also undermines the independence of the mediator who does not act on behalf of either party.

The parties could be asked whether they attended mediation; a fact which could be independently confirmed by the mediator. Beyond that bare confirmation, the confidentiality of the mediation will be undermined, placing the mediator in a quasi-judicial role. This has implications for the fairness of the process and independence of the mediator. It also provides an opportunity for satellite disputes causing further delay and distress. It could lead to calls for mediators give evidence about what happened, which would be highly inappropriate.

If parties are aware that their engagement is being 'assessed' by the mediator this will inevitably undermine the whole process. A consideration of whether there was a 'reasonable attempt' to mediate (beyond knowing whether the party attended) erodes so many of the fundamental tenets of mediation that it cannot fairly be described as a mediation at all.

For those who experienced domestic abuse but may not fully appreciate that certain behaviours were abusive, mediation cannot address the underlying power imbalance. If the court decided that there was an insufficient attempt to mediate in a case with this sort of power imbalance, it has a chilling effect on victims of abuse : a judge effectively saying they do not believe the victim (in advance of any hearing evidence on this issue). Similarly, individuals with other vulnerabilities such as learning needs, mental health, emotional needs or physical impairment are liable to be inappropriately prejudiced by any objective assessment of engagement.

We draw attention to paragraphs 7.4.1 of the Harm Panel report in particular "Given that conciliation and mediation are usually considered – and para 9 of PD12J falls to be implemented – at the first hearing before allegations of domestic abuse have been determined, the court should take a precautionary approach unless there is positive evidence that alleged abuse has been acknowledged and addressed and that parties are able to speak and negotiate freely on their own behalf." We stand by this advice of the Panel upon which the ALC was represented.

The ALC have concerns at information such as 'time taken' or 'number of sessions' being used as a criterion of reasonableness. Some parties may reach agreement in one session; others will take many sessions. Equally for some it is obvious that agreement cannot be reached at the first session.

Objectively determining reasonableness whether by assessing the amount of time spent in mediation or otherwise is likely to result in real injustice, not least if it is to the benefit of one

party to delay resolution for their advantage. The ALC consider that this proposal risks undermining the parties' article 6 rights.

9a. Do you agree that urgent applications, child protection circumstances (as set out in the current MIAM exemption), and cases where there is specified evidence of domestic abuse, should be exempt from attempting mediation before going to court?

Yes. The ALC would be very concerned about the removal of these exemptions or a dilution of their contents, they are necessary to safeguard a child's welfare. Such removal has the potential to cause risk of harm to a child. We note that the Harm Panel advised no changes to these important safeguards.

What circumstances should constitute urgency, in your view?
Please explain your answer

The ALC consider that the current definition of urgency under rule 3.8(c) FPR is appropriate. The ALC have always been concerned that the MIAM exemption pursuant to 3.8(b) is narrowly drawn. Parties (either of them) may have child protection concerns which have not yet been investigated by a local authority under section 47 or be subject to a child protection plan. In practice that has been met with an exemption claim under r3.8(c)(aa) urgency 'risk of harm to a child' which is rightly interpreted broadly to ensure that a child's welfare is safeguarded.

If this exemption is watered down, it may lead to a decision to inappropriately require attendance at mediation which will at best will cause unnecessary delay and at worst could cause/exacerbate risk to a party and/or a child. That risk could come from a parent being denied time with their child which will be further delayed if exemptions are changed and /or mediation made compulsory.

10. If you think other circumstances should be exempt, what are these, and why?

No.

11. How should exemptions to the compulsory mediation requirement be assessed and by whom (i.e., judges/justices' legal advisers or mediators)? Does your answer differ depending on what the exemption is?

The best way to get parents to mediate is to provide them with early legal advice; compulsory mediation is not a substitute for funded early legal advice. It will provide clear understanding of their rights, and confidence that mediation is right for them in the specific circumstances of their case.

