Supporting earlier resolution of private family law arrangements:

A consultation on resolving private family disputes earlier through family mediation

Ministry of Justice

Submission

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Introduction

1. JUSTICE is a cross-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.

2. This submission sets out JUSTICE's response to "Supporting earlier resolution of private family law arrangements: A consultation on resolving private family disputes earlier through family mediation" ("**the Consultation**") presented by the Ministry of Justice ("**MOJ**").

3. JUSTICE's response is largely based on our Working Party report, *Improving Access to Justice for Separating Families* (2022) chaired by Professor Gillian Douglas.[1] The Working Party consisted of 25 experts in family justice, a combination of JUSTICE members and representatives from other organisations, including the Nuffield Family Justice Observatory ("**NFJO**"), the Family Justice Council and Cafcass. It also consulted over 100 stakeholders, with a broad range of experience, including family justice professionals (lawyers, mediators, judges, magistrates, legal advisors), social workers, psychologists, the volunteer and community sector, domestic abuse charities, family lawyers in other countries. And critically, the Working Party also took evidence from adults, including litigants in person ("**LIPs**"), and children with lived experience of the family justice system. These consultations were in addition to extensive desktop research, on the evidence-base for separating families' needs, experiences and outcomes both in and out of court.

4. The Working Party made 43 recommendations to improve the family justice system, to make it more efficient and tailor it to the needs of families not professionals. To do this, the recommendations sought to ensure the participation of vulnerable adults and children, to safeguard against unsafe outcomes, and to create opportunities for the safe, fair and sustainable resolution of disputes outside of court where appropriate.

5. JUSTICE's responses to the Consultation are below. In summary, our key concerns with the proposals are four-fold:

    a. **The lack of evidence for the proposals**:

[1] JUSTICE, *Improving Access to Justice for Separating Families* (2022)

i. There is no evidence that the courts are being inappropriately used by any significant number of families. Instead, the evidence shows that a minority of families use the family court, and the vast majority of those who do cannot be safely diverted away from court.

ii. there is no evidence that *mandating* mediation for the remaining minority will lead to better outcomes for children.

iii. The evidence suggests that one size does not fit all and in fact a variety of interventions could facilitate improved experiences and outcomes of the family justice system, and/or earlier resolution of problems where appropriate. These include but are not limited to the impact of early legal advice to both improve early settlement and improve experiences in court. This does not therefore support the prioritisation and funding of mediation over all other services and interventions for families.

b. **The risk of unsafe outcomes**. In creating a presumption of mandatory mediation and threatening costs sanctions, even with exceptions, there is a real risk of unintended consequences**.** These are that vulnerable parties will not claim an exemption to which they are entitled, through fear, intimidation, lack of legal knowledge or empowerment. Or they will claim the exemption but the evidential bar will be set too high. These scenarios risk unfair and unsafe outcomes for the exactly vulnerable parties and children family justice system is there to protect.

c. **Preparedness of the mediation profession and its regulators.** There have been recent initiatives in mediation regulation to improve safeguarding standards. This is positive. However, those newly improved standards need to be embedded, monitored and evaluated, and the capacity of the regulator to monitor and enforce those standards needs to be assessed. To position them as the effective "gatekeepers" to the family court now, prior to such work, would be peremptory and would risk unsafe outcomes.

d. **The right of the child to be heard.** The UK is a signatory of the ("**UNCRC**") which secures every child's right to be heard when decisions are being made about their lives. However, child inclusive mediation is optional, expensive, and still a minority practice. JUSTICE is concerned that state-mandated mediation will in fact lead to fewer children having their voices heard, in breach of the UK's obligations.

6. In light of the above, JUSTICE concludes that the proposals are not a proportionate interference with families' rights to access the courts in the determination of their child arrangements problems, under Articles 6 and 8 of the European Convention of Human Rights ("**ECHR**").

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Question 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**

Please provide reasons for your answer

7. JUSTICE's Working Party and many before it noted the disaggregated landscape of support available for separating families. This includes, for example, parenting programmes for adults, as well as guidance about communicating separation to children, support groups and resources for problems which co-exist with separation (such as mental health problems, financial and housing issues), and support and resources for children themselves. There is a clear need therefore to increase access to these resources.

8. However, JUSTICE does not consider the proposal meets this need. Instead the MOJ seeks to mandate attendance at one kind of intervention, which it is prioritising over all others, without any evidence for that decision, nor any information about how suitability would be determined safely in the community. JUSTICE is aware of the 'proof of concept' pilot in Manchester, Support with Making Child Arrangements Programme ("**SwMCA**"). However, while this pilot offered the Separating Parents Information Programme ("**SPIP**") to parents, it did so i) after a court application and subsequent safeguarding; ii) on a voluntary basis; and iii) the vast majority of cases were screened out or opted out.[2] Therefore, this pilot cannot be said to provide any evidence that a mandatory shared parenting course at the door of court will improve outcomes for adults and children.

[2] . MOJ and Cafcass, *Support with Making Child Arrangements Programme – Six-month Pilot Evaluation Report* (2020).

9. JUSTICE *does* support improvement in the accessibility of holistic support for parents, including, where appropriate, shared parenting programmes in the community. We agree that there should not be a need to go to court to access a shared parenting programme. However, for this to be achieved, we consider the following are required:
    - **Financial support**, to provide access to those who cannot otherwise afford the cost of the programme in the community, without a court order. We know that the private law cohorts in the family court in England and in Wales are disproportionately economically deprived.[3] Therefore without this financial support, any additional support for separating families is unlikely to be accessible for some of the most economically vulnerable families.
    - **Community access,** currently families need a court order to access shared parenting courses, like Working Together for Children ("**WT4C**") from Cafcass Cymru, or in England Cafcass's Planning Together for Children ("**PT4C**") (replacing the SPIP in April 2023). This would clearly need to change. Furthermore, if referral is not happening through the courts, access would need to be facilitated through trusted community places and networks. JUSTICE considers support may go unaccessed by the most vulnerable families if support is only available in one place and families are expected to know it exists and find their way there. Instead, JUSTICE recommends consideration of how it can be integrated existing networks and how new ones can be established, such as family hubs. A hub and spoke design is essential in JUSTICE's view, to target the families who most need support proactively and reach those who will not attend a centre due to lack of confidence or their having had previous bad experiences.[4] This should include schools as well as trusted people and organisations within marginalised communities. These recommendations are not solely for the purpose of improving access to parenting programmes, but improving access to holistic support, information and advice, legal and non-legal, for separating and separated families.
    - **Suitability and risk screening**: not all forms of support are suitable for all families. In the roundtable for domestic abuse organisations held by MOJ policy for this consultation, there was some confusion about whether the proposals were for *parenting programmes,* which could include programmes for abusive parents, or *shared parenting programmes,* which provide co-parenting strategies and guidance.

[3] L. Cusworth et al, Uncovering private family law: Who's coming to court in Wales? (NFJO, 2020) a Uncovering private family law: Who's coming to court in England? (NFJO), 2021

[4] In line with the Children's Commissioner for England's observations in Family Hubs Policy Paper (2021), p. 4.

The latter are inappropriate for families in which there is domestic abuse, or other risk factors (such as mental health problems or substance misuse problems which impact parenting capacity and pose a risk of harm to the child and/or the other parent). In such families, an intervention aimed at collaborative parenting, rather than risk-based strategies, could lead to inappropriate and even unsafe advice. Indeed, we know that these families make up the majority of the cohort actually in court; the SwMCA pilot found 80-86% of cases featured factors which made diversion to an out of court intervention unsuitable, one of the interventions being a SPIP. If these programmes are going to become available before court, there will of course have been no Cafcass safeguarding, no police checks, no local authority checks. To ensure, therefore, that inappropriate cases are not referred shared parenting programmes, risk-screening in the community is essential. However, previous studies of risk screening in SPIPs have found it to be inconsistent and inadequate.[5] JUSTICE therefore considers that universal and systematic risk screening practices must be established by all programme providers and by those referral professionals who may refer to them. Such risk screening should thereafter be evaluated to test whether it is working effectively.

10. In conclusion, JUSTICE is unable to support the proposal because it does not feature any of the above requirements. It is essential in JUSTICE's view to establish financial support, robust risk screening and community referral networks for support to be better accessed in the community. If those steps are missed, and instead a mandatory requirement is imposed, JUSTICE suspects it will not have the desired effect to support families to avoid court. Rather, it is highly likely, in JUSTICE's view, that it will become another "hoop to jump through" or "box to tick" and not a meaningful, safe and effective intervention.

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

- **No**

Please provide reasons for your answer

11. JUSTICE does not agree with mandating WT4C or PT4C before mediation can start. From the perspective of the child, JUSTICE is concerned about capacity of the programme providers being able to meet demand, and the delay that may be incurred.

