Consultation on strengthening existing rules and practice directions to encourage earlier resolution of private family law children and financial remedy arrangements

Family Procedure Rule Committee

&

Ministry of Justice

Submission

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For further information contact:

Ellen Lefley, Lawyer
email: elefley@justice.org.uk

JUSTICE, 2nd Floor Lincoln House, 296-302 High Holborn, London, WC1V 7JH
email: admin@justice.org.uk website: www.justice.org.uk

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 the "Consultation on Strengthening Existing rules and practice directions to encourage earlier resolution of private family law children and financial remedy arrangements"[1] ("**the Consultation**") presented by the Family Procedure Rule Committee ("**the Committee**") alongside Ministry of Justice ("**MOJ**") Policy.

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.[2] 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.

[1] 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 (30 March 2023)

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

5. Before addressing the Consultation Questions in turn, JUSTICE has the following overall concerns with the Consultation and its proposals:

    - The Consultation has been launched concurrently with another MOJ consultation.[3] Conducting two consultations at the same time on significantly overlapping matters is likely to cause strain on capacity of those organisations wishing to respond in this policy area. Despite this, the subject Consultation is only for 8 weeks rather than the standard 12 weeks for a Government consultation. Whilst it has been suggested that 8 weeks is standard for a Committee consultation, JUSTICE notes the significant involvement of MOJ Policy in developing these proposals and indeed the Consultation has been sent out by the MOJ.[4] In any event, even taking the 8 week period to be the correct minimum standard, JUSTICE considers the concurrent consultation was a clear reason to extend the minimum response period. JUSTICE does not therefore consider that the consultation is a "proportionate" length of time, nor that it has taken account of the capacity of the charity groups being consulted, per the Consultation Principles 2018.[5]

    - Furthermore, JUSTICE suspects that the largest group who will be affected by these changes are those who are claiming MIAM exemptions for domestic abuse. Despite this, no frontline domestic abuse support organisations have been sent the consultation.[6] Whilst the Domestic Abuse Commissioner's Office has been sent the consultation, this is no substitute for the practical case experience of frontline organisations. Another clear omission from those who were sent the Consultation was the Nuffield Family Justice Observatory. As such JUSTICE questions how effectively the Consultation has "targeted" the full range of people who will be affected by the policy.[7]

    - In terms of the proposals, JUSTICE is concerned about the evidence base underlying the Consultation's focus on strengthening the existing provisions around attendance at Mediation Information and Assessment Meetings ("**MIAMs**") and encouraging more people to attend mediation or other forms of non-court dispute resolution ("**NCDR**") through non-consensual adjournments and costs orders.

[3] MOJ, Supporting earlier resolution of private family law arrangements, (23 March 2023)

[4] Per the Forwarding letter to the Consultation, dated 30 March 2023

[5] UK Government, Consultation Principles 2018, at para E and para G

[6] Forwarding Letter (n 4)

[7] Consultation Principles 2018, para F.

There is significant evidence in private children cases from the MOJ itself that families consider court to be the last resort.[8] There is also evidence that, when analysing the cases which do come to court, the large majority are appropriate for court and cannot be safely diverted. Again in the MOJ's own "proof of concept" pilot in Manchester, *Support with Making Child Arrangements Programme*, only 14% of the cases (171 out of 1190) were deemed suitable for diversion.[9] Most of the suitable cases nevertheless dropped out of the Programme (68%), mainly due to parties preferring the court process, wanting an enforceable agreement, inability to agree and communication issues.

- Furthermore, no systematic research has been undertaken to determine the extent to which MIAM exemptions are falsely or unnecessarily claimed. Meanwhile, the existing research does not support that exerting more coercive pressure to mediate will improve outcomes for adults and children. As we lay out in our consultation response, changing rules based on impressions, anecdotal evidence and unsubstantiated beliefs risks introducing deleterious delays, removing safety nets, exposing parties and children to coercion and harm, and effecting serious injustices.

Section 1 – MIAMs

Question 1: Do you consider that there would be any specific issues that may arise as a result of the proposed amendments to Rule 3.8? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know"

[8] 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). Recently confirmed in Symonds, J. et al. Separating families: Experiences of separation and support (Nuffield Family Justice Observatory, 2022)

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

6. **Yes.** JUSTICE has identified several issues with the proposed amendments, detailed in the below table.

MIAM Exemption/ Evidence Requirements	**Current Provision**	**Proposed Amendment**	**JUSTICE response**
Urgency r3.8(1)(c)(ii)(ad)	Urgency (c) the application must be made urgently because – (ii) any delay caused by attending a MIAM would cause - (ad) unreasonable hardship to the prospective applicant;	Amend r3.8(1)(c)(ad) to remove "unreasonable hardship" and replace with "significant financial hardship" Reasoning To make clear that this exemption relates to financial hardship and therefore is likely to only be relevant in financial remedy cases (rather than private family law children cases)	*JUSTICE is not clear on the intended difference here between "reasonable" and "significant". Is the intention to allow the court to take the view that financial hardship is not significant enough, even if it is reasonable? If so what is significant? More clarity on this would be appreciated.*
Previous MIAM attendance or previous MIAM exemption – NCDR attempted r3.8(1)(d)(ii)	Previous MIAM attendance or MIAM exemption (d) – (i) in the 4 months prior to making the application, the person attended a MIAM or	(1) Amend to include a non-exhaustive list of examples of types of NCDR being available to applicants AND (2) Remove	*In relation to Proposal (1) JUSTICE supports any measures which will increase the information available to families about their options. However, it must be noted for the attention of MOJ Policy that the impact of doing this by*

	participated in another form of non-court dispute resolution relating to the same or substantially the same dispute; or (ii) at the time of making the application, the person is participating in another form of non-court dispute resolution relating to the same or substantially the same dispute;	subparagraph r3.8(1)(d)(ii) AND (3) Amend to ensure that exemptions based on NCDR attendance are supported by evidence from the NCDR provider. Reasoning For proposal (1) – to ensure there are examples of common NCDR types available as a suggestion to parties. For proposal (2) – to ensure that parties still attend MIAMs even if they are already participating in NCDR, as MIAMs can still be helpful to refer to potentially more suitable forms of	*listing Non Court Dispute Resolution ("**NCDR**") in the rules is extremely limited. JUSTICE does not realistically see what impact a list of examples in the rules will have on the use of NCDR – the rules are already long, unwieldy and impenetrable for many LiPs, and often not known about when families are trying to understand their options. Instead, families firstly need accessible information and advice about what their legal rights and obligations are, and help to navigate the different options for dispute resolution. JUSTICE particularly highlights its recommendations for publicly funded early legal advice to meet this need, as well as an authoritative online information platform.[10] And secondly, families need those dispute resolution options to be affordable. We know that the private law cohorts in the family court in England and in Wales are disproportionately economically deprived.[11] In JUSTICE's view it is not the lack of a list of options in the*