In their conclusions to chapter 5, [5.9] the Harm Panel identified that "Once abuse is recognised by the victim, it is very helpful for them not to feel alone when they are trying to raise that abuse with children's social care, Cafcass/Cymru and the court. The fear of disbelief is a significant factor dissuading victims from raising allegations. However, that fear can be mitigated by appropriate support and legal advice." Skilled legal advice is essential for both parents not just the party raising domestic abuse but those facing the allegations. Early concessions can assist considerably in progressing safe arrangements for children. The current legal aid gateway requires the parent to have identified themselves as a victim of abuse and evidence it. That is unrealistic at this stage. Early advice legal aid would assist in diverting more cases from court than compulsory mediation. If the pre court education and mediation scheme was supported by legal advice certificates for a lawyer to assist the parties there is a better prospect of early safe agreements.

The proposal suggests that the parties will be able to self-certify exemptions. Those exemptions will need to be scrutinised to ensure they are validly claimed. The ALC note that it is also proposed that evidence supporting an exemption would have to be supplied with the application in several cases. Requiring evidence at point of application rather than at first hearing could lead to unnecessary and undesirable delay in issuing an application. Some of the evidence may not be easy to obtain (e.g. if a DA exemption is claimed regarding the respondent having a relevant conviction, it may not be easy or quick for the applicant who knows the existence of a conviction to obtain evidence of it) and may result in some applications not being made at all.

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(which will include spending time with both parents where safe to do so). It would also be concerned about a decision being made about mediation without hearing from both parties.

At the first hearing the court will have the benefit of hearing from the parties (including the respondent who until that point will not have had full opportunity to respond) and a Cafcass safeguarding letter which may raise additional risk issues/matters relevant to mediation attendance. At gatekeeping it will not have this information and may therefore decide on mediation suitability on inadequate information. Any decision should await a safeguarding report from Cafcass at the very least. The ALC are concerned to ensure that parties are not deprived of access to justice and of putting their case in respect of attendance.

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

12. What are your views on providing full funding for compulsory mediation pre-court for finance remedy applications?

The observations about parents who are victims of domestic abuse apply with equal force here. The definitions of domestic abuse incorporate financial abuse there would still need to be psycho-educative work and a screening tool for safe mediation to be possible. The outcomes of these cases substantially affect children and their security at home. Concurrent financial litigation can at times prolong children cases and so any measures to bring about early resolution is welcome provided it recognises and provides support for victims of domestic abuse when mediating if they have not qualified for an exemption. We have set out our concerns above as to a mandatory process of mediation.

13. Does the current FMC accreditation scheme provide the necessary safeguards or is additional regulation required?

No – additional regulation required

Please provide reasons for your answer
See answer 14 below

14. If you consider additional regulation is required, why and for what purpose?
Please state your answer

We consider that compulsory attendance at a psycho educative course about all forms of domestic abuse and a form of the separated parents programme are sensible and safe mechanisms to get across meaningful information and flush out issues of safeguarding at an early stage. This should be regulated to maintain the standards required for such delicate trauma informed work. The mediators and providers should have regulated mandatory training programmes for their staff to ensure that they meet the necessary standards for risk assessing a situation for harm before any mediation work can take place. We consider any domestic abuse assessments and screening should be conducted by domestic abuse experts.

15a. Should the requirement for pre-court mediation be expanded to include reasonable attempts at other forms of non-court dispute resolution (NCDR), or should it be limited only to mediation?

Mediation
Other forms of NCDR
Don't know x

Please explain your answer

The ALC are concerned about the proposal for mandatory mediation as set out above. That said, mediation does not suit every case. The parties should not be inhibited from choosing an alternative form of NCDR if they both agree.

However, mediation is likely to be the most cost-effective form of NCDR. The Family Mediation Voucher Scheme will be available to help parties solve disputes through mediation; this funding is not available for other NCDR. It would be inappropriate to compel attendance at a form of NCDR which is likely to be expensive and where funding is not available. In the event that funding was provided, other forms of NCDR could be considered but only with agreement.

We do not consider single lawyer models to be suitable for those who have suffered domestic abuse; there is a high risk of coercion and a deeply troubling power imbalance.

15b. What are the advantages and disadvantages of expanding the requirement?