[5] L Trinder *SPIP Plus pilot evaluation* (DfE, 2014)

12. More fundamentally, JUSTICE again does not consider the evidence supports the proposals. This is because the MOJ's reliance on the SwMCA pilot in support the proposal is flawed, not least given the small cohort of individuals who underwent the SPIP+mediation intervention. Of the 1190 which were considered by the pilot over the six-month pilot, the vast majority, 1019. were screened out for various reasons including safety. Of the remaining 171 individuals, a further 124 decided to opt out, with 47 cases remaining. Thereafter, only 18 cases safely and voluntarily participated in the SPIP+mediation intervention. This is clearly not representative of the court-going population (ie 18 of the 1190) and not representative of those who would be directed towards mandatory SPIP+mediation under the current proposals. The number of such cases is unknown because 1) there are no proposals to explain how the Cafcass screening undertaken in the pilot would be replicated out of court and 2) critically, the voluntary nature of the interventions is dispensed with in the proposals.

13. Finally, again JUSTICE is disappointed to see the incomplete referencing of the pilot results with respect to outcomes. The consultation only quotes one outcome figure – that 78% of the SPIP+mediation families resulted in "*either a consent order or made an application to withdraw their court case"*. There are two additional outcomes which were also measured and which provide a more accurate picture: 56% (10 families) reached full agreement, and a first hearing was avoided for only 22%, i.e. 4 families. JUSTICE is very disappointed that such findings, which temper the success which can be claimed by the first 78% finding, were omitted in the consultation. This is only exacerbated by the fact that the full pilot evaluation has not been put in the public domain by those consulting; JUSTICE has the evaluation only as a result of a Freedom of Information request made by one of our academic Working Party members in 2021.

Question 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**
- **via an online resource**
- **by any other means (please specify)**

Please provide reasons for your answer

14. JUSTICE considers information about the court process, as well as legal information about the substantive law applicable, should be provided in a multitude of ways and locations including and further to those listed.

15. Legal information should be accessible in the community at whatever stage a family is at in solving its child arrangements problem. Not all adults who would benefit from legal information will be at the point of wanting to attend a MIAM (or indeed being a position to pay the *circa* £100 to do so). Some may want some initial information; some may be exempt from a MIAM and should be able to access legal information about that; some may be respondents in cases in which a MIAM is exempt, who will have urgent information needs; and some may be joining litigation which is already underway, whose information needs are even more urgent.

16. As such, legal information should be accessible in the community, in a variety of places where families will go for help (a "no wrong door" approach). In JUSTICE's view, this means developing networks of advice, information and support as explained in the response to **Question 1** above. Specialist organisations who can provide legal information must form part of those networks; it is unhelpful and disorientating for legal help organisations, for example Citizens Advice Bureau, to be kept separate from other support agencies who could assist separating families with their non-legal problems, such as in a family hub setting.

17. JUSTICE also agrees that legal information should be available online (see further in response to **Question 4** below). Critically, the Working Party noted that the significant number of litigants in person ("**LiPs**") in these proceedings will continue to need legal information throughout the case; the effective participation of LiPs and the prompt resolution of the case is dependent on their ability to access accurate and timely legal information. Any online information source should meet such information needs, not solely explaining resolution options outside of court. In court, the Working Party further recommended that a case progression officer be allocated to each case, whose role would be to progress the practical and evidential needs of the case and improve the participation of litigants in person. This role would include facilitating access to legal information.

18. Of course, legal information for adults will only partly address the information needs of this cohort. The disruption to children's lives through parental separation can cause distress, trauma and confusion for children. This can be exacerbated if children are kept in the dark and then fill in gaps in their understanding and knowledge with distressing inaccuracies

(for example, going to court means mum or dad is going to prison).[6] In terms of holistic information and support, this should form part of the design of networks or family hubs in the community. This should particularly include schools in such networks, who will often be aware that children want information, and be in a position to deliver it.

19. Finally, JUSTICE heard from many consultees during our Working Party that non-tailored legal information can only go so far. While it can be an important first step for families, individuals want, and in many cases need, legal *advice*. For those who seek to understand their legal rights and obligations, general information cannot enable them to ask questions and apply the law to their individual circumstances. Those who can afford personally delivered legal advice will pay for it privately, however, the disproportionately economically deprived cohort who do end up in court are less likely to be able to do so.

20. The "Affordable Advice" service by Law for Life in partnership with Resolution demonstrates the impact of making legal advice more accessible. The service is aimed at those with finance and/or children problems, both before or during court, when advice has been inaccessible due to fear and confusion about prices, the high cost of advice, and lack of confidence about how to find a good solicitor, and how to be sure it will be worth it. Throughout pages of online legal information on the AdviceNow website there are regular opportunities to receive advice from a Resolution lawyer at a fixed rate. An evaluation identified that the advice has been successful in enabling individuals to weigh options, make informed choices, reduce their stress, improve their confidence to act, and helped them make their case better.[7] It is important, however, to note that the advice was at a fixed fee, not free, and therefore the most deprived will still have been excluded from the service.

21. Furthermore, the MOJ's own Legal Support for Litigants in Person ("**LSLIP**") programme has been funding and evaluating a limited number of legal support services.[8] The evidence in the interim report suggests improved client outcomes in all areas; however, early specialist legal advice in relation to family problems had a particularly successful impact on out of court resolution: 79% of the family sample who received generalist advice,

[6] See summary of research in A. Roe, Children's experience of private law proceedings: six key messages from research (NFJO, 2021)

[7] See Law for Life, *Research Briefing Affordable Advice Service* (May 2023)

[8] Three national, five local and three regional grants, covering a range of areas in England and Wales. MOJ, Legal Support for Litigants in Person (LSLIP) Mid-Grant Review: Summary of Key Findings, see Map at slide 4.

casework and early specialist legal assistance *before engagement with the formal court system* (stages 1 and 2 in the evaluation) resolved problems avoiding the need to go to court, as opposed to 11% of the employment sample and an average of 62% across all areas of law. [9]

22. We therefore consider publicly funded early legal advice to be a vital tool within the family justice system: it can help separating families access the right solution, it can help focus resources on the families who need court most, and can better prepare those families for court. **We recommend that publicly funded early legal advice on child arrangements should be piloted without delay**.[10]

Question 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?

23. The internet is an important tool to help families find the information they need and navigate their options.[11] However, JUSTICE's Working Party was concerned by the sheer volume of information online of varying quality, amongst which users do not know what or whom to trust.[12] There are also a number of online forums in which community members share details of their child arrangements problems and others give advice. The use of

[9] Welham and W. Dugdale, Legal support for litigants in person mid-grant report (MOJ, 2022) Table 20 at p. 80.

[10] The Working Party was not the first to suggest early legal advice should be reintroduced in this area. The Law Society and Resolution shared with us their policy recommendations for the reintroduction of early legal advice for private family disputes, which they have been making for some time. It was also recommended by the Westminster Commission on legal aid and the House of Commons Justice Committee. The latter discussed possible models, including Resolution's "family law credit" scheme, which would combine assessment of legal aid eligibility with other options in an early advice session, and an updated version of the Green Form scheme, which was introduced in 1973, that would allow individuals to understand their rights and be directed to the services that are most appropriate for their situation. House of Commons Justice Committee, The Future of Legal Aid : Third Report of Session 2021-22, (21 July 2021) HC 70, pp. 43-44. See also Westminster Commission on Legal Aid, 'Inquiry into the Sustainability and Recovery of the Legal Aid Sector (All-Party Parliamentary Group on Legal Aid, *October 2021), p. 25.*

[11] The *Legal Problem and Resolutions Survey* found that 46% of those who had recently experienced a family problem used the internet, either alone or in combination with another source of advice, to find information and advice on how to solve the problem. This was high in comparison to almost all other civil and administrative problems they looked at. See R. Franklyn, T. Budd, R. Verrill and M. Willoughby, Findings from the Legal Problem and Resolutions Survey 2014-15 (MOJ, 2017), p. 81. This research is almost ten years old, JUSTICE considers it likely that use of the internet, particularly post-Covid, has been maintained or increased.

[12] R. Lee and T. Tkacukova, 'A Study of Litigants in Person in Birmingham Civil Justice Centre,' 2017, at pp. 11-13. I. Pereira, C. Perry, H. Greevy and H. Shrimpton, 'The Varying Paths to Justice: Mapping problem resolution routes for users and non-users of the civil, administrative and family justice systems' (MOJ Analytical Series, 2015), p.43.

these online forums by those who cannot afford personally delivered advice is unsurprising: they offer emotional support and much needed interaction with peers tailored to their problem. However, they are unregulated environments which lack quality-control, providing fertile ground for misleading information and advice.

24. In conclusion, the Working Party recommended **a single authoritative online information platform for separating families.**[13] This would provide not only legal information, but holistic information and separation and signposting to legal and non-legal support.