[10] JUSTICE report (n 2) pp 45-58

[11] 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

		NCDR and provide other services. For proposal (3) – to ensure that the court has information about the type of NCDR that has taken place, to help inform its decision as to whether parties should still be required to attend a MIAM.	*rules which is preventing families from making use of collaborative law, arbitration or solicitor negotiation. It is financial accessibility which will prevent many, since public funding support for NCDR is for mediation only, at the exclusion of other forms. Indeed, the consultation says this would be a list of NCDR which is "available" to parties; for the families who cannot pay privately this is incorrect - those financial barriers mean such NCDR is unavailable to them in reality.* *In relation to Proposal (2) JUSTICE disagrees with this deletion. Mandatory pre-court interventions limit people's access to the court for the determination of their civil rights and obligations, a right under Article 6 of the European Convention of Human Rights ("**ECHR**"). In doing so, any limits must be proportionate to a legitimate aim. Providing information about NCDR to an applicant, when it is safe to do so, is a legitimate aim. The proportionately exercise,*

			however, requires a balance between providing information about NCDR and facilitating timely and effective access to court. The exercise must also take into consideration the additional cost of MIAMs – around £100 for those ineligible for legal aid – and the delay they incur, which is unlikely to be in the welfare interests of any children involved. *In light of the above factors, if parties are already engaged in NCDR, JUSTICE cannot see that mandating a MIAM nevertheless is proportionate, and therefore cannot support the suggestion.* *This does not preclude the rules, professionals or public education literature from informing parties that a MIAM may have additional benefits to them, or advising individuals to attend MIAMs voluntarily nevertheless. Albeit, JUSTICE is unaware of any evidence to show that those already participating in NCDR materially benefit from attending a MIAM in addition.*

			With respect to Proposal (3), JUSTICE questions the need for this amendment, being unaware of any evidence that there are significant problems with parties being unclear or dishonest about the NCDR they have participated in. There may also be difficulties with applicants being charged extra for letters (as we know is the case with GPs), or limits in any event about how much a NCDR practitioner can say about the nature of the NCDR due to either privilege or confidentiality. JUSTICE considers a more proportionate and less administratively burdensome approach is to ask the parties about the NCDR at first hearing. If the court is not satisfied with the answer, and it is a way of case managing the case justly, and in the welfare interests of the children, the court could order the applicant to provide evidence at that point.
Previous MIAM attendance or previous MIAM exemption – NCDR attempted –	The MIAM requirement does not apply if – (e) – (i) in the 4 months prior to making the application, the	Remove sub-paragraphs (e) and (g).	*JUSTICE again is concerned that this is disproportionate. The time limit in sub-para (e) and the stipulation in sub-para (g) that the application is made in existing proceedings are*

r3.8(1)(e), (f) and (g)	person filed a relevant family application confirming that a MIAM exemption applied; and (ii) that application related to the same or substantially the same dispute; or (f) – (i) the application would be made in existing proceedings which are continuing; and (ii) the prospective applicant attended a MIAM before initiating those proceedings; or (g) – (i) the application would be made in existing proceedings which are continuing; and (ii) a MIAM exemption applied to the application for those proceedings; -	Reasoning Circumstances can change, and therefore even where a MIAM exemption applied previously, it should still be necessary to attend a MIAM before making a court application (unless a different exemption applies currently).	*already addressed to situations in which it is unlikely that the circumstances will have changed. JUSTICE considers the majority of cases will not have changes circumstances, and to mandate attendance and further money spent on a MIAM is again disproportionate and risks infringing Article 6.*
Accessibility – r3.8(1)(k)	Other (k) – (i) the prospective applicant is or all of	Amend the wording so the exemption would	*Any recognition of remote video MIAMs must take into account the issue of digital exclusion.*[12]

[12] JUSTICE, Preventing Digital Exclusion from Online Justice (2018)

	the prospective respondents are subject to a disability or other inability that would prevent attendance at a MIAM unless appropriate facilities can be offered by an authorised mediator; (ii) the prospective applicant has contacted as many authorised family mediators as have an office within fifteen miles of his or home (or three of them if there are three or more), and all have stated that they are unable to provide such facilities; and (iii) the names, postal addresses and telephone numbers or e-mail addresses for such authorised family mediators, and the dates of contact, can be provided to the court if requested; -	not apply where the prospective applicant or all of the prospective respondents can access a MIAM online/ by video, even if they are not able to attend in person. Reasoning To account for MIAMs held online and through video which now take place frequently	*That is to say that some people are excluded from, and cannot participate equitably in, digital options due to not having the hardware, connectivity or confidence. 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 by their phone companies as they cannot afford their phone bills. As a result they have no internet at home.* *In addition, as well as online access being not practically available, what if online access is unsafe, or not private? What*

