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## **“What about me?”**

### **Reframing Support for Families following Parental Separation**

REPORT OF THE  
FAMILY SOLUTIONS GROUP  
(Subgroup of The Private Law Working Group)



12 November 2020

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## Foreword

This impressive report is the work of the Family Solutions Group (FSG), a subgroup of the Private Law Working Group, formed earlier this year (2020) with a brief to give fresh and focused attention to improving the experiences of, and opportunities for, separating families away from the Family Court. The multi-disciplinary nature of the membership of the FSG shines through this report, evidenced by the many ways in which the needs of the separating family have been discussed and analysed. The report, which is rich with ideas and recommendations, builds materially on and develops the ideas within the second report of the Private Law Working Group (March 2020). The result is testament to the energy and inspiration which each member of this FSG has brought to its work.

The title emphasises the strong central theme of the report – encouraging all of us who work in the field of family justice to place the child's long-term welfare, and the child's rights, ever more firmly at the centre of our work. The report rightly observes that the current processes for issue resolution (in or out of court) tend to operate largely for parents. The FSG proposes the creation of a framework of directly accessible community-based services for children and young people whose parents separate, offering them information, consultation, support and representation; the FSG urges the abandonment of the ingrained culture of traditional welfare protectionism, replacing it with a presumption that all children and young people aged 10 and above be heard in all issue-resolution processes outside of the courtroom. While the need for swift and unimpeded access to the Family Court is rightly recognised as vital for some families, particularly where there are safety concerns, the FSG nonetheless reframes how we should consider the arrangements for issue resolution in and out of the court system. Significantly, it encourages us to reflect on the well-recognised fact that many parental disagreements about children following separation are not *legal* disputes, and that a *legal* response may indeed be unhelpful for many families.

All of us who work in the family courts, and indeed in connected spheres, will benefit from learning the new language adopted in this report. This is but one step in the direction of a much-needed societal shift, through public education and government support, away from what many parents still see as 'custody battles', to the long-term goal of cooperative parenting. The FSG is clear in its objective to reach separating families before they turn to the law. This is all the more important, as the report makes clear, given the extraordinary and ever-increasing pressures on the court system at present. In this regard, the report makes a range of clear and practical recommendations for change.

I would like to thank all members of the FSG for bringing their wide range of experience to the table, and for their valuable and enthusiastic contributions to this important piece of work. I offer my particular thanks to Helen Adam for chairing the

group, harnessing its talent, and for inspiring us all with her clear vision for achieving better outcomes for separating families. I would also like to thank Dr. Jan Ewing for her particular contribution to the report, and its production.

I commend this report to all those who work in the Family Courts and beyond; I am confident that it will make a significant contribution to the design of long-term systemic reforms around family separation, and short-term initiatives to relieve the pressures in private family law in the courts.

Mr Justice Cobb  
Chair of the Private Law Working Group  
October 2020

## EXECUTIVE SUMMARY

### A. The Children Act 1989, 30 Years on

1. The Children Act 1989 was implemented nearly 30 years ago.<sup>1</sup> It was ground-breaking legislation, making radical changes to the law relating to children and their families in both private and public law. The old proprietorial concept of child 'custody' was swept away and replaced by a new legal concept of 'parental responsibility'. The golden thread running through the Act was that child welfare was to be paramount at all times. It was bold, radical, and admired across many jurisdictions.
2. Thirty years on, the inspiring principles underpinning the Act have yet to be fully realised. Rather than introduce policy and funding to support awareness of 'parental responsibility' and 'child welfare', successive governments have funded our family justice system, with the door of the court open to all. When parents separate, where do they turn? Where do their children turn?
3. Attempts to steer couples away from the court and into mediation have ended up being counter-productive.<sup>2</sup> Since awareness of mediation in the general population is low<sup>3</sup> and provision of support outside of the court system is patchy and poorly signposted, this leaves a void for separating families at a time of great need. It is no surprise, therefore, that parents who struggle to agree arrangements in the aftermath of relationship breakdown still view their issues as legal issues, aware of the provision which is available: the family court.
4. This paper looks into the void, attempting to reframe the needs of the separating family outside the language and context of law and the family court. What can be done now to fulfil the aspirations of the Children Act 1989? What can be done to promote parental responsibility, with child welfare at the heart of decision-making? What do parents and children need from society to protect their family relations after separation and how can that be provided across England and Wales? Importantly, how can the needs and rights of the child be advanced to centre-stage and recognised as of prime consideration, rather than the mere secondary subjects of dispute resolution between their parents?