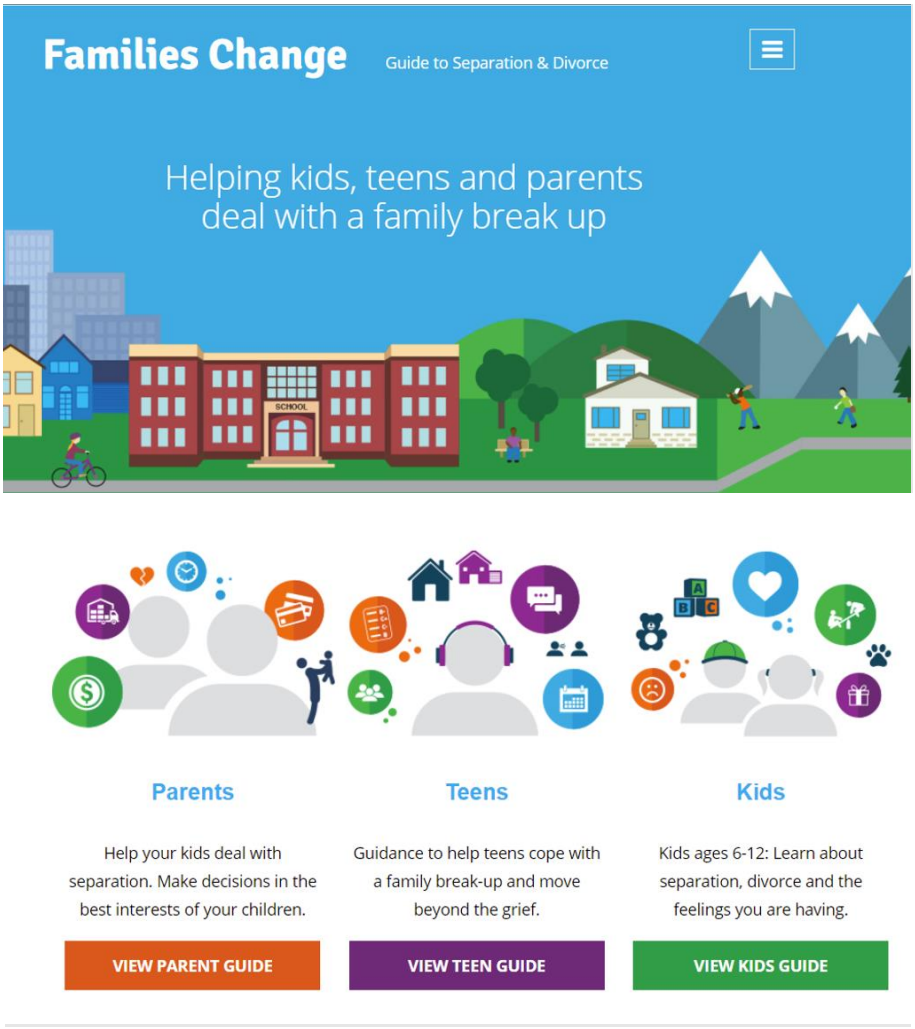
25. JUSTICE further supports that platform being designed with children as discrete users in mind. With regards to legal information about court process specifically, there are some good court and non-court resources on the Cafcass website. However, the website is not currently easy to navigate, nor do all children have the opportunity to engage with Cafcass or know who they are. Some children who are seeking information do not have parents in court, whilst even those in court may not be aware of Cafcass.[14] The accessibility of information for children would therefore be greatly improved by a single authoritative online platform, which would not only host such court information but be a resource for all children experiencing separation, not just those whose parents are in court, would in our view be more accessible than the Cafcass website. Other websites could also signpost more children to it, such as Childline.

26. The online platform should therefore include an opportunity for the user to identify themselves as a child on the landing page, and thereafter access tailored information and links to support and advice. The landing page of "*Families Change*" websites, used throughout Canada and in some US states, is a useful example.[15]

[13] Others have also suggested this solution: I. Pereira, C. Perry, H. Greevy, and H. Shrimpton, The Varying Paths to Justice: Mapping problem resolution routes for users and non-users of the civil, administrative and family justice systems. (MOJ, 2015); A. Barlow, J. Ewing, R. Hunter, and J. Smithson, Creating Paths to Family Justice: Briefing Paper and Report on Key Findings (2017) pp. 11-12. In other areas of the justice system, see JUSTICE, Delivering Justice in an Age of Austerity (2015); Understanding Courts (2019); Solving Housing Disputes (2020)

[14] Less than half of children currently have an "opportunity to be heard" in private proceedings in court, not all of whom will be engaging with Cafcass but instead with local authority social workers, whose familiarity with private law proceedings can be inconsistent. See C. Hargreaves et al, 'Uncovering private family law: What can the data tell us about children's participation?' (NFJO, 2022), pp. 8-11.

[15] For example, Families Change – British Colombia



27. In the longer term, as the content of the website develops and provides more access to useful information, the website will need to be skilfully ordered and easily navigable, to prevent information overload for users. JUSTICE supports the development of an interactive tool rather than simply providing digitised written information, videos and hyperlinks. An interactive tool would give users the opportunity to 'self-triage' through a series of questions and decision trees, thereby tailoring information to their specific needs.
28. JUSTICE's report, *Delivering Justice in an Age of Austerity,* first recommended such self-triage be integrated into online civil justice in 2015.[16] An example can be seen in the MOJ's housing disrepair tool, which provides a series of questions to help narrow the relevant information for the user, such as the type of housing, the urgency of the problem and the effect on the tenant's health. This then produces a curated page of information and links

[16] Inspired by the British Colombia Civil Resolution Tribunal online portal and the Dutch Rechtwijzer system. See JUSTICE, Delivering Justice in an Age of Austerity (2015) p. 33 onwards.

based on what the user has said.[17] This could include links to advice, and JUSTICE again highlights the "Affordable Advice" pilot discussed above.

29. For an interactive tool to navigate a range of legal and non-legal information and support effectively, cross-governmental collaboration would be beneficial, including between the Department of Health, the Department for Education, the Department for Work and Pensions, the MOJ, the Department for Levelling Up, Housing and Communities. and devolved Welsh Government Departments of Health and Social Services, and Education, Social Justice & Welsh Language. It will also need to be able to have a national reach, but provide local information, and therefore local authority participation will be vital, for example through coordination with family hubs.
30. Such an online platform would therefore require significant investment, time and user-testing, as well as ongoing maintenance to ensure information is kept up to date. However, the Working Party considered the investment to be more than justified, and indeed likely to be offset by downstream savings, if people are better enabled to know what to do, who to ask and where to go, and empowered to address their problems sooner rather than later, be that through legal help, non-legal help, or a combination of the two.
31. Finally, JUSTICE notes that online information is not a panacea. Some people who need to access information and advice will be digitally excluded and it is vital that there is a multi-channel approach which includes networks of organisations who can provide in person and telephone help, as set out in our response to **Question 3**.

Question 5: Do you think it is appropriate for mediators to determine suitability for a co-parenting programme at an information meeting? Please state yes/no/don't know and provide reasons for your answer.

- **No**

Please provide reasons for your answer

32. As stated in the response to **Question 1**, risk screening is essential to ensure the appropriate interventions are recommended for the appropriate families. An intervention aimed at collaborative parenting, in a case which requires risk-based strategies, could lead to inappropriate and even unsafe advice.

33. Currently, suitability for these programmes is determined by Cafcass. In 2020, the MOJ Harm Panel report expressed significant concerns about the limitations of Cafcass's

[17] MOJ, Check how to get repairs done in your rented home.

safeguarding interviews, including resource constraints.[18] However, they are conducted by a trained, accredited and regulated social worker, benefit from local authority and police disclosure, and usually will speak to both parties.

34. JUSTICE is concerned that mediators within a MIAM are not currently in a position to provide a similar level of risk-screening. Firstly, of course, there is no equivalent power to access police and local authority records. This makes the need for consistent and high-quality risk-screening even more important. Secondly, there are concerns about the consistency and quality of risk screening in practice.[19] It should be acknowledged that the regulator – the Family Mediation Council ("**FMC**") – have recently released new MIAM standards in 2022, which is to be welcomed.[20] Prior to this, however, there was minimal guidance or standards set by the Code of Conduct or Regulatory Framework. These documents briefly mention domestic abuse and child safeguarding, but do not mention other factors which have now for the first time been listed in the MIAM standards: "drug or alcohol addiction"; "other vulnerabilities such as physical or mental health challenges or intellectual capacity that may impact on participants' capacity to engage in the mediation process or their safety", and "emotional readiness of the MIAM participants to engage in mediation and its likely impact on their effective participation in the mediation process". These standards are a clear improvement. However, they are new and have only just been imposed on the profession. The extent to which they have been implemented in practice is unknown, and JUSTICE anticipates they will need time and resources to embed into the profession. JUSTICE would also suggest evaluation of their success would be desirable.
35. JUSTICE further notes that, even under the new MIAM standards, there is no one tool nor a menu of recommended or approved tools, which could ensure some consistency to the screening taking place across the country. This was considered by the JUSTICE Working Party, and indeed it was recommended that consistency would be improved with the **systematic use of a common structured risk screening tool by professionals throughout the family justice system, including mediators, legal professionals, any professionals conducting family hub intake assessments, and Cafcass in court, to ensure a consistent and proportionate response to risk, wherever a family go for**