			if a party has a disability which makes it more difficult for them to participate online? JUSTICE considers the experiences of these families should be at the front of the committee's minds when redrafting the rules to incorporate the availability of video MIAMs. Whilst they may work for some, they are not an option for all.
Detention, bail conditions, license terms – r3.8(1)(l)	Other (l) the prospective applicant or all of the prospective respondents cannot attend a MIAM because he or she is, or they are, as the case may be – (i) in prison or any other institution in which he or she is or they are required to be detained; (ii) subject to conditions of bail that prevent contact with the other person; or (iii) subject to a licence with a prohibited contact requirement	As above, amend the wording of (l)(i) so that the exemption would not apply if the prospective applicant or all of the prospective respondents could access online or video MIAMs. Reasoning To ensure that prison Governors consider whether a prisoner can attend an online or video MIAM which may be more suitable than producing the	*To JUSTICE's knowledge, prisoners are only entitled to one 30-minute video call per month, and despite this entitlement existing in theory, access to video calls in prison in practice can be extremely poor, with significant delays despite the monthly quota.* *We are not aware that the same protections around confidentiality are available to video MIAMs from prison as are available to solicitor conversations – JUSTICE seeks clarification on this.* *Furthermore, the idea of Governors permitting a prisoner to attend in person for a MIAM, as suggested in the reasoning, is novel to*

	in relation to the other person; or	prisoner in person. (Consultees should note that victims of domestic abuse where the respondent is in prison shall still be able to claim the domestic violence exemption)	*JUSTICE, and we have no knowledge of this occurring in practice. If it does we defer to those with experience. In any event we consider the exception needs to remain available so that those without sufficient access to prompt and private video calls of sufficient quality could claim an exemption.*
Habitual residence – r3.8(1)(m)	Other (m) the prospective applicant or all the prospective respondents are not habitually resident in England and Wales	Remove this provision r3.8(1)(m) Reasoning This relates to geographical location, and therefore is no longer relevant given the availability of online and video MIAMs	*JUSTICE disagrees with this amendment. Indeed, it is confusing why the proposals seek to remove this exemption but only amend and not remove r. 3.8(1)(o) – this appears inconsistent.* *If an individual is not in the UK this does not mean they can access an online MIAM. In fact there are many reasons they could not and could be digitally excluded. If the proposals want to accommodate existence of online MIAMs, this can be done by keeping the exemption but adding ... "and is unable to access or participate effectively or safely in an online MIAM".*

Mediator availability r3.8(1)(o)	Other (o) – (i) the prospective applicant has contacted as many authorised family mediators as have an office within fifteen miles of his or her home (or three of them if there are three or more), and all of them have stated that they are not available to conduct a MIAM within fifteen business days of the date of contact; and (ii) the names, postal addresses and telephone numbers or e-mail addresses for such authorised family mediators, and the dates of contact, can be provided to the court if requested; -	(1) Amend to specify that this exemption should only apply if the applicant is unable to access a MIAM online/ by video. (2) Amend so that the details of contacted mediators must be provided to the court (rather than can be provided if requested). Reasoning To account for MIAMs held online and through video which now take place frequently.	*See response above with regard to ability to access a MIAM online/by video. JUSTICE further notes that people living in rural areas in particular suffer from poor internet connectivity.*
Distance from mediators – r 3.8(1)(p)	Other (p) there is no authorised family mediator with an office within fifteen miles of the	As above, amend the wording to account for the prospective applicant or all of the prospective	*As above.*

	prospective applicant's home; or	respondents not being able to access a MIAM online/ by video	
Mediator exemptions – r 3.8(2)	Other (2) an authorised family mediator confirms in the relevant form (a 'mediator's exemption') that he or she is satisfied that – (a) mediation is not suitable as a means of resolving the dispute because none of the respondents is willing to attend a MIAM; or (b) mediation is not suitable as a means of resolving the dispute because all of the respondents failed without good reason to attend a MIAM appointment; or (c) mediation is otherwise not suitable as a means of resolving the dispute.	Remove sub paragraph (c) – Reasoning From our engagement with the FMC and mediators, we have been made aware that mediators would not use this exemption, as all scenarios are covered by other exemptions above, and subparagraphs (a) and (b).	*JUSTICE considers a final catch all is useful. Whilst those mediators the Committee have spoken to will have considerable experience, it will not reflect the full experience of all the mediators in the country. Even if a minority only occasionally use it, JUSTICE considers the benefits of maintaining the current provisions outweigh any purported advantages of the suggested reform.*

Question 2: Do you consider there are further amendments which could be made to Rule 3.8 to increase attendance at MIAMs (in the appropriate cases)? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know"

7. **Yes** – JUSTICE does consider there are further amendments which should be made to the MIAM exemption list. However, these are amendments which would better secure prompt access to the court for those who need it, not amendments which increase attendance.

8. JUSTICE notes that the Official Solicitor in her response to the Private Law Working Group's consultation in 2020 raised the issue of capacity.[13] She noted there was no exception for those lacking capacity to negotiate, which should be added to the MIAM exemptions. JUSTICE is concerned this recommendation from the Official Solicitor has not been actioned and seeks clarification on the status of her recommendation, whether it has been considered and if so whether it has been rejected by the Committee. The absence of this exemption is a further reason to keep the catch all provision at r.3.8(2)(c) which could be useful in such cases pending an additional exemption being added.

9. JUSTICE is also concerned about the well-known difficulties for domestic abuse victims in obtaining evidence of their abuse which fits the current listed criteria in the rules.[14] MOJ research has shown the difficulties for domestic abuse victims in acquiring evidence of their abuse. 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.[15]

10. 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."[16] This is of course

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

[14] JUSTICE heard evidence during our Working Party from domestic abuse support services, who regularly faced financial barriers due to medical professionals and police charging for letters and disclosure. See JUSTICE report, (n 2) p111.

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

[16] 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") pp 180-181

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.