<sup>1</sup> Implemented on 14 October 1991.

<sup>2</sup> The removal of legal aid for legal representation from all but a narrow category of separating parents, while retaining legal aid for mediation, as introduced by the Legal Aid Sentencing and Punishment of Offenders Act, 2012. This effectively removed (and did not replace) a key gatekeeper to mediation referrals, the family lawyer.

<sup>3</sup> Barlow, A., Hunter, R., Smithson, J. and Ewing, J. (2017). *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times*, Palgrave, Socio-Legal Studies.

## **B. Putting Children's Rights and Welfare first**

5. The Children Act 1989 and the United Nations Convention of the Rights of the Child (UNCRC) provide a framework for decision-making which respects the rights of children to be consulted when decisions are made about their lives, whilst protecting them from both the responsibility of making the decision and the consequences of making a mistake. These are fundamental rights but few children in England or Wales are able to exercise them. This is not for lack of legislation: the rights already exist. It is for lack of provision.
6. It is critical to recognise that children are at risk of harm when parents separate. Family breakdown is a time of great vulnerability and research has consistently shown that unresolved parental conflict is harmful to children. Destructive inter-parental conflict affects children of all ages, across infancy, childhood, adolescence, and even adulthood. The way in which parents communicate with each other impacts children's long-term mental health and future life chances.
7. A further consequence of parental conflict is that some children lose a close relationship with a parent following separation. The law is clear, that in the absence of safety concerns, a child should be able to enjoy a close relationship with both parents, and one parent does not have the right to stop that. No child should have the loss of a close parental relationship during critical childhood years thrust upon them by the decisions of one parent at a time of conflict.
8. Society's response to family breakdown must therefore promote children's rights and the long-term benefits of cooperative parenting. This may not be possible in the immediate aftermath of relationship breakdown, but a holistic and relational response to separation is needed to promote the chances of both parents providing cooperative parenting to their children.
9. For some families, this may not be safe. In cases of high conflict and abuse, safety is a priority and a court intervention may be required as one of a number of responses. Children in these cases must be identified early and they, and any parent who is at risk, need appropriate support and protection.
10. However, the majority of families need an entirely different support which is holistic and relational:
  - A framework and language which promotes child welfare and a cooperative parenting approach.
  - Access to information and direct services for children.
  - Mechanisms for the child's voice to be heard at the time when decisions are being made which affect them.
  - Access to information and direct services for parents about how to parent following separation.

- A consideration of the emotional state of the parents and the impact this has on their parenting decisions.
- A multi-disciplinary response, involving therapists, parenting specialists, mediators and legal services.

These do not form part of the administration of justice and currently there is no framework for the provision of suitable services, clearly signposted and accessible to all.

11. The absence of adequate provision for families who do not need the justice system comes at great cost to society as a whole. Taking just the financial cost, the annual cost to the taxpayer of family breakdown is now estimated to stand at £51 billion, up from £37 billion ten years ago.<sup>4</sup>

### C. A System in Crisis

12. The 'Family Justice System' is in crisis. This is no exaggeration. The numbers of parents making applications are unmanageable and family courts are stretched beyond limits, with the numbers of applications (often about matters that should never have reached the doors of the court) growing exponentially.<sup>5</sup> The system is recognised as broken and in need of radical reform.<sup>6</sup> The Family Justice Reform Implementation Group has been tasked with formulating proposals for an overhaul of the system. However, this will take time.
13. In the interim, the Family Solutions Group has been asked to consider what can be done now to improve the current system for parents and children? Our recommendations take advantage of child-focussed legislation, rules and professional duties which already exist but are not widely understood or applied. Our recommendations are essentially about communication (nationally, locally, and professionally) to move away from a 'justice' response to parental fallout and make child welfare the central and overriding factor.