[18] R. Hunter, M. Burton and L. Trinder, Assessing Risk of Harm to Children and Parents in Private Law Children Cases (MoJ, 2020) (the "**MOJ Harm Panel Report**"), pp58-59

[19] One study found an average of just three minutes was given to screening, concluding clients were not given enough opportunity to disclose the abusive behaviour. P. Morris, 'Mediation, the Legal Aid, Sentencing and Punishment of Offenders Act of 2012 and the Mediation Information Assessment Meeting' (2013) 35 *Journal of Social Welfare and Family Law* 445. See further discussion in *Mapping* Paths, fn 27 above, pp. 100-101

[20] Family Mediation Council, *MIAM Standards*

help. Such a tool would be a universal initial screen for overall risk, not limited to domestic abuse, for every person, and would identify the need for fuller assessment and referral to support services if a risk is identified. The best tool JUSTICE identified during our Working Party process was the Australian Family Law Detection of Overall Risk Screen tool ("**FDOORS**"),[21] which is a whole-of-family, first level risk screening framework designed specifically for use across the family law sector, including by mediators, family relationship professionals such as counsellors, and lawyers.[22] It is also currently being piloted as part of a court intake procedure.[23] FDOORs screens for overall risk, including violence (victimisation and perpetration risks), infant and child developmental and safety risks, conflict and communication, parenting stress and collateral stressors.[24]

36. In such circumstances, JUSTICE considers it would be peremptory to augment the *consequences* of the mediator-screening process – to include suitability for a WT4C/PT4C course – before the efficacy and safety of that newly-improved process has been demonstrated.

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

37. **Australia:** The consultation mentions the Australian system as a comparator. However, there are several aspects of what Australia offers which are not replicated in our system nor included in the consultation proposals.
    - **State funded Family Relationship Centres** ("**FRCs**") **provide a one stop shop** in the community. This gives families the multi-disciplinary help they need, either in the centre or through active referral (where with the client's consent the FRC can send client information direct to the service provider). Services counselling, specialist support, legal advice and assistance, a telephone advice line (including legal advice and telephone mediation), legal aid, as well as in person family dispute resolution ("**FDR**"), including joint meetings and shuttle FDR.[25]

[21] Previously known as FL-DOORS.

[22] J. E. McIntosh, J. Lee, & C. R. Ralfs, '*The Family Law DOORS Research and practice updates*' (2016) 98 *Family Matters* 34, 35.

[23] Federal Circuit and Family Court of Australia, The Lighthouse Project.

[24] J. E. McIntosh, J. Lee, & C. R. Ralfs, '*The Family Law DOORS Research and practice updates*' (2016) 98 *Family Matters* 34, 37; and Family DOORS, 'About - Family DOORS screening tool'.

[25] See Australian Government, Attorney-General's Department, Operational Framework for Family Relationship Centres, (revised 2019)

- **FRCs are also designed to proactively help families who need the court**: In cases involving violence or child abuse, when dispute resolution is not appropriate or safe, or parents wish or need to resolve their difficulties in court, "FRCs should work closely with the courts, legal service providers and other parts of the family law service system to assist families achieve effective resolution of these more complex family separation issues."[26]
- **FRCs proactively offer legal help**: FRCs were originally designed to exclude legal and court-related services, to be a "*non-adversarial source of assistance to replace (emphasis added) lawyers and courts*".[27] However, after three years, the evaluation of the reforms noted legal and non-legal professions could complement each other to better assist families, and it was decided that legal help should be incorporated into FRCs. The 'Legal Assistance Partnerships Program' commenced in FRCs in 2009, and evaluators found it to be successful in improving the focus of parents on the best interests of children; addressing power imbalances between parents; and assisting less adversarial dispute resolution.[28]
- **Risk screening**: the FDOORS tool referenced above is specifically included in the FRC operational framework, which stresses the role of the screening and assessment not as a "eligibility" assessment for mediation, but as part of the FRC's role as "gateway for couples and families in the community to a range of services they may need."[29]
- **Specialised pilots and funding**: Finally, the consultation mentions the introduction of Coordinated Family Dispute Resolution in Australia: a specialist, multi-disciplinary and lawyer assisted approach involving rigorous screening in cases with reported histories of domestic abuse. This was only an option for a short while, since it was a pilot. The pilot attempted to create a safe mediation process which heard vulnerable parties' and children's voices in cases in which there had been a history of domestic violence. It was not a cheap process and went far beyond anything being suggested in this consultation: it required a team of professionals, including lawyers for each parent,

[26] FRC Operational Framework, p7

[27] Evaluators further identified that coordination, communication, mutual respect and high levels of trust were the key characteristics identified to successful partnership working between legal and non-legal family relationship professionals, including lawyers, mediators and family counsellors. House of Representatives Standing Committee on Family and Community Affairs. *Every picture tells a story: Report of the Inquiry into Child Custody Arrangements in the Event of Family Separation*. (Canberra: Commonwealth of Australia, 2003) p. 89.

[28] See R. Kaspiew, M. Gray, R. Weston, L. Moloney, K. Hand, L. Qu & the Family Law Evaluation Team, Evaluation of the 2006 family law reforms (Australian Institute of Family Studies, 2011); and L. Moloney, R. Kaspiew, J. De Maio, J. Deblaquiere, K. Hand and B. Horsfall Evaluation of the Family Relationship Centre legal assistance partnerships program Final report (Australian Institute of Family Studies, 2011).

[29] FRC Operational Framework, p6

domestic abuse workers, a mediator, a specialist children's practitioner, and other specialist workers depending on the families' needs. The model with these safeguards and professionals was evaluated as safe, however it was not rolled out for "*political, resource and funding*" reasons. JUSTICE would certainly support funded pilots in this area but stresses the specialist professional resource which would be required.[30]

38. The current proposals are significantly different; most notably, there is no community infrastructure to provide a "gateway" to multidisciplinary support, which can be alongside or indeed instead of any FDR. Nor is there any indication that significant funding is proposed for specialist, multi-disciplinary, lawyer-assisted NCDR models like Coordinated Family Dispute Resolution. Instead, the proposals seek to delegate the gatekeeping to private practitioners without the infrastructure and referral networks of FRCs.

39. Even within the above infrastructure, Australia has nevertheless experienced difficulty with its mandatory FDR. Research has found that "FDR is occurring in a sizeable number of families where a history of family violence is alleged." And that "issu[ing…] a certificate is generally seen by FDR practitioners as a 'disempowering' act, which brings participation in FDR to an end, rather than an 'empowering' act, which permits clients access to litigation as an additional dispute resolution process."[31]

40. **Norway:** Sections 51-54 of Norway's Children Act 1981, as amended, mandate all separating couples with children under 16 to attend "mediation". Again like Australia this is at a state funded community venue – the local Family Counselling Office. However, it is important to clarify that only one hour is mandatory. JUSTICE understands that the first hour is primarily information provision. Since all separating parents must go, it can also assist those who are able and ready to agree arrangements to do so. This is a different cohort to those parents who disagree about child arrangements, and is likely to contain a majority of parents who would never approach the courts. After one hour, parents are encouraged to continue with up to 7 hours of free mediation, but this is entirely voluntary. Therefore, for parents who have disagreements and who wish to access the courts, the mandatory element is more akin to our MIAM than to compulsory mediation. JUSTICE further notes with concern that there are no sifting or triage mechanisms for identifying and

[30] See R. Field and A. Lynch, 'Hearing parties' voices in Coordinated Family Dispute Resolution (CFDR): An Australian pilot of a family mediation model designed for matters involving a history of domestic violence' (2014) 36:4 *Journal of Social Welfare and Family Law*, 392.

[31] B. Smyth, W. Bonython, B. Rodgers, E. Keogh, R. Chisholm, R. Butler, R. Parker, M. Stubbs, J. Temple & M. Vnuk, *Certifying mediation: a study of section 60I certificates* (CSRM Working Paper No. 2/2017)

then diverting high conflict families and those experiencing abuse into more appropriate services. This has been noted to be particularly controversial, risking such needs being overlooked and children being put at risk of harm.[32]

41. One further notable aspect of the Norwegian system is the way in which the State has proactively increased the availability of child inclusive mediation by rolling out a child inclusive mediation tool to Family Counselling Offices.[33] This was spurred on by the constitutional change in 2014 which explicitly enshrined children's rights to participation,[34] domestically incorporating children's right to be heard "in all matters affecting the child" in Article 12 of the United Nations Convention on the Rights of the Child ("**UNCRC**").

42. In England and Wales, a survey in 2015 found that around a third of mediators registered with the FMC had the necessary training in direct consultation with children. However, most of those child inclusive mediators engaged with fewer than ten children each year.[35] A smaller 2019 survey by the Family Mediation Council found that 33% of cases involved children aged 10 or above still living at home, and when considering those cases only, the survey found that children were consulted in 26% of cases.[36] Child inclusive mediation is still therefore a minority practice.