11. JUSTICE considers that the current requirements are too restrictive and risk victims of abuse not being able to evidence their abuse and therefore being unable to claim their exemption. JUSTICE therefore recommends the rules are simplified by removing the additional evidential requirements and considers MIAM exemptions should be self-declared to the court. This would mitigate against the outcome whereby victims of abuse are either disengaged from the process or otherwise enter the MIAM process feeling obliged to submit to mediation. This risk is more pronounced for some victims of abuse than others, for example some victims of abuse from ethnic minorities who already are experiencing significant social and cultural pressure, within families and within communities, to reconcile and agree contact.[17]

Question 3: Do you consider that there are benefits to applicants attending a pre-application standalone MIAM (in instances where the respondent doesn't engage or is not contactable, for example), as opposed to both parties attending post-application when ordered by the court? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

12. **No.** JUSTICE appreciates the motivation for this proposal and the problem it recognises: the poor access of many individuals (mostly those who cannot afford private legal help) to information, advice and support before court. Wider reform is needed. However, this consultation is based on the MIAM as it currently is, provided by mediators, chiefly focused on assessing suitability for mediation, costing around £100, and with fairly modest alterations. Indeed to make the requisite changes needed to the provision of information, advice and support in the community would go far beyond the Committee's powers. On the basis of what the current MIAMs are, even if the modest reforms in the consultation are rolled out successfully by the FMC, JUSTICE does not consider that mandating standalone MIAMs is the right policy solution.

13. There are a small number of cases in which a respondent's whereabouts are unknown, and because of that fact their circumstances are likely to include some of the more complex

[17] MOJ Harm Panel report, fn 2 above, pp. 46, 64 and 145. See further an in depth qualitative study of the intersection between domestic abuse, post-separation child contact and women of South Asian and African-Caribbean Women: R. Thiara and A. Gill, Domestic Violence, Child Contact, Post-Separation Violence: Experiences of South Asian and African-Caribbean Women and Children (NSPCC, 2012).

cases. For example, resident grandparent-applicants who have been advised by the local authority to apply for a child arrangements order, when the parents' whereabouts are unknown. Mandating a MIAM in these circumstances is of extremely limited value, when it would delay the application (which would not be in the interests of the child) and cost the grandparents £100 which would be better saved for the household, particularly given the current cost of living crisis.

14. If the respondent emerges, then as the consultation says, a MIAM can be considered by the court at that point. Again, JUSTICE stresses the difference between MIAMs being *available* to applicants and respondents, and the question of making them *mandatory*, which engages Article 6 ECHR. JUSTICE does not consider that the proportionality case for making standalone MIAMs mandatory is made out, and disagrees therefore with the proposal.

Question 4: Do you consider that there would be any specific issues that may arise as a result of the proposals relating to Rule 3.9? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

15. **Yes.** JUSTICE agrees that one size does not fit all with respect to NCDR; the research evidence from the *Mapping Paths to Family Justice* project clearly points to this conclusion.[18] This has also been recently reconfirmed by qualitative research by Bristol University.[19] To the extent that the FPRC can act by changing the rules on the content of the MIAM to include information about other NCDR, JUSTICE supports this. For this to have a meaningful impact in practice, however, JUSTICE considers the Committee will have to work with the FMC to implement the rules, to ensure they are supported by guidance and some expectations set about the standard of NCDR information provision that is expected. For example, explaining that NCDR options exist in the abstract is unlikely to have any impact – information will need to be given about local providers, the nature of it, whether it is confidential, ways in which the child's voice may be heard, any quality markers to look for (eg membership of Resolution), the likely costs, or at least cost brackets, and where the individuals can go for further information.

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

[19] Symonds, J. et al. Separating families: Experiences of separation and support (Nuffield Family Justice Observatory, 2022)

16. For the attention of MOJ Policy in receipt of this consultation, we reiterate the impact that public financial support for other forms of NCDR could have, as is available for mediation. Indeed, the outcomes of this process are likely to be significantly skewed by the current financial support available: MIAMs may provide information about a NCDR process about which the individual had no knowledge and may consider to be significantly more suitable for their dispute. However, without financial support a significant number of people will be unable to pursue that NCDR option.

17. JUSTICE also wishes to express concern at this point in the Consultation about the dissonance between this consultation and the concurrent MOJ consultation. This consultation is suggesting a more inclusive approach to NCDR, in recognition that one size does not fit all and that different dispute resolution procedures will suit different disputes, dynamics and families. However, the MOJ concurrent consultation is not only suggesting that one type of NCDR – namely mediation – should continue to be given priority, but that it should be so prioritised as to be mandated. It furthermore only proposes to allow for an exception to mandatory mediation if parties have made a reasonable attempt *to mediate*, not a reasonable attempt to settle out of court in other NCDR.

18. In reality, if these MOJ proposals are implemented, the information in the MIAM about other NCDR that this Consultation proposes will be relatively pointless. The key point for the individual will be: do not try collaborative law, solicitor negotiation or any other NCDR *even if it is better suited to you than mediation*, because if you do and it does not work out, you will be at a disadvantage and you will have to try (and likely pay for) mediation on top of that to be able to access the courts.

Question 5: Do you agree that the person conducting the MIAM should “assess” the suitability of different forms of NCDR at the MIAM? Please answer “Yes” or “No” and give full reasons and examples to support your answer. If you are unable to answer this question, please state “Don’t know”.

19. **No.** Whilst this may be a future ambition, practically there are a number of difficulties in imposing a broad NCDR "assessment" role on mediators currently. As a result of these barriers, JUSTICE suggests it should be an information and *assistance* role with respect to NCDR. Meanwhile we recommend MOJ consider how the below barriers can be addressed.

20. The only "assessment" of suitability so far in MIAMs has been for mediation. That assessment is by the mediator, in respect of the mediation that they themselves offer. The mediator is therefore an expert in their own process and assesses on that basis. There are problems with that assessment as it is, and JUSTICE is particularly concerned with evidence of poor and inconsistent risk screening in MIAMs.[20] JUSTICE recognises the recent work that has gone into revising the MIAM standards by the FMC, however the impact of those revisions needs to be embedded and evaluated. It should also be remembered that the vast majority of screening only relates to domestic abuse. Whilst this a known prevalent risk in these cases, there is also evidence of disproportionate substance misuse, self-harm and mental ill health in the private children proceedings cohort,[21] all vulnerabilities which can impact the suitability of mediation.