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<sup>4</sup> <https://relationshipsfoundation.org/publications/pressreleases/cost-family-failure-2018-update>

<sup>5</sup> See the comments of HHJ Wildblood QC in Re B (a child) (Unnecessary Private Law Applications) who notes that in Bristol Family Court by January 2021 they expect that they will have double the number of outstanding private law cases that they had in January 2020 with requests for micro-management that had arisen before His Honour in the past month including: i) At which junction of the M4 should a child be handed over for contact? ii) Which parent should hold the children's passports (in a case where there was no suggestion that either parent would detain the children outside the jurisdiction)? iii) How should contact be arranged to take place on a Sunday afternoon?

<sup>6</sup> Report of the Private Law Working Group, *The Time for Change, The Need for Change, The Case for Change*, March 2020.



## D. Our Core Recommendations for Immediate Improvements

### Political Responsibility

14. The Welsh Government has a Families Division and a minister whose brief includes children and families. We recommend that, in England, the government should establish a family lead to provide coherent oversight of the provision for children and parents. The needs of the separating family extend beyond access to justice as provided by the Ministry of Justice (MoJ). [Chapter 2, Part A].

### Public Education

15. The divorce reform due to be implemented in 2021 marks a shift away from notions of 'fault' and 'blame'. We recommend:
  - A wide public education campaign, to reframe family breakdown away from 'justice' language, and towards an understanding of child welfare. This must promote the rights of children to enjoy a relationship with both parents if there are no safety concerns, and the importance of an ongoing parenting relationship for the child's wellbeing, not just the individual parent relationships with the child.
  - An authoritative website (we suggest 'The Separated Families Hub') providing clear and accurate information.
  - Widespread dissemination of information, to include basic training and resources for other 'touchpoints' for the family, (GPs, schools, health visitors, CABs, Family Hubs) so that they can signpost appropriately at the earliest signs of family breakdown. [Chapter 4, Parts B and C].

### A Framework of Support Services for Children and Young People

16. The current system is entirely led by the needs and wishes of parents. Whilst good quality information is available for young people online, it is difficult to access and they struggle to know which information to trust.<sup>7</sup> Young people whose parents separate need a dedicated 'place to go' online.<sup>8</sup> Also, young people's views are not taken into account in the majority of cases.<sup>9</sup> The culture that children should have no voice while far-reaching decisions are made about their lives is changing, with increasing recognition that the right of the child to be heard is a key factor in improving outcomes and a core component of child

<sup>7</sup> Barlow, A., Ewing, J., Hunter, R. and Smithson, J. (2017). *Creating Paths to Family Justice Briefing Paper & Report on Key Findings*.

<sup>8</sup> *Final Report of the Voice of the Child Dispute Resolution Advisory Group* (March 2015), recommendation 27, p. 52.

<sup>9</sup> In contravention of the UN Convention on the Rights of Children Article 12.

welfare. However, the mere recognition of that right is of small consequence if it cannot be exercised and there are no direct services to support it as is currently the case. We recommend:

- The establishment of a framework of direct support services for information, consultation, support and representation for children and young people whose parents separate.
- A presumption that all children and young people aged 10 and above be offered the opportunity to have their voices heard in all processes for resolving issues between parents, including mediation and solicitor-led processes.
- A dedicated section for children on 'The Separated Families Hub', and information and resources provided to other 'touchpoints' for children (recognising that services and 'touchpoints' for young people may look different in England and Wales). [Chapter 3, Part B].

#### Two possible pathways

17. Some families need the intervention of the family court. In cases of domestic abuse, the language of cooperative parenting is inappropriate and safety is the overriding factor. The right pathway must be identified from the outset using safe screening methods, and a clear distinction understood between two possible pathways:
  - The safety pathway - those needing safety to be immediately signposted to appropriate legal and other support.
  - The cooperative parenting pathway – parents to be supported in understanding the long-term needs of the child and offered options for resolving issues with the other parent.