43. Should the MOJ seek to mandate mediation in England and Wales, the UK's obligations pursuant to the UNCRC are engaged, namely the requirement to facilitate children's right to participate under Article 12 UNCRC. As such, how the State will proactively promote *child inclusion* would need to be part of that package of reforms. JUSTICE recommends this should include parental education, through the provision of trustworthy information about the value, principles and practice of children's participation; support for the continued training of practitioners to be child inclusive; and funding for the extra work involved in child inclusive NCDR, both when it is the same practitioner (such as a child

[32] A Nylund, (2018) 'A Dispute Systems Design Perspective on Norwegian Child Custody Mediation' in A Nylund et al (eds), *Nordic Mediation Research*, Ibid, p18. Once parents get to court, they are exempt from 'court-connected custody mediation' if the children are seen to be at risk of abuse or neglect. Ibid, p21.

[33] Ministry of Children and Families, *Tildelingsbrev til Barne-, ungdoms og Familiedirektoratet* (2018). In just 4 years the proportion of children consulted went from 7% in 2014 to 26% in 2018. L Grape, R Thornblad and B Handegard, (2021) 'Child Sharing Preferences on Contact and Residence Arrangements in Child-inclusive Family Mediation in Norway' 29 International Journal of Children's Rights 31, at p35.

[34] The Constitution 1814; section 104.1. See also The Children Act 1981, section 31.

[35] The Voice of the Child in Alternative Dispute Resolution Advisory Group, Final Report (March 2015), pp. 9-10

[36] The survey sought data only on those ten years old and over since a presumption of offering children the opportunity to participate in child inclusive mediation is currently predicated on such a threshold. Family Mediation Council, Family Mediation Survey Results (2019), p. 3.

inclusive mediator) and when the child inclusion can be facilitated by another practitioner, such as NYAS child advocates.

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

44. The new pre-mediation meeting would effectively become the triage meeting for the entire family justice system. It would put mediators in a position of considerable responsibility beyond their current role, tasked with gatekeeping who should be compelled to mediate and who should be exempted.

45. The new MIAM would therefore be the only opportunity for the mediator to gather information upon which to decide if the case is one which should be compelled to mediate. This makes the elucidation of safety information a matter of paramount importance. We refer to our concerns in response to **Question 5** above, and the need for risk screening to be conducted systematically using researched tools which screen for a range of risks. Further information is also critical to enable the mediator to decide if mediation should not be compelled (see our response to **Question 10** below): the mediator would need to understand the parties' emotional capacity to negotiate; whether individuals have had any access to legal advice and whether they need it; and other vulnerabilities which impact capacity to negotiate or the safety of negotiation. Further research on how this can be done effectively and consistently would be highly desirable, for example through researched tools.

46. If the MIAM were to further consider the suitability of the dispute for other forms of NCDR, as was proposed in the Family Procedure Rule Committee Consultation,[37] then there would also need to be professional services networks, especially on a local level, so that an assessment is informed by what is actually available. This will mean the MIAM can lead to a meaningful referral to a service which can meet the needs of the individuals, as can be seen in the Australian FRCs. Such networks should be based on shared knowledge and respect between professionals about the NCDR they provide and agreed factors between professionals about what disputes/individuals are "suitable". Whilst there are some examples of such networks in the country which have been developed voluntarily, JUSTICE does not understand these networks to be widely available at all. However, they

[37] 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* (March 2023)

are crucial; MIAM providers need to know the details about the services available around them. It will be difficult to appropriately recommend a process if they cannot advise what the approximate cost will be, if they are not clear on the pros and cons of the process, if they cannot vouch for the quality of the provider or if they are unaware of specific eligibility criteria. This need not only include private providers; for example there may be local authority-run Family Group Conferencing for which some families would be suitable, but if there is insufficient awareness of the eligibility criteria then it will not be successfully referred to.

Question 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?

47. This is inherently context-specific. JUSTICE considers it would be extremely unhelpful and arbitrary to stipulate a certain number of sessions or hours.
48. What is "reasonable" is particularly challenging because of the personal and emotional nature of these cases, and the difficulties already being experienced by this cohort. For example:
    - We know the court-going cohort is disproportionately economically deprived, and there is no current offer of publicly funded early legal advice in private family disputes. Therefore, many will not have had access to legal advice. JUSTICE queries what is "reasonable" when someone does not understand their legal rights and obligations?
    - We know that 10% of cases feature non-parents as parties.[38] These include, for example, local authority-supported applications from grandparents for child arrangements orders or Special Guardianship Orders). Again, it is not clear what is "reasonable" when, for example, the parents of the child are not in a position to care for the child, but struggle to come to terms with that fact. They may feel unable to "consent" to the order, in mediation leading to a consent order, but may be able to "not actively oppose" in court.
    - Separating couples may not be emotionally ready to negotiate. What is reasonable when someone is clearly distressed?
    - Individuals may have other intersecting issues, for example they may be suffering with mental ill health. What is reasonable when someone has depression/anxiety which is impacting their ability to negotiate?

[38] Cusworth, L. et al. *Uncovering private family law: Exploring applications that involve non-parents ('the other 10%')*, (Nuffield Family Justice Observatory, 2023)

- There may be clear imbalance of power, not in an abusive context but for example when one party has legal representation and the other does not. What is reasonable when the representation of the other party becomes intimidating for the unrepresented party?

Question 9:
a) 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**

Please provide reasons for your answer

49. JUSTICE agrees that urgency, child protection concerns and domestic abuse should all be exempted, so in principle agrees with this Question. However, in practice, JUSTICE is concerned by the suggestion of the current MIAM evidential thresholds being adopted. MOJ research has shown the difficulties for domestic abuse victims in acquiring evidence of their abuse for existing "specified evidence" requirements. Organisations, and health professionals in particular, can be unwilling to write letters; data protection issues arise when attempting to access evidence from the police; language or other vulnerabilities create barriers; and victims who do not disclose abuse to an organisation that can supply evidence end up significantly disadvantaged.[39] Furthermore, the MOJ's Harm Panel was particularly concerned about police evidence and recommended "urgent consideration is given by police forces, together with the family court and policy representatives, as to how police disclosure may be funded where parties are not legally aided and are not, otherwise, able to fund it themselves."[40] This is of course a vicious circle as the evidence from the police for a MIAM exemption will also often be the evidence needed for legal aid, presuming they fall under the means-threshold. **JUSTICE therefore considers that a statement from a party should be sufficient to explain the relevance of the exemption to any court. In the case of a mediator, the exemption should be offered when risk of harm to the child or the parent is identified in risk screening procedures.**

[39] Farai Syposz, *Research investigating the domestic violence evidential requirements for legal aid in private family disputes* (MOJ, 2017) pp. 2-3.

[40] R. Hunter, M. Burton and L. Trinder, Assessing Risk of Harm to Children and Parents in Private Law Children Cases (MOJ, 2020) pp 180-181

b) What circumstances should constitute urgency, in your view?

50. Again, urgency is very context dependent. It is unsurprising that many people will consider their cases to be urgent, given how important child arrangements are to most individuals coming to court. Conversely, some individuals may not understand the urgency of their problem without legal advice (for example a parent with parental responsibility taking a child on holiday and not returning) and not mark an application as urgent when it is. Again, JUSTICE reiterates the value of early legal advice, which could provide applicants with a "reality check" when their case would and would not be likely to be deemed urgent by the court.

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

51. Child arrangements and financial remedies cases engage Article 6 ECHR: the right to a fair trial in the resolution of civil rights and obligations. Individuals also have the right to a family life, and as such Article 8 ECHR is also engaged, which contains requires decision-making processes to be fair and sufficient to afford due respect to the family interests safeguarded by it,[41] requirements which "*essentially overlap*"[42] with Article 6. Any restriction of individuals' right to access the courts in these cases under Articles 6 and 8 must therefore be in accordance with the law, pursuant to a legitimate aim and proportionate.

52. JUSTICE supports the role of mediation for parties who are legally-informed, who both have equal negotiating capability within the process, do not require other protective or expert functions of the court, and who wish to voluntarily submit to mediation. For these families, mediation can doubtless provide autonomy, flexibility and often a quicker process. However, when it comes to mandating that process for people who do not wish to, do not feel able to, cannot safely submit to it, JUSTICE has significant concerns that mandatory mediation is an unacceptable obstruction to such parties' Article 6 rights.

53. Mandatory mediation has previously been found to be a disproportionate infringement of Article 6 in the past. In *Halsey v Milton Keynes NHS Trust* [2004] 1 WLR 3002 Lord Dyson observed: "It seems to us that to oblige truly unwilling parties to refer their disputes to

[41] *Petrov and X v Russia* (Application no. 23608/16) 23 October 2018, paras 101 and 112.