21. In the JUSTICE Working Party report, we recommended 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 help. Such a tool should be a universal initial screen for overall risk, not limited to domestic abuse, for every person, which will identify the need for fuller assessment if a risk is identified, along with suitability for referral for support services.[22]

22. In addition to this, JUSTICE considers there are other practical barriers to be overcome if mediators are to be given the task of authoritatively assessing suitability for other NCDR as well as mediation:

    - Firstly, there needs to be further research into *how* to assess the suitability of the dispute to different forms of NCDR, based on not only practical factors (eg cost) but

[20] 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, n 8 above, pp. 100-101.

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

[22] JUSTICE report, n 2, pp 63-66. The Working Party found an example of a tool which could significantly assist such coordination in Australia. The Family Law Detection of Overall Risk Screen tool ("FDOORS") 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. It is also currently being piloted as part of a court intake procedure. 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. 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'

also factors like safety (as explained above, with there needing to be a developed consensus about what identified risks would be manageable in which processes).

- Secondly, there 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. 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 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 there is insufficient awareness of the eligibility criteria then it will not be successfully referred to.

- Thirdly, there would need to be dedicated training and accreditation for mediators or other professionals who might conduct MIAMs to ensure consistent standards and quality of assessments.

23. Without the above barriers being addressed, JUSTICE considers imposing an "assessment" role on MIAM providers could in fact result in a worse experience for the user. They risk being assessed as suitable for services which are in fact unsuitable in a way in which the MIAM provider was unaware, or they risk being further delayed and confused by a process which recommends processes in theory with no meaningful assistance to access them in practice. Therefore, we currently do not support any requirement on the MIAM provider to "assess" the parties or the dispute for NCDR to the extent that it would direct the parties on what is suitable and unsuitable for them. Instead, we suggest it should be an information and assistance role. Meanwhile we recommend MOJ consider how the above barriers can be addressed.

24. Finally, on the matter of delivery, JUSTICE queries the ongoing restriction of the MIAM to be conducted only by mediators. If the role is going to be wider and will facilitate

understanding of a broader range of options, then those family justice professionals may too be able to conduct the meetings, for example lawyers or arbitrators.

Question 6: Do you consider that there would be any specific issues that may arise as a result of the proposal that any required evidence of a MIAM exemption should be provided with the application to court? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

25. **Yes.** See below.

Question 7: Do you consider that there would be any specific issues that may arise as a result of the proposed amendments to bring forward the point at which the court must review the MIAM exemption and any supporting evidence to the gatekeeping stage for private family law children cases? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

26. **Yes.** In response to both Questions 6 and 7, JUSTICE is concerned about the impact of requiring evidence upfront and considering it before the first hearing. As in our response to Question 2, JUSTICE stresses the need to consider the position of the most vulnerable applicants coming to the family court, and whether these evidential requirements could frustrate or delay their access to justice.

27. Requiring evidence to be filed upfront with the application would create an additional barrier to the courts. There are clear problems with doing this:

- It will impact the most vulnerable who are entitled to exemptions. As outlined in Question 2 above, there are well-known difficulties for domestic abuse victims in obtaining evidence of their abuse which fits the current listed criteria in the rules. Bringing the evidential requirement forward risks putting those domestic abuse victims who cannot obtain evidence – who may be some of the most marginalised and/or vulnerable – in a position in which they feel they cannot make the application. Should it have this effect, and dissuade the exact people who *should* be coming to court from doing so, this would be seriously undermining, not improving, access to justice.
- For those who do have the means and the ability to access such evidence but doing so would cause a delay, JUSTICE is concerned that delay will in many cases be contrary to the welfare interests of the children concerned. Rather than being "useful" delay, this will simply be bureaucratic delay.

28. For similar reasons, JUSTICE cannot support the proposal to review cases for their MIAM exemption evidence at the gatekeeping stage before the first hearing. The Consultation is silent in paragraphs 28-30 as to the possible outcomes of this earlier evidence review, but JUSTICE assumes it links to paragraph 19 and the intended result is to dismiss applications and/or direct MIAMs. This will again impact those at risk of harm who may not be able to obtain evidence easily, and JUSTICE is concerned that it could lead to unsafe outcomes for adults and children.

29. Instead, any review of a MIAM exemption must allow for the applicant to participate by explaining why they have been unable to obtain evidence. The first hearing is an apt opportunity for this, and of course also benefits from the Cafcass safeguarding letter. Often, information from the police and local authority in the safeguarding letter will provide the missing information, circumventing the need for a review of the MIAM exemption evidence. It would be very concerning if the rules were changed to prevent such cases from coming to first hearing, and instead causing them wrongly to be rejected at gatekeeping stage. Again, JUSTICE stresses that this would obstruct and delay justice for the most vulnerable applicants and their children.

Question 8: Do you consider that there would be any specific issues that may arise as a result of the proposal that where a claimed exemption is no longer relevant, the court has the power to order both parties to attend a MIAM, where appropriate? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

30. **Yes.** JUSTICE observes that the court already has the power to order parties, under r3.4(1)(a), to adjourn for such specified period as it considers appropriate to enable the parties to obtain information and advice about, and consider using, non-court dispute resolution; and where the parties agree, to enable non-court dispute resolution to take place. Therefore the Question is unclear in what way r.3.4 is insufficient. If the Question is alluding to the ability to exercise this power earlier, before the first hearing, then JUSTICE does not support the proposal, for the reasons explained in the answer to the previous Question above.

Section 2 – Dispute Resolution Encouraging Engagement with NCDR

Question 9: Do you agree with the proposal to give the court the power to adjourn private family law children proceedings and/or financial remedy proceedings, when the court believes that NCDR would be beneficial for the parties, to allow them to attempt to resolve their issues outside of court? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

31. **No.** The Question does not contain the most important part of the proposal - that the phrase "when the parties agree" would be deleted from the rules. Not only would the court be dispensing with the parties' consent in this manner, it is also tied to costs consequences. JUSTICE considers it to be extremely difficult therefore to see the difference between this proposal and mandating NCDR.

32. 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 and expresses a strong preference for mediation. Changing the rules in this way and dispensing with the consent of parties who may be extremely vulnerable could potentially expose the victim of abuse and any children to risk, in the period of delay and in any NCDR to which they would feel obliged to submit.