Many parents feel unsupported in mediation, having to take legal advice outside of mediation meetings and not having the emotional support of their lawyer present. If there is a power imbalance between the parents, mediation can create agreements that fail almost instantly when they are put into practice.

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 a particular type of NCDR, 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.

As above, the ALC would be concerned about those who have suffered domestic abuse feeling pressurised to attend any form of NCDR. The ALC consider that any form of NCDR cannot replace early, accessible legal advice. Very often victims of domestic violence question their own judgment (after years of controlling behaviour); these individuals would benefit from legal advice, properly funded rather than being forced into NCDR.

More broadly and of concern to the ALC is that mediation which involves the children, albeit not widely used in our experience, 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 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 MoJ response to the Harm Report concluded with a recommendation that 'that the range of options for hearing from and advocacy, representation and support for children be explored more fully as part of the work of elaborating and piloting the reformed Child Arrangements Programme. We will trial a stronger voice of the child, as part of the inquisitorial approach in the IDAC pilots (above) to ensure children's wishes and views are central to the process. We will also re-assess methods of child engagement, working with child psychologists and other experts to understand more about how and when children want to engage in a process, and provide their own account'. Contrary to the government position in June 2020, compulsory mediation and / or NCDR mandates a process which has no provision to hear the voice of the child, still less a 'stronger voice'.

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 any NCDR process which excludes the possibility of hearing the views of the subject children.

If you have answer 'mediation only', go to question 15e and ignore 15c and 15d.

15c. If for 15a you answered, 'other forms of non-court dispute resolution (NCDR)', to what other forms of NCDR should it be expanded?

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15d. If for 15a you answered, 'other forms of non-court dispute resolution (NCDR)', what accreditation/regulatory frameworks do other forms of NCDR have that could assist people in settling their family disputes in a way that fits with the legislation that applies to private law children cases and financial remedy cases?

This is best answered by collaborative lawyers and arbitrators

15e. If the requirement is limited to mediation, should completion of another form of dispute resolution lead to an exemption from the requirement to attempt mediation?

Yes – if parents agree to another form of NCDR, the ALC consider that they should be exempt from the requirement to attempt mediation which is liable to cause delay which will not be in the interests of the child.

16. What is the best means of guarding against parties abusing the pre-court dispute resolution process:

(i) should the court have power to require the parties to explain themselves?

Mediation is a confidential process. Requiring parties to provide detail from the mediation inevitably undermines that confidentiality. It is likely to inhibit participation in the process.

Mediators are not able to advise on the legal merits or facts of a case, rather they facilitate an agreement. Without understanding the merits of their case or what the court would consider an outcome in the best interests a child, it is not surprising that some parents wish for a judge to decide. It is why NCDR is no substitute for having access to legal advice. It is that advice which will support the NCDR process.

Consequently, 'requiring the parties to explain themselves' may result in an unfair assessment by the tribunal as how well the litigant has used the pre court dispute process. Parties should always have the right not to settle and to proceed to a hearing. This is likely to disproportionately affect those affected by domestic abuse; and/or who are litigants in person who may not be able to articulate their position sufficiently.

(ii) what powers should the court have in order to determine whether a party had made a reasonable attempt to mediate, for example when considering possible orders for costs?

The ALC consider the court could properly enquire as to whether the party had attended mediation. Beyond this the ALC have considerable concerns about breaching the confidentiality of the process, and impartiality of the mediator. See response to question 8.

The ALC have concerns at information such as 'time taken' or 'number of sessions' being used as a criterion of reasonableness. Some parties may reach agreement in one session; others will take many sessions. Equally for some it is obvious that agreement cannot be reached at the first session. Objectively determining reasonableness by assessing the amount of time spent in mediation is likely to result in real injustice, not least if it is the benefit of one party to delay resolution for their advantage and/ or put pressure on the other party to agree.

17. How could a more robust costs order regime discourage parties in court from avoiding reasonable attempts at pre-court or post-application mediation and lengthening proceedings unnecessarily? Should judges continue to have discretion to decide when to make these orders and what specific costs to include?

The court already has the power to make costs orders if it thinks it just to do so (rule 28.1 FPR). In deciding what order to make the court will have regard to all the circumstances including the conduct of the parties (r44.2(4) CR 1998).