We recommend triaging the family circumstances and needs at an early 'Information and Assessment Meeting' (IAM) as soon as possible after separation. [Chapter 4, Parts D and E].

#### A holistic approach

18. Addressing the emotional landscape in family disputes has the potential to transform the futures of the parents and children involved. We recommend:
  - A holistic approach which takes into account the emotional state of the parents and their ability to resolve issues.
  - Bundled support packages of legal services, mediation and counselling to be recognised as best practice.

- Training for all legal professionals on the emotional journey for separating parents, and the impact on their ability to make child-focussed decisions.
- Promotion of programmes which support parents to move on from the emotional turmoil of the relationship breakdown. [Chapter 4, Part G].

#### Parenting Programmes

19. There are many jurisdictions where completion of a parenting plan or attendance at a parenting programme is mandatory for those who divorce. Neither are a requirement here. We recommend:
- The establishment in England of a self-regulated body of parenting programmes, kitemarked to an agreed standard. (Parenting programmes are a devolved matter and there is already work underway on this in Wales.)
  - Attendance by parents at a registered parenting programme to become the norm following separation. We would welcome this as part of the implementation of the new divorce legislation. [Chapter 4, Part H].

#### Language and Process

20. In many parenting disputes, the ‘dispute’ is a symptom of unresolved conflict and broken communication. The offer of an adversarial justice system adds fuel to the fire, driving parents apart. We recommend:
- A shift in language away from legal disputes towards a language of supporting parents to resolve issues together.
  - Distinguishing between processes which support parents to resolve issues together, and processes which set them apart. [Chapter 5, Part A].

#### Family Professionals

21. The separating family needs to get the best out of the differing professionals available. We recommend:
- A different language and broader understanding of how parents may be supported to resolve issues following separation. Good practice by family professionals will look beyond the particular issue in question and consider how any process will affect the parent relationship.
  - Local networks of ‘family professionals’ to promote an integrated approach to problem-solving issues between parents, with therapists, parenting specialists, mediators and legal services.

- Enhanced training for mediators and solicitors in specified areas.
- Introduction of accountability to comply with the Law Society's Family Law protocol, to safeguard children (in cases with no safety concerns) from acrimonious legal representation on behalf of parents. [Chapter 5, Parts A, B and C].

#### Interface with the Family Court

22. Rules exist to promote the diversion of cases to be resolved out of court, but these are not being followed in many family courts. We recommend:
- Training for all family judges, magistrates and legal advisors on MIAMs and the benefits to children of parents who resolve issues together.
  - Robust enforcement of the MIAM rules by judges and court staff.
  - Proper case-management by all family judges in compliance with their duty to consider out of court options. We propose a new 'Part 3 protocol' to assist judges in fulfilling their duty in this respect.
  - In cases where it is safe to do so, we recommend a definable threshold for the consideration of child welfare. [Chapter 6].

#### 23. Conclusion

It will take time to shift societal attitudes to prioritise child welfare and parental responsibility when parents separate. The divorce reform being introduced in 2021 represents a perfect opportunity to begin this shift, and support healthier transitions for both parents and their children. The Children Act was to be a 'charter for children'<sup>10</sup> yet three decades on their voices, rights and interests are still marginalised in decision-making when parents separate. We believe the time has now come to transform our thinking in both England and Wales towards an approach which puts safety first, and otherwise promotes a child-centred, child-inclusive, holistic approach for both parents and children.

<sup>10</sup> *Children Act, A Report by the Secretaries of State for Health and for Wales on the Children Act 1989 in pursuance of their duties under section 83(6) of the Act.* Cm 2144.