33. We also consider that, in cases when there is evidence of abuse, but the judge considers the case may be suitable for NCDR, then there is a risk of judges pre-judging the issues in the case. The President of the Family Division, Sir Andrew McFarlane, has previously commented on the "thin line in some cases, between case management…and premature adjudication"[23] which family judges already must tread. These proposals would be at significant risk of overstepping this thin line, and effectively pre-judging the outcome of the allegations of abuse.

34. Outside of domestic abuse cases, non-consensual adjournments for NCDR are still likely to risk unfair delay which would not be in the welfare interests of the child, and frustrate access to justice for vulnerable parties. We know that there is disproportionate substance

[23] *Re Q (Children)* [2014] EWCA Civ 918, para 54.

misuse, self-harm and mental ill health in the private children proceedings cohort.[24] These are sensitive and personal issues which parties may not volunteer at the outset of proceedings. There is also evidence that they make successful mediation less likely, even when combined with legal information and counselling.[25] We also know that NCDR may be an inappropriate or ineffective way of resolving disputes for parties for other reasons: factors like emotional readiness are important, as is imbalance of power, for example when one party has a lawyer and the other does not.[26] As such, mandating negotiation in such circumstances can risk traumatic experiences, whilst being unlikely to lead to a sustainable outcome, but will inevitably result in delay for the child. The proposal clearly engages Article 6 ECHR, and for all the reasons above JUSTICE does not consider the proposal would be a proportionate measure to achieving a legitimate aim, which in these cases is the safe, fair, prompt and sustainable resolution of disputes, in the welfare interests of any children involved.

35. This does not mean the court cannot make observations about NCDR suitability, seek Cafcass's advice on it, and ask the parties' representatives to consider it (if they have them). JUSTICE fully supports the use of the current rule 3.4(1)(b) in cases in which the parties have participated effectively, Cafcass has been consulted, there has been a collaborative process which has identified an NCDR option, and both parties consent to it. This, in JUSTICE's view, is the proportionate approach to such orders.

36. Finally, JUSTICE questions whether such an amendment to the rules in secondary legislation would be in fact *ultra vires.* Section 75 (5) of the Courts Act 2003 stipulates that "Any power to make Family Procedure Rules is to be exercised with a view to securing that— (a) the family justice system is accessible, fair and efficient". For the reasons above, JUSTICE considers this proposal makes the family justice system *less* accessible, and risks unfairness, and as such would not be compliant with this primary legislative condition.[27] In any event, JUSTICE considers it would lead *de facto* to mandating NCDR, which the concurrent MOJ consultation has conceded would require primary legislation.[28]

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

[25] A. Barlow and J. Ewing, An Evaluation of Mediation in Mind – Final Evaluation report (University of Exeter, 2020), p. 2.

[26] *Mapping Paths to Family Justice* (n 18)

[27] Indeed this is likely part of the reason that MIAMs were provided for in primary legislation in the Children and Families Act 2014, rather than through rule change.

[28] MOJ, Impact Assessment: Consultation on supporting earlier resolution of private family law arrangements, IA: MoJ033/2022 (2 March 2023).

Question 10: Do you have any views on the appropriate timing for the court to adjourn proceedings in private family law children cases and/or financial remedy cases, in response to the issues raised in Paragraph 34(e)(i) and (ii)? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

37. **Yes.** JUSTICE agrees that this should certainly not be decided on the papers. However, even by first hearing, there would need to be rigorous safeguards to ensure adjournments were not ordered on an insufficient understanding of the case. For example:

    - Vulnerabilities which may affect the suitability of NCDR but which have not been disclosed yet in proceedings (see above response to Question 9).

    - By the first hearing it is not unusual for a Cafcass safeguarding telephone call not to have taken place with a party (particularly respondents from whom there can be zero information by the first hearing), and/or disclosure from police or local authority not having been received.

    - Many litigants will not have received any legal advice, about how to express their case, the evidence they may need to bring to the court's attention, the rules, the law, and the merits of their case.

38. In these circumstances, the judge or the magistrates lack the information about the case to make an adequate assessment of the suitability of the case for NCDR at an early stage. Again, JUSTICE reiterates the need for publicly funded early legal advice for these matters, which would significantly improve the ability of judges to understand the issues in the cases before them at an early stage, and help them cases manage effectively. This would improve the courts' ability to identify those cases which may be suitable for NCDR and provide more information and encouragement about it as an option. However, per the response to Question 9, we do not consider this should extend to dispensing with parties' consent to an adjournment for NCDR.

39. The need for better information earlier in proceedings contributed to JUSTICE's further recommendations in our report, to include a more substantial initial investigation in cases at the outset, before any hearing. Similar processes are being piloted in the MOJ's pathfinder pilot sites, in Dorset and North Wales, in recognition of this need. In light of this recognition in the pilot sites, JUSTICE considers it to be contradictory and concerning that

other courts in England and Wales which are unable to benefit from such increased information early on in the process would, regardless, be encouraged to dispense with parties' consent to an NCDR adjournment.

Section 3 – Costs Orders

Question 11: Do you consider that there would be any specific issues which would arise from amending the Rules to include an express provision for the court in financial remedy proceedings to factor in as a matter of "conduct" any failure to undertake a MIAM, if parties are ordered to attend a MIAM post-application, when considering costs orders against a given party? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

40. **Yes.** JUSTICE queries the necessity of this proposal given the broad discretion in the court's existing powers, especially r.28.3(7)(e), to consider "any other aspect of a party's conduct in relation to proceedings which the court considers relevant". For those who are i) ineligible for any MIAM exemptions, ii) subsequently ordered to attend one by the court, and iii) do not attend the MIAM nevertheless, we accept this could possibly amount to relevant conduct. However it equally may not - the reason for not attending may be entirely justifiable, and indeed could be based on issues which arose after the order. Therefore, JUSTICE strongly supports retaining judicial discretion to look at all the circumstances in the case, and not creating an automatic costs penalty.