[42] *X v Croatia* (Application no. 11223/04) 17 July 2008, para. 59.

mediation would be to impose an unacceptable obstruction on their right of access to the court" (at [9]). JUSTICE is aware of the significant amount of commentary which has followed *Halsey*, much of which is set out in the Civil Justice Council's report on *Compulsory ADR*.[43] In *Lomax v Lomax* [2019] 1 WLR 6527, Moylan LJ distinguished *Halsey*, on the basis that mandatory early neutral evaluation was a single hearing, *as part of the court process*. This was therefore recognised to be a "very different situation" to obliging parties to submit to mediation out of court, as in *Halsey.*

54. This distinction is critical in the context of private family proceedings, given the disproportionately economically deprived cohorts who go to the family court with private family disputes and linked issues with access to legal advice and representation.[44] As the JUSTICE Working Party observed, litigants resorting to court in person are often unadvised, unassessed and have not benefitted from a 'reality check' in their case. For these LiPs, the judge or legal adviser in the first hearing is sometimes the first legally-qualified person with whom they have spoken. Mandating mediation in this context risks obstructing, not facilitating, access to justice, by mandating a process which is impartial and is not governed by the law or the legal rights and obligations of the parties. This further distinguishes *Lomax*: obliging an unadvised party to submit to mediation will *prevent* access to the judicial legal evaluation that was being mandated in *Lomax,* not facilitate it.

55. JUSTICE is also concerned about the impact of the proposals on vulnerable parties who need to access the courts. The evidence of the vulnerability of the cohort also must be taken into account. As the CJC remarked in its report, "A fundamental principle for the design of any new process or rule must be the need to protect vulnerable parties."[45] Previous research of LiPs in private family proceedings, finance and children matters, identified 17 indicators of vulnerability, with half of the LiPs experiencing one of these indicators *in addition* to the inherent vulnerability of being a LiP.[46] They were: being a victim of violence, suffering from depression; alcoholism; being a young lone parent; drug use; history of imprisonment; mental illness; living in temporary accommodation with children;

[43] CJC, *Compulsory ADR* (June 2021)

[44] In 2012, before LASPO, only 12% of private children cases were unrepresented on both sides, while both sides were legally represented in 45% of cases. Ten years later, the statistics show a near-reversal: only 18% of cases are fully legally represented, while 41% have no legal representation on either side. See MOJ, Family Court Statistics Quarterly: January to March 2022, Table 10.

[45] CJC, Compulsory ADR, para 106

[46] L. Trinder, R. Hunter, E. Hitchings, J. Miles, R. Moorhead, L. Smith, M. Sefton, V. Hinchly, K. Bader and J. Pearce, *Litigants in person in private family law cases* (MOJ, 2014)

illiteracy; terminal illness; involvement with social services; physical disability/ill-health; neurodiverse conditions including Attention Deficit Hyperactivity Disorder, *Autism* Spectrum *Disorder* and dyslexia; learning difficulties (including those with borderline mental capacity to make decisions on their own behalf); difficulty controlling emotions; extreme nerves and anxiety (causing sleeplessness, vomiting and panic); and language difficulties (ranging from those who spoke moderate to no English, two of whom appeared in court without interpreters). Multiple vulnerabilities were particularly associated with experiences of violence, abuse and harassment, and with mental health problems.[47] Others have highlighted the particular vulnerability of victims of abuse from some minoritised ethnicities, who can experience significant pressure out of court, within families and within communities, to reconcile and agree contact.[48]

56. More recent research into population level data in Wales confirms that the level of vulnerability in this cohort exceeds that of the wider population. In the year prior to proceedings, adults involved in private children proceedings in Wales had higher rates of health service use (GP and hospital admissions) than their peers.[49] They were around two to three times more likely to have recorded mental health problems including anxiety, depression and substance use and four to five times more likely to self-harm. Meanwhile, domestic abuse (no differentiation of perpetrator or victim) was 20 times more likely to be mentioned in the healthcare records of women and almost 30 times more likely for men.[50]
57. The above evidence of vulnerability of course overlaps with the evidence of safety concerns. The SwMCA pilot found both, concluding that 80-86% of cases had too high a level of risk or legal need to be manageable out of court, in the judgement of the assessing Cafcass family court advisers. This included cases in which safeguarding risks were raised, including domestic abuse, parental drug or alcohol misuse, other violence, child protection concerns, and children known to the local authority; cases which were too

[47] Ibid, p. 28.

[48] In their submission to the MOJ Harm Panel, Southall Black Sisters outlined many issues with the current court system, but thereafter stated "for many of the BME women we work with, having to go through the formal justice system – even repeatedly – is still immensely preferable to being subjected to relentless family and community pressures to agree informal variations of court orders or out-of-court harassment by the perpetrator, wider family or community – or forced to go through community/religious dispute resolution meetings." See further MOJ Harm Panel report, pp. 46, 64 and 145. And a qualitative study of the intersection between domestic abuse, post-separation child contact and women of South Asian and African-Caribbean heritage: R. Thiara and A. Gill, Domestic Violence, Child Contact, Post-Separation Violence: Experiences of South Asian and African-Caribbean Women and Children (NSPCC, 2012).

[49] A further report by the Data Partnership, which linked NHS healthcare data with Cafcass Cymru data, then contrasted the results with a comparison group of adults in Wales who had not been involved in a private law application, matched on their age, gender, local authority and deprivation quintile. L. Cusworth et al, Uncovering private family law: Adult characteristics and vulnerabilities (Wales) (NFJO, 2021).

[50] However, the total number of men with domestic abuse recorded was less than the total number of women.

conflicted to be diverted, both those deemed "high conflict" and cases of implacable hostility; cases featuring other issues of parental vulnerability such as physical/mental health issues and parent learning difficulties; and cases which had a legal need requiring court. This was noted in the evaluation to be consistent with other studies which identified safeguarding concern, including but not limited to domestic abuse, at between two-thirds and 85% of private law cases.[51]

58. This of course does not mean all those cases, or even a majority, will proceed to a final hearing and a judicially-determined outcome. Many will settle during proceedings. But they may need the court process for all kinds of reasons: a non-exhaustive list would include safeguarding checks; social work opinion, including on supervised interim contact; risk assessments; access to third party information; access to experts (funding permitting); fact finding processes; interpreters; intermediaries; a level of child engagement which is unavailable out of court;[52] protective orders including interim orders; orders in intractable cases; and in the end, if it is required, a decision-making role in accordance with the law, which will consider the child's welfare as paramount.

59. JUSTICE acknowledges that the proposals include exemptions. However, we remain unconvinced that they are sufficient to ensure that the policy is human rights-compliant. The proportionality analysis must consider a four-stage test as follows:

    1. Is the objective of the measure pursued sufficiently important to justify the limitation of a fundamental right?
    2. Is the measure rationally connected to the legitimate aim?
    3. Could a less intrusive measure have been adopted without unacceptably compromising the objective?
    4. Having regard to these matters and to the severity of the consequences, has a fair balance been struck between the rights of the individual and the interests of the community?[53]

60. Those questions are taken in turn below:

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[51] Citing L. Trinder, J. Connolly, J. Kellett, C. Notley and L. Swift, *Making contact happen or making contact work? The process and outcomes of in-court conciliation* (London: Department for Constitutional Affairs, 2006); G. S. Macdonald, Domestic violence and private family court proceedings: Promoting child welfare or promoting contact? (2016) 22:7 *Violence Against Women* 832; and B. Hamlyn, E. Coleman and M. Sefton, Mediation information and assessment meetings (MIAMs) and mediation in private family law disputes (MOJ, 2015).

[52] Just under half of cases in court provide the child with an opportunity to be heard. This compares to far lower rates of child participation in mediation (see response to Question 6), an unknown amount in collaborative law but acknowledging the high costs of that process, and the unknown but anecdotally nearly non-existent levels of child participation in other NCDR like arbitration and solicitor negotiation.

[53] *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39

1. **Is the objective of the measure pursued sufficiently important to justify the limitation of a fundamental right?** This is a preliminary question, which depends on the objective, i.e. the legitimate aim *in principle*. Mediation at all costs, regardless of outcome or experience, would clearly not be sufficiently important, in JUSTICE's view. Rather the objective would have to be the earlier resolution of those disputes which end up in court but which can be safely, fairly and sustainably resolved out of court.
2. **Is the measure rationally connected to the legitimate aim?** The measure is mandatory mediation with exemptions. While there are clearly benefits for *some* families of mediation, these are limited to a minority of those dispute which end up in court; SwMCA pilot would suggest a maximum of 14-20%. Importantly, there is no evidence that mandatory mediation leads to improved outcomes for children over and above voluntary mediation; none of the SwMCA families were compelled into mediation nor threatened with costs sanctions. Therefore, JUSTICE questions whether the measure is "rationally connected" to the legitimate aim by evidence.
3. **Could a less intrusive measure have been adopted without unacceptably compromising the objective?** Many less intrusive measures could be adopted. JUSTICE highlights the benefits of funding early legal advice, creating networks of support, information and advice for families out of court, and supporting a range of NCDR processes including packages of support. These less intrusive measures could facilitate access to earlier information, advice and holistic support for families. Far from "unacceptably compromising" the objective, JUSTICE considers they would better assist those families who would otherwise go to court to find a safe, fair and sustainable resolution out of court.
4. **Having regard to these matters and to the severity of the consequences, has a fair balance been struck between the rights of the individual and the interests of the community?** Finally, to assess the severity of the consequences and the balance being struck, it is necessary to consider both the intended and unintended consequences of the policy, and the impact on the cohort of families trying to access the court, in light of the above evidence. The following should therefore be considered:
    a. Whether inserting a *presumption* into the pre-court space, and then providing exemptions, will put vulnerable parties who need those exemptions at any disadvantage. JUSTICE suggests that it will: there is an additional barrier to accessing court for the most vulnerable, since an additional evidential burden is being added before they can access court.
    b. What the risks are? There will be a risk of parties not claiming exemptions to which they are entitled, through fear, intimidation, lack of legal knowledge or empowerment. Or they will want to claim the exemptions but the evidential bar

will be set too high. The resulting risk is of unfair and unsafe outcomes for the exactly vulnerable parties and children the family justice system is there to protect.