Rule 44.2(5) provides that the conduct of the parties includes—(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed … any relevant pre-action protocol;(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; (c) the manner in which a party has pursued or

defended its case or a particular allegation or issue; and (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.' (Our emphasis)

Whilst it is not routine for costs orders to be made in children cases that is for good reason: as set out in Sutton *London Borough Council v Davis (No 2) [1994] 2 FLR 569:* the proceedings are partly inquisitorial, and the aspiration is that in their outcome the child is the winner and indeed the only winner. The court does not wish the '*spectre of an order for costs to discourage those with a proper interest in the welfare of the child from participating in the debate', 'it can also generally be assumed that all parties to the case are motivated by concern for the child's welfare.'*

If one party makes an application for costs, the court will hear submissions as to the reasonableness of the parties conduct and the ALC consider that the court should continue to have a discretion as to when to make such orders and what costs to include. The current rules permit the court to review participation in any pre action protocol (which is presumably where any proposed changes to mediation will sit), and do not see that any amendment to the rules is required.

There should be considerable caution in going beyond the current rules which may have the effect of litigants not pursuing applications in the interests of the child. The ALC would have real concern if a party with a weak case could intimidate the other party into reaching a settlement, by threatening costs if they refused to settle, and would have concerns if this prevented access to justice- there are several article 6 considerations. The ALC can foresee this being used as a form of economic abuse; and risks vulnerable individuals agreeing arrangements that are unsafe to avoid a costs order.

Inevitably if such an order was made it would lead to satellite litigation considering the 'reasonableness' of the approach to mediation. This will result in further court time and delay for those who understand how to challenge such an assessment; for those who do not it could result in real injustice.

18. Once a case is in the court system, should the court have the power to order parties to make a reasonable attempt at mediation e.g., if circumstances have changed and a

previously claimed exemption is no longer relevant? Do you have views on the circumstances in which this should apply?

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 clearly not in the interests of children to be subject to extended and protracted proceedings and if matters can be safely and appropriately resolved out of court then this is welcomed.

However, 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 mediation 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.

In many cases the ALC would think that cases approaching readiness for determination would be better listed for final hearing than delayed for an attempt at mediation by unwilling parents.

There may be cases where an applicant has made an application to reinstate contact. Further delay in arranging and attending a MIAM may the applicant parent to go without contact with their child(ren) which will negatively impact upon the child. In circumstances where time is of the essence, when applications are initially made in respect of decisions regarding medical care, education and safety and welfare of the child(ren), it may not be in the best interests of the child to order a MIAM (after the initial exemption is no longer be relevant) when a court order is needed to prevent a further issue in respect of a child arising again.

19. What do consultees believe the role of court fees should be in supporting the overall objectives of the family justice system? Should parties be required to make a greater contribution to the costs of the court service they access?

The Supreme Court in Unison [2017] UKSC 51 emphasised the constitutional right of access as to the court as being inherent in the rule of law. In *Unison*, the Fees Order was declared

unlawful if there is a real risk that persons will effectively be prevented from having access to justice, or if the degree of intrusion into access to justice is greater than justified by the purpose of the Fees Order.

The question of whether fees effectively prevent access to justice must be decided according to the likely impact of the fees on behaviour in the real world. Fees must be affordable not in a theoretical sense, but in the sense that they can reasonably be afforded. Where households on low to middle incomes can only afford fees by forgoing an acceptable standard of living, the fees cannot be regarded as affordable.

A review of the Nuffield Research https://www.nuffieldfjo.org.uk/resource/private-family-law-whos-coming-to-court-england demonstrates that in 2019/20, 29% of applicant fathers and 31% of mothers making a private law application lived in the most deprived quintile (by definition, representing 20% of the wider population), with 52% of fathers and 54% of mothers living in the two most deprived quintiles (representing 40% of the wider population).

Threat of higher court fees risks placing these litigants beyond the court, effectively creating a two-tier legal system, and where children are adversely affected. The ALC would not support any increase to the court application fee.

- **End** -