## CHAPTER 1: INTRODUCTION TO THE FAMILY SOLUTIONS GROUP

*The task of identifying, developing and then funding a better way to achieve good enough co-parenting between separated parents is a matter for society in general, policymakers, government and, ultimately Parliament; it is not for the judges.*

*My purpose today is, therefore, simply to call out what is going on in society's name, and at the state's expense, and invite others to take up that call.*

**Sir Andrew McFarlane, President of the Family Division, keynote address, Resolution Conference 2019**

### **A. The Private Law Working Group and the Family Solutions Group**

24. The Family Solutions Group was set up in January 2020. Its specific purpose was to make recommendations to the Private Law Working Group (the PrLWG) for improvements to the 'pre-court space' which can be implemented in the immediate or short-term. The needs of families are multidimensional, and families will often need support 'pre-court', 'in-court' and 'post-court'. However, the focus of the Family Solutions Group has been to consider recommendations to support individuals, parents and children from the moment of relationship breakdown up to a time when an application to court may be made. The background is set out below.
25. In late 2018, the President of the Family Division invited Mr Justice Cobb to set up the PrLWG to review the operation of the Child Arrangements Programme. The PrLWG published an interim report for consultation in July 2019<sup>11</sup> and reconvened in the autumn to consider its recommendations in the light of the responses received. The interim report shows widespread recognition of several failings in the current private law system, including a lack of coordinated support for separating parents and their children at a local level, difficulties with the system for MIAMs, and problems within the court process itself.
26. One of the recommendations in the PrLWG's interim report was the creation of a 'Supporting Separating Families Alliance' to take forward the work needed at local and national levels to provide the help that families need at the earliest opportunity. This might be before, alongside, or instead of a court process. In November 2019 the Nuffield Observatory, with Cafcass, hosted a scoping event on behalf of the PrLWG to review the offer for separating families and their needs.

<sup>11</sup> Private Law Working Group. (June 2019). *A Review of The Child Arrangements Programme [PD12b FPR 2010]. Report to the President of the Family Division.* Available at: <https://www.judiciary.uk/wp-content/uploads/2019/07/Private-Law-Working-Group-Review-of-the-CAP-June-2019.pdf>

27. Many at that event, and of the consultation responses, called for a move away from a 'family justice' system, which is adversarial by its very nature, towards a 'family solutions' system, which would aim to create more tailored support for parents and children. The reframed system would involve a more holistic assessment of the needs of children and families and offer a range of legal, dispute resolution, relationship support, and therapeutic services for both parents and children, on an integrated basis, with court services available for parents who cannot safely agree arrangements for their children.
28. The PrLWG published a second, interim report in April 2020 titled '*The Time for change, the Need for change, the Case for change*'. The report stated:

*This title reflects our increasingly firm belief, significantly fortified by the many responses to our consultation, that the time has come now to seize the initiative to plan for fundamental, long-term and sustained system change in the way our 'private law' family disputes are resolved.*<sup>12</sup>

29. This type of systemic change will take time: perhaps as long as 5-10 years. This longer-term work is being led under the auspices of the Family Justice Reform Implementation Group.
30. The longer-term goal of systemic change remains a key priority. Nevertheless, the difficulties faced by separating families and the strains upon an already over-stretched court system means that immediate improvements must be found: doing nothing while we wait for longer-term changes to be introduced is not an option. Improvements which are possible within the existing legislative framework are needed now.
31. In its interim report in 2019, the PrLWG made recommendations which apply to both the pre-court space for families and to the operation of the Child Arrangements Programme within the court process. It emphasised that an effective range of out-of-court family resolution services rather than the court would better serve a significant proportion of families and their children when parents separate.<sup>13</sup>
32. The PrLWG membership is made up largely of justice professionals whose work with families is within a court context. Therefore, in January 2020 Mr Justice Cobb set up a separate 'Family Solutions Group' to consider the pre-court space and make recommendations to the PrLWG for immediate or short-term improvements, short of statutory change. The terms of reference and membership of the Family Solutions Group are set out at Annex 1.

<sup>12</sup> Private Law Working Group (March 2020), n 6 above.

<sup>13</sup> Private Law Working Group. (June 2019), n 11 above.