61. On balance, JUSTICE does not consider the proposals to be proportionate.
62. Notwithstanding JUTSICE's primary position, if mediation were to be imposed, it goes without saying that exemptions would have to be as accessible as possible. Their purpose would not be to keep families out of court, but to make mandatory mediation as safe as possible. JUTSICE therefore has listed several exemptions below, in addition observations are listed below on the exemptions.

- **Capacity to mediate.** JUSTICE notes that the Official Solicitor in her response to the Private Law Working Group's consultation in 2020 raised the issue of capacity.[54] She noted there was no exception for those lacking capacity to negotiate, which should be added to the MIAM exemptions. JUSTICE draws attention to this recommendation and considers there should be an explicit exemption for lack of capacity.

- **If the child will not be given an opportunity to be heard in the mediation.** Children have the right to be heard, however child inclusive mediation is still a minority practice in England and Wales (see above). It could therefore be unavailable to families, for example due to a lack of provider within a reasonable distance, or as a consequence of the cost implications for the parties, including where any financial help is offered, such as the £500 mediation voucher. JUSTICE does not consider it would be appropriate to deem any parents who want to find a child inclusive option to be "unreasonable", and therefore considers there should be an exemption for such families.

- **Vulnerability of one of the parties.** This should be an inclusive concept of vulnerability, and should not involve an exhaustive list.[55] For any definition, we recommend the inclusion of language such as "personal or situational, permanent or temporary", which is used in the Civil Procedure Rules at PD 1A at para. 3.

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[54] Private Law Working Group, Second Report: the time for change, the need for change, the case for change (March 2020), p7 at para 6.

[55] See materials on the Advocates Gateway, for example Toolkit 10: 'Identifying vulnerability in witnesses and parties and making adjustments' "*Vulnerability does not fit neatly into a single definition. While vulnerabilities for special measures (due to age, incapacity or fear or distress) are defined in statute, all vulnerabilities […] should be recognised, and suitable steps taken to ensure the person's needs are met.*"

- **One or both parties want but have not been able to access legal advice.** As discussed above, JUSTICE does not support parties who have not had access to legal advice being compelled to mediate. JUSTICE therefore supports such an exemption.

- **Inequality of bargaining power among the parties.** One party being unrepresented in mediation, while the other has a legal team, is an example of a significant imbalance of bargaining power. It may not be that all cases are inappropriate for mediation, but JUSTICE does not think that unrepresented parties in such circumstances should be *compelled* to mediate. We therefore recommend that this forms an exemption.

- **Emotional readiness to negotiate.** Research has highlighted that parents seek the court's help when they are not emotionally ready to negotiate, and that such emotional readiness is achieved by parties at different times.[56] When a child arrangement problem arises and either adult is not emotionally ready to negotiate, JUSTICE supports an exemption, to avoid a traumatic and likely unsuccessful process for those who are not ready to negotiate, and unnecessary delay to the child.

- **Need for court evidential procedures or orders.** Some cases may require additional disclosure orders (eg enhanced police disclosure), expert opinions or testing (eg social workers from Cafcass or the local authority, or DNA testing), or findings of fact. Such cases should not be compelled to mediate on an insufficient evidential basis, and indeed to do so would risk unsafe outcomes for the children. Therefore JUSTICE recommends a separate exemption for such cases.

- **Mediation is inaccessible.** There may be geographical barriers to accessing mediation. The consultation mentions online mediation and suggests geographical distance may no longer be an issue. However, while remote processes are good for some, they are not always accessible. JUSTICE has recently consulted with Support Through Court, the majority of whose work is supporting litigants in person in family proceedings. They shared with us that the cost of living crisis is having a particular impact on families' ability to engage with online processes, so much so that they have taken on a digital support role with the "help with fees" service which is now online. They are regularly seeing parents whose main way of accessing digital resources was their smart phones, but whose connectivity is limited or in some cases stopped entirely

[56] A. Barlow, R. Hunter, J. Smithson and J. Ewing, *Mapping Paths to Family Justice: Resolving family disputes in neoliberal times* (Basingstoke: Palgrave Macmillan, 2017), p. 92.

by their phone companies as they cannot afford their phone bills. As a result they have no internet at home. JUSTICE therefore recommends an exemption to protect digitally excluded people from sanctions, if they do not have the connectivity, confidence or hardware to participate in online mediation.[57] JUSTICE would oppose any scheme which would mean parents who do not want to consent to online mediation to count against them as "unreasonable".

- **A catch-all "in all other circumstances it would be inappropriate or impractical"**. For example, there may be practical assistance required which would not theoretically exempt the parties from mediation, but in the circumstances the mediator cannot provide it, such as interpretation services or assistance for individuals with a low reading age. A catch all provision would ensure mediators can screen out all cases they do not practically or ethically feel able to compel to mediate, for which JUSTICE would strongly advocate.

Question 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?

63. JUSTICE considers it is *critical* that exemptions are accessible from multiple places.

- If the system is going to make mediation mandatory, people – including those who would be entitled to an exemption – will start going to mediators. They may not know they can or should be exempt. Of course, therefore, mediators must have the power to identify if an exemption applies. If an individual seeks an exemption and the mediator refuses, it would be wholly inappropriate and an excessive infringement of Article 6 if that then barred the individual from going to court. That individual must thereafter be able to apply to court, claiming an exemption, and have the court decide. This is particularly important in cases in which the safety information, from the police and/or the local authority, is not available to the mediator but will be available to the court. It is also important in other cases of domestic abuse, for example when a victim of abuse feels intimidated, untrusting or otherwise unable to disclose abuse to a mediator, but later is able to do so and wishes to directly seek a protective order from the court.

[57] See JUSTICE stresses the need for a multi-channel approach to ensure accessibility of online processes for those who are digitally excluded. See further JUSTICE, *Preventing Digital Exclusion from Online Justice* (2018)

- There should also be a level of self-triage, so a person can decide whether one of the exemptions applies and, if so, go straight to court. This is self-evidently especially important for urgent cases. The exemption can be dealt with in the application and response court forms, and can be a matter which is discussed in the initial safeguarding with Cafcass or in other evidence to the court.
- If there are going to be any sanctions for any exemptions being inappropriately claimed, then this must be a judicial decision, since these decisions are accountable through appeal (at least in theory, however there are significant practical barriers to litigants in person accessing appeals, namely they do not know they can appeal case management decisions and do not know how). Furthermore, JUSTICE suggests there will be many cases in which it is inappropriate to make a binding decision on exemptions on the papers alone; parties should have the opportunity to understand the consequences and make representations.

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

64. JUSTICE's report focused on child arrangements problems, however it was very clear in our consultations that those problems often cluster with finance problems, as well as other legal and non-legal issues following separation. We are also aware that mediations proceed on the basis of doing both finance and children matters together; they are not separated in the same way they are in the courts. As such, JUSTICE considers that providing funding for one but withholding funding for the other may frustrate the success of mediation in cases in which the family have problems in both areas. When that mediation is mandatory, furthermore, JUSTICE considers there is an added weight to the argument that both should be funded.

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

• No – additional regulation required

Question 14: If you consider additional regulation is required, why and for what purpose?

65. The FMC is currently unable to require child inclusive mediators to be DBS checked. JUSTICE was grateful to the FMC for confirming this during the Working Party process, and we note they did so with concern and a clear desire to be able to have such a power. It is not immediately apparent why this is, but JUSTICE presumes it is due to the lack of statutory powers and duties of the FMC. JUSTICE urges MOJ to work with FMC to identify why this is so and, regardless of the outcome of this consultation, correct this lacuna in the regulatory framework.