41. Furthermore, we stress the need for any order to attend a MIAM to be explained to any litigants in person in plain English, without legal jargon, and for any litigant in person who does fail to attend a MIAM to be reminded of the costs consequences. Before any court hearing which will consider costs, litigants in person should be alerted to that fact so that they can have adequate time to prepare their reasons.

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

or “No” and give full reasons and examples to support your answer. If you are unable to answer this question, please state “Don’t know”.

42. **Yes.** There are clearly some cases in which this policy may have the desired effect, and focus people's minds. The problem with any costs "threat" being more closely linked to non-engagement with NCDR is the risk of unintended consequences. In these cases, this is the risk of intimidating vulnerable parties, including victims of domestic abuse, those with poor mental health, those experiencing community or cultural pressure, and some LiPs in cases in which the other party is represented. Then, as a result of intimidation, rather than consent, those parties submitting to NCDR when in fact they need to access the courts to access a fair process and a safe outcome.

43. The proposal here caveats that the court has both i) determined NCDR is suitable and ii) has judged that a party lacks a good reason for not engaging. However this will not assist if the fear of costs consequences prevented a vulnerable party from coming to court in the first place. Domestic abuse charities with whom JUSTICE has consulted are extremely concerned that this will happen, fearing the courts will be seen as even more of a hostile and unwelcome environment for abuse survivors to access safety and fair outcomes.

44. Furthermore, if a vulnerable party doesn't engage with NCDR and proceeds to court, it is not clear how "good reasons" will be determined, based on what evidence in proceedings, and with what safeguards.

- If an unrepresented victim of domestic abuse has not been able to evidence their abuse to the court’s satisfaction, will this be deemed to be without good reason? This would be highly concerning given the existence of evidential barriers discussed above and documented in the Harm Report, yet JUSTICE is not satisfied that there are safeguards preventing it from happening in these proposals.

- If an individual is distressed and does not feel emotionally ready to negotiate, will this be deemed a good reason? If so, how would this be implemented fairly and consistently?

- If a party had been unable to access legal advice during the adjournment and that had therefore been their reason for not engaging, would this be deemed a good reason? Again, ensuring it is approached consistently and fairly would be challenging.

45. The above is not to say that the current costs powers always lead to fair outcomes; however to go further and add a costs presumption as this proposal does, poses too significant a risk of inconsistency and unfair outcomes, in JUSTICE's view.

46. Finally, it must be remembered that appealing any of these orders, once made, is almost impossible for litigants in person, including those who are victims of abuse, who often will not understand what can be appealed, on what grounds and how to do it. In any event, LiPs will often not be legally empowered to pursue an appeal after a difficult and often alienating court process, and will be unlikely to want to risk the cost consequences of appeal.

Question 13: Do you think that attendance at NCDR should be determined through factual questions asked of the NCDR provider, or should the provider be asked to give subjective views as to whether an individual 'engaged' with NCDR (noting the satellite litigation and subjective determination concerns noted by the Committee)? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

47. Knowing if someone has attended an appointment is of limited value, but may be of use in certain cases, for example when there is a dispute about said attendance taking place. JUSTICE suggests that providers should only be asked about these factual issues when it is necessary, since the first port of call for this information is the parties; when the parties agree that x number of meetings took place there will be no need to ask the provider.

48. We agree with concerns about subjective determination expressed in the Consultation and the wider concerns about confidentiality and privilege in asking NCDR professionals to divulge whether and to what extent parties have engaged in NCDR. In Australia, where dispute resolution professionals must confirm whether parties have made a genuine effort in the dispute resolution, practitioners have described it as an "impossible task", posing problems with confidentiality and placing "an unwieldy and difficult burden on practitioners" and 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".[29] JUSTICE therefore considers there to be little to be gained in imposing any such requirement on NCDR practitioners.

Question 14: Do you consider that there would be any specific issues which would arise from having a pro-forma provided to the court which asks the parties to: a) set out their position in relation to NCDR at the first hearing, and; b) set out their reasoning following any non-attendance at NCDR (where this has been recommended by the court) or at other later stages in proceedings? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

49. **Yes.** JUSTICE reiterates the Committee's observation that a party's reasoning for non-attendance at NCDR may change throughout proceedings, and stresses this must be taken into account. Documenting a snapshot of a party's approach to NCDR at the start of the case is unlikely to be of use if it has developed throughout the case. For example, a party may not be emotionally ready to negotiate, may not have received legal advice, or may reasonably wish for the court to consider the need for a fact-finding or expert evidence to which the other party does not agree, all of which could change (and in many cases will be asynchronous with the other party's position in relation to NCDR).

50. JUSTICE suggests it may be more proportionate and less of an administrative burden if the court required the parties to provide their position in relation to NCDR *ad hoc*, in cases when the issues and the dynamics between the parties are known.

Question 15: Do you consider that the pro-forma should be required by the court via an "Ungley-style" order, or should it be a request by the judge rather than a standard requirement? If a requirement, at what stage(s) in the proceedings should it be made? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

51. **Either/or question therefore unable to answer Yes or No.** As explained above, JUSTICE expects the best approach would be to request positions from parties *ad hoc*,

[29] 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.

and not to impose a standard requirement. See further reasoning in response to Question 17.

Question 16: Do you have any suggestions for what the pro-forma should look like or should include? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

52. **Yes.** The disadvantage of a new pro forma is that it may oversimplify the question of NCDR, especially if it does not include any opportunity for free text but only contains tick boxes, as suggested in the Consultation. As explained in our response to Question 5 above, speaking about NCDR options in abstract is of limited assistance. The suitability of, and parties positions on, different forms of NCDR will depend on the local accessibility, the cost, flexibility, the parties' understanding of the pros and cons, whether they feature an element of legal advice or evaluation, and parties emotional and practical readiness to negotiate. If the court is going to ask parties for their position on NCDR, it would be useful to know about the parties reasons, rather than asking them about their position in principle only then to discover their position is caveated on it being under a certain price bracket, or on the basis that they will be able to access legal advice as part of the service, when in fact that is not on offer (for example mediation).