33. Since then, in June 2020, the Ministry of Justice (MoJ) Report Assessing the Risk of Harm to Parents and Children in Private Children Proceedings (hereafter 'MoJ Risk of Harm report') was published.<sup>14</sup> This report raised serious concerns about how the family court handles allegations of domestic abuse in private law cases. It has prompted a major review of the operation of the family court, to ensure safety is a first principle rather than a presumption of contact, and to move from an adversarial process into one which is investigative and problem-solving. This comprehensive redesign of private law proceedings is a key focus for the PrLWG.
34. The statistics are not entirely clear, but it has been suggested that around one third of families who separate are now turning to the family court,<sup>15</sup> and that somewhere between 49% to 62% include allegations or findings of domestic abuse.<sup>16</sup> Supposing (which will not be the case) there were no allegations or findings of domestic abuse in the cases which do not involve a court application, this suggests that domestic abuse may feature in up to 20% of all separating families. This is a worryingly high percentage. We also know that 24% of 18–24s report having been exposed to domestic abuse between adults in their homes during childhood.<sup>17</sup> Cases where abuse is alleged, or there is the potential for harm because of, for example, addiction or severe mental health issues must be handled in a way which prioritises safety above all else. For the remainder, likely to be approximately 76-80% of separating families, there remains the goal of supporting parents to resolve issues in a child-focused way.
35. For cases that do not engage the court process, the starting point should be a presumption that involvement of a parent in the life of a child will further the child's welfare, provided that parent can be involved in the child's life in a way that does not put the child at risk of suffering harm.<sup>18</sup> Where there is any allegation or admission of harm by domestic abuse to the child or a parent, or any evidence indicating such harm or risk of harm, then the presumption should not apply.<sup>19</sup>

<sup>14</sup> Hunter, R., Burton, M. and Trinder, L. (2020). *Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Final Report*. Ministry of Justice. Available at: <https://www.gov.uk/government/consultations/assessing-risk-of-harm-to-children-and-parents-in-private-law-children-cases>.

<sup>15</sup> Douglas, A. (2019). 'The Child Arrangements Programme'. *Family Law* 49(1): 45-47; Williams, T. (January 2019). *What could a public health approach to family justice look like?* Nuffield Family Justice Observatory for England & Wales.

<sup>16</sup> Ibid. Hunter et al, n 14 above, p.13.

<sup>17</sup> Radford, L., Corral, S., Bradley, C., Fisher, H., Bassett, C., Howat, N. and Collishaw, S. (2011). *Child abuse and neglect in the UK today*. NSPCC

<sup>18</sup> Children Act 1989, s 1(2A), (2B) and (6)

<sup>19</sup> Where there are proceedings, Practice Direction 12J provides that, where such allegation or admission has been made, the court must consider carefully whether the statutory presumption applies. Since the MoJ 'Risk of Harm' Report found evidence that within court proceedings Practice Direction 12J is being implemented inconsistently (p6), we take the view that the presumption should not apply to cases that do not engage the court process where abuse is alleged or admitted.

36. Where, after a thorough screening and triaging process, there are no safety or harm concerns, the emphasis should be on establishing, or re-establishing, contact between the parents and the child, making use of contact centres as a 'stepping-stone' to achieving this goal where needed.
37. There are therefore two separate pathways which need a distinct approach:
- The safety pathway, centred around safety as being of primary importance, over any presumption of contact or ongoing parental involvement.
  - The cooperative parenting pathway, which presumes that parental involvement, almost always in the form of contact with both parents, is beneficial to a child. This pathway is based around a long-term goal of cooperative parenting and shared responsibility.
38. Any case in which there is an allegation of domestic abuse, (or those where no allegation is made but screening has identified abuse) should be directed into the safety pathway. The focus of the Family Solutions group has therefore been:
- 38.1 To support safe screening methods to identify domestic abuse and signpost appropriately, where the court must remain the core and central intervention and become far more effective in this role as proposed by the MoJ Risk of Harm report;
- 38.2 To promote and encourage the cooperative parenting pathway, diverting parents away from court and supporting them to resolve issues in a way which builds a successful co-parenting relationship for the long-term.

## **B. Membership of the Family Solutions Group**

39. The Family Solutions Group is a multi-disciplinary group with representatives from the domestic abuse sector, academia, parenting programmes, children's services, Cafcass and Cafcass Cymru, MoJ, Department for Work and Pensions (DWP)'s 'Reducing Parental Conflict' programme (RPC), solicitors, mediators, therapists and judiciary.