66. Furthermore, as discussed above, the proposals position the mediator as the gatekeeper to the family court. This is a considerable responsibility, with poor conduct having the potential to infringe the human rights of those seeking to access the court. If the FMC is to be charged with the governance of this new role, it must have the capacity to set, maintain and enforce standards throughout the profession. JUSTICE recommends a gap analysis is conducted of the regulatory framework and powers of the FMC, in which the DBS check power referenced above would be one identified gap. This would consider any resource need to train and support mediators, as well as resource and power needs to ensure compliance with standards, for example the newly introduced MIAM standards. It should be considered whether compliance powers may need to go beyond a complaints procedure, and also include more proactive functions, such as investigations or audits. By comparison, Cafcass social workers are regulated by Social Work England, but Ofsted have a further oversight role. JUSTICE considers this gap analysis should take place *before g*iving mediators significant safeguarding responsibility*,* in positioning them as gatekeepers to the family courts.

67. In terms of accreditation, JUSTICE observes that mandatory mediation presents a significant shift in the mediator's role. It will no longer be a voluntary process, which is a key principle of mediation. JUSTICE anticipates therefore that accreditation and training processes may need to adapt to involuntary mediation, and the challenges that will present. The number of cases, the attitudes of those coming to mediation and potentially the complexity of cases they see, are likely to change. This may impact the accreditation process for mediators, the skills they should have and the training they do. JUSTICE would expect such adaptations to be in place and trialled before any mandatory mediation was imposed.

68. Finally, JUSTICE queries whether "family mediator" ought to become a protected title. Currently it is not, and anyone can hold themselves out to be a mediator. If mediation were to be made mandatory, we understand this would be specific to FMC accredited mediators.

JUSTICE anticipates, however, that the FMC, and its accreditation of mediations, is not well-known outside those working in the family justice sector, and it is unrealistic to this those coming to mediation will all know to look for FMC accreditation. Any mediation happening there is completely outside the current regulatory structures.

Question 15:

a) 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?
• Other forms of non-court dispute resolution (NCDR)
Please explain your answer

69. The evidence shows that one size does not fit all with respect to NCDR.[58] For example, research into mediation, solicitor negotiation and collaborative law demonstrates all have strengths and weaknesses for different clients, based on their cost, flexibility, speed, incorporation of legal advice, their ability to overcome imbalances of power, or ability to pause in case parties need time to be emotionally ready.[59]

70. However, JUSTICE stresses the importance of cost, which will likely play a significant role in NCDR choice, given the private law cohort is disproportionately economically deprived. Currently, the only publicly funded NCDR process is mediation. JUSTICE therefore strongly supports consideration of how other forms of NCDR can be financially supported for those who would otherwise be unable to access them, but who would benefit from them better than court.

b) What are the advantages and disadvantages of expanding the requirement?

71. The clear advantage to expanding the requirement is better meeting the differing needs of the population of families for whom out of court resolution is suitable, but who may not be best suited to mediation.

72. In terms of disadvantages, JUSTICE reiterates the above concern about affordability. If the requirement is expanded to include other forms of NCDR, but mediation continues to

[58] A. Barlow, R. Hunter, J. Smithson and J. Ewing, *Mapping Paths to Family Justice: Resolving family disputes in neoliberal times* (Basingstoke: Palgrave Macmillan, 2017); Symonds, J. et al. Separating families: Experiences of separation and support (Nuffield Family Justice Observatory, 2022).

[59] Barlow et al, *Mapping Paths*, pp. 149-152.

be singled out for public funding, then the affect will be to give those who can pay privately a faster and more bespoke route to court. As such, JUSTICE supports the inclusion of other forms of NCDR, but recommends that there is financial support available for them.

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

73. A non-exhaustive list is as follows: collaborative law; solicitor negotiation; one-family-one-lawyer models; arbitration; and social work collaborative processes for example Family Group Conferencing.

d) 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?

74. Lawyer-led processes would be subject to various regulators, including CiLEX, the Law Society (through the Solicitors Regulatory Authority) and the Bar Council (through the Bar Standards Board). These regulators are overseen by the Legal Services Board which also oversees the Office for Legal Complaints (which runs the Legal Ombudsman scheme). For non-lawyer-led processes, this would depend on the professional facilitating the process. For example, Social Work England would regulate any social worker-led Family Group Conferencing.

Question 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
(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?

75. JUSTICE does not consider that not wanting to mediate is an "abuse" of the system.

76. The court can already order parties to explain themselves by ordering a witness statement or a position statement under its general case management powers. However, there are clear issues with ordering parties, or indeed mediators, to disclose details about whether the party has made a "reasonable attempt": breaching contractual confidentiality in the mediation process, and/or undermining without prejudice privilege which has covered the negotiations. This has proved to be a problem in Australia, where dispute resolution professionals must confirm whether parties have made a genuine effort in the dispute resolution, through issuing a certificate to that effect. Practitioners have described judging "genuine effort" as an "impossible task", posing problems with confidentiality and placing "an unwieldy and difficult burden on practitioners". As a consequence, the benchmark for determining "genuine effort" has been kept low. Practitioners have also explained that they see the issuing of such a certificate as "punitive, harsh and unhelpful in an arena intended to support individuals and their children to achieve workable, liveable parenting agreements".[60]

77. Rather than being something which can be remedied through additional court powers, for example to compel mediators to disclose details about the mediation, JUSTICE considers these difficulties to further support why pre-court NCDR should not be mandated and thereafter sanctioned by courts.

Question 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?

78. Above we have repeatedly highlighted the disproportionate economic deprivation in the cohort of families using the private family courts. Furthermore, the family jurisdiction is one in which the overriding objective explicitly states courts must have regard to the welfare of children. Children's welfare in these families is rarely improved through costs orders against the parents on whom the child is dependent.

[60] National Alternative Dispute Resolution Advisory Council (NADRAC) Maintaining and enhancing the integrity of ADR processes: From principles to practice through people (Canberra: Commonwealth of Australia, 2011), p 95.

79. Furthermore, JUSTICE has significant concerns about the risks of such a regime dissuading vulnerable parties from accessing the courts. As explained in our response to **Question 10**, such unintended consequences must form part of the proportionality analysis of the measures and whether they are complaint with Articles 6 and 8. JUSTICE considers that costs sanctions will only deepen the risks which we have identified above, namely intimidating exactly the vulnerable parties the family justice system is there to protect, as well as resulting in unfair and unsafe outcomes for them and their children. Therefore JUSTICE does not support a more robust costs order regime. JUSTICE further notes that, for the rare cases in which a costs order is fair and reasonable, the court already has the power to make such an order.

80. JUSTICE strongly supports retaining judicial discretion to look at all the circumstances in the case. Any loss of judicial discretion – and use of automatic costs penalties – could risk leading to arbitrary and unfair outcomes which do not consider the welfare of the child in the case on its particular facts, something JUSTICE considers would be antithetical to the overriding objective.

Question 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?

81. There is already a route back into NCDR if, during the court process, it has been identified as being more suitable for the parties and they consent to the NCDR. This can be found at 3.4(1)(b) of the Family Procedure Rules. The impact of this existing rule could be enhanced if there was better practical access to NCDR from court. For example, information hubs in courts which provide information about local mediation services, legal advice availability, and links to any family hubs or other networks of services for separating families.

82. However, JUSTICE does not support dispensing with parties' consent and ordering parties to mediate. In practice, JUSTICE stresses there are significant risks with this proposal. For example, in the case of a respondent victim of domestic abuse who has been struggling to access a letter from a GP or police records for the purpose of legal aid, and therefore comes to the first hearing with no representation, and no evidence of their unsuitability for

NCDR. Meanwhile the perpetrator applicant attends a MIAM or mandatory mediation and expresses a strong preference for mediation. Mandating mediation against the parties' consent in this case could potentially expose the victim of abuse and any children to risk of harm, in the period of delay and in the NCDR to which they would feel obliged to submit.

83. Outside of domestic abuse cases, we know that there is disproportionate substance misuse, self-harm and mental ill health in the private children proceedings cohort.[61] These are sensitive and personal issues which parties may not volunteer at the outset of proceedings, in the court form or in Cafcass's safeguarding checks which are not confidential. It is therefore highly likely that cases already do and will come to the first hearing with vulnerabilities undisclosed, particularly when parties are LiPs. Introducing a power to dispense with parties' consent to NCDR in such circumstances will therefore likely be used against parties with undisclosed vulnerabilities, and will likely disadvantage more vulnerable parties. For similar reasons to those given in the answer to **Question 10** above, therefore, JUSTICE does not consider that such powers would be compliant with Articles 6 and 8.

Question 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?

84. Again, it is necessary to highlight the disproportionate economic deprivation in the cohort of families using the private family courts currently. Furthermore, the family jurisdiction is one in which the overriding objective explicitly states courts must have regard to the welfare of children. Children's welfare in these families is rarely improved through the imposition of higher costs on parents upon whom child is dependent. This is especially the case during the current cost of living crisis. The role of court fees in supporting the overall objectives of the family justice system needs to take these factors into account, and ensure court fees are not raised indiscriminately in a way which obstructs access to justice.

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[61] Cusworth et al, Uncovering private family law: Adult characteristics and vulnerabilities (Wales) (NFJO, 2021)