53. JUSTICE considers that an order permitted parties to file a stated position on NCDR would work well. The further benefit of the latter would also be that the judge would be able to recite the types of NCDR that they consider may be suitable (eg mediation), the reasons why the court considers they may be suitable, and specifying what the court is requesting from the parties.

Question 17: Do you consider that there is a way to ensure that this proforma is not requested from victims of domestic abuse? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

54. **No.** The word "ensure" here is key: there is no way of ensuring this, since this would require a 100% success rate in identifying victims of domestic abuse. The evidence heard by the MOJ Harm Panel report demonstrates this is not happening, even in children cases, let alone in financial remedies cases. As was recommended in that report, as well as in

JUSTICE's Working Party report, and has been recognised in the pathfinder pilots, the risk of that happening is reduced if the process is frontloaded with more information-gathering and improved safeguarding procedures before first hearing.

55. If the Committee does not wish to ask victims of domestic abuse about their views on NCDR, which JUSTICE agrees is the right approach, then JUSTICE considers the best way to reduce this risk is the tailored *ad hoc* approach above. Any training of judges and magistrates to use said approach should also highlight the need to safeguard victims of domestic abuse and other vulnerable litigants. This should include training on the multiple reasons why parties may not wish to participate in NCDR, including reasons that the party may wish to keep private (for example their mental health), as well as practical reasons such as access to legal advice and costs.

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

Question 18: Do you have any views on the advantages or the disadvantages of the single lawyer models and ENE in regards to private family law children proceedings and/or financial remedy proceedings? Please answer "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please state "Don't know".

56. **Yes.** JUSTICE is certain that there will be families who will benefit from these newer and/or rarer models. Again, however, JUSTICE reiterates the evidence of disproportionate deprivation in children proceedings, and therefore it is perhaps unhelpful to group financial remedy and children cases together in this respect. For families experiencing child arrangements problems who would otherwise be suitable for such models, the disadvantage of these models like all other NCDR processes, other than mediation under £500, is the affordability.

57. One advantage of both these models is that they offer some legal guidance on how the dispute is likely to be resolved. It would not surprise JUSTICE if this was a key benefit for those families choosing such processes over others. A clear message from our consultees during our Working Party – lay, professional and volunteer – was that while general information can be an important first step for families, when a problem arises individuals want, and in many cases need, legal advice from a professional. 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. Again, JUSTICE

stresses the improvements which could be achieved to the prompt and effective resolution of disputes, in or out of court, with the provision of publicly funded early legal advice.

Final observations

58. JUSTICE considers a lot of the policy aims in this Consultation would be better achieved with funding towards early legal advice. The opportunity to correct wholly unrealistic expectations of court, consider a client's suitability for mediation and other NCDR, and give legal advice which they will trust, would in our view result in significant benefits to families in children and finance cases. It would encourage NCDR where appropriate[30] providing participants with a basic legal understanding of their rights and obligations beforehand. And for those who do need the court, it would assist promptly, while also providing access to legal aid entitlements for those eligible. In this way, it would benefit a majority who may or may not need the family court, as opposed to the above proposals which will in fact only target a minority.

59. JUSTICE also considers that the policy ambition to broaden access to NCDR does not wrestle with the financial reality for many families. As JUSTICE has repeatedly flagged in this consultation, to increase the content of the rules and the MIAM to reflect a broader understanding of NCDR will be of extremely limited impact if there is no financial support for those other NCDR processes.

60. Finally, JUSTICE notes the absence of any reference in the Consultation to the child's right to be heard both in proceedings and outside of court, as provided for by Article 12 of the UN Convention on the Rights of the Child. Whilst not all children have their voices heard in court proceedings, it is a minority practice outside of court. Of course facilitating child participation well in NCDR, for example in mediation or collaborative law, needs a funded and qualified professional, and therefore this is part of the aforementioned issue of affordability and deprivation. A fuller explanation of our concerns about the rights of the child to be heard will be included in our response to the concurrent MOJ consultation.

[30] As solicitors used to do before the LASPO Act 2012. In 2020/21 there were half as many legally-aided mediation starts as there were a decade ago: there were 7,699 mediation starts in 2020/21, half those recorded in 2011/12 (15,357). Throughout, the proportion of successful mediations (those reaching full or partial agreement) is constant at between 60-64%, however there is no data on the longevity of these agreements and if those cases go to court. See MOJ, Legal Aid Statistics Quarterly: October to December 2021, Table 7.2.

61. For the more immediate attention of the Committee, however, is the JUSTICE recommendation that a culture change is needed throughout the family justice system with respect to child participation, including in the Family Procedure Rules.

62. The Working Party found that children's opportunities to participate in court proceedings currently are still determined to a large extent by what the adults want and the imperative to resolve the dispute, rather than being determined by the child's rights and needs. It recommended that children must no longer be seen as "passive, dependent and less than adults" but rather "active social actors in their own lives".[31] It was the Working Party's view that fundamental reform of the system into one which *proactively* provides children with opportunity to participate effectively and meaningfully was necessary, and this should be strived for outside of court as well as in court.

63. With respect to the court rules, the Working Party considered that an important first step could be taken: to recognise the child's right to participation and the court's duties to the families who come to it in the rules of the court.

64. The Working Party recommended an explicit duty upon the court to provide children with the opportunity to participate in a case concerning them. It considered this should be done through amendments to Part 3A and Practice Direction 3AA. It further endorsed the recommendation of the Vulnerable Witnesses and Children Working Group in 2015[32] that the overriding objective be amended to reflect that dealing with a case 'justly' includes the participation of children (along with vulnerable witnesses and parties).

65. JUSTICE urges the Committee and MOJ to consider these recommendations when considering broader reforms in the rules and in family justice policy.

[31] E Kay M Tisdall, 'Subjects with Agency? Children's Participation in Family Law Proceedings' (2016) 38:4 Journal of Social Welfare and Family Law 362.

[32] Vulnerable Witnesses and Children Working Group, Final Report (2015)