## **C. Our focus**

40. The time between a relationship breakdown and a possible court application is a huge topic, worthy of detailed analysis and research.



- In financial terms, the cost to the taxpayer of family breakdown is now estimated to stand at £51 billion, up from £37 billion ten years ago.<sup>20</sup>
  - There are other costs which cannot be quantified in financial terms: pain and suffering; anxiety and stress; a loss of health, wealth and wellbeing.
  - Of most concern is the research which consistently shows that parental conflict causes harm to children, with multiple knock-on effects through childhood and beyond. Thus, the cycle of cost continues.
41. We cannot profess to present a comprehensive set of issues and remedies within the limitations of a voluntary group, meeting over a short time-frame. That will fall to the Family Justice Reform Implementation Group as they make their proposals for the longer-term systemic changes which are needed. However, based on available research to date, and with several hundred years of professional experience between us of the pre-court landscape for separating families, we easily reached consensus on some key recommendations.
42. We were helped in our discussions by the findings from Exeter University's 'Creating Paths to Family Justice' (Creating Paths), building on the research from Mapping Paths to Family Justice (Mapping Paths) in 2014. We agree with the Creating Paths recommendations.
43. The Family Solutions group has focused on changes which:
- are centred around safety as being of primary importance;
  - are child-focussed, promoting a long-term understanding of child welfare and the benefits of cooperative parenting;
  - can be achieved within existing legislation;
  - make use of existing provision; and
  - can be achieved without incurring substantial costs.
44. Many of our recommendations are about a change in culture and emphasis. For some families, there needs to be a rigorous pathway to protect them from perpetrators of abuse. Other families would benefit from family breakdown ceasing to be, as a matter of ingrained habit and culture, an automatically adversarial process. For all families, we need to provide care and support for adults and children going through a difficult time.
45. As well as formulating our recommendations, the Family Solutions Group has presented an opportunity for multi-disciplinary discussions. These have been

<sup>20</sup> <https://relationshipsfoundation.org/publications/pressreleases/cost-family-failure-2018-update>

valuable and have opened up various ideas and opportunities which are already starting to bear fruit.<sup>21</sup> It has highlighted the value of bringing those from differing professional disciplines together to create a more holistic response to family breakdown.

#### **D. Timing and Opportunity**

46. Our discussions are timely. As one member of our group put it (before Royal Assent on the new divorce legislation) three extraordinary factors have coalesced to provide an unprecedented opportunity to rethink the relationship between legal and community-based services, namely:

*At the judicial level, there has been the detailed work of the Private Law Working Group.*

*At the legislative level, there is the imminent passage into law of the Divorce, Dissolution and Separation Bill, that removes the fault factor from the legal process.*

*At the societal level, there is the COVID-19 pandemic, as a result of which much of the world is experiencing practical and emotional upheaval, along with fears about the future.<sup>22</sup>*

47. We are conscious that there have been multiple calls for reform over the years, and countless initiatives to improve the landscape for separating families. Our recommendations follow on from those made in the Family Justice Review, past Presidents of the Family Division, research studies, professional bodies, the voluntary sector and so on. The same has been said over many years. With momentous reform now underway to divorce law and calls for change from the PrLWG, we hope the recommendations which follow may be seen afresh.
48. COVID-19 represents both an opportunity and a threat. Opportunity is presented by the requirement all have faced to reinvent working practices and provide services to families in the lockdown. We are in a season of thinking 'outside the box'.
49. The threat comes from the financial recession we now face and the lack of available funds to be spent on new initiatives or proposals. However, our

<sup>21</sup> The group looking at the needs of children have now formed a working group, with encouragement from the DWP representative on the Family Solutions working group, to develop an infographic and video resource for young people on parental separation, with the aim that this obtains quality mark assurance from the PSHE Association and is used as part of the PSHE curriculum. Another development is the beginnings of co-working at national and local levels between the domestic abuse sector and mediators.

<sup>22</sup> Cantwell, B. (2020). 'The time to rethink legal and community services to separating families in dispute/conflict?' *Family Law* 50(9) 1122-1126.

proposed spending must be seen in the light of the estimated £51 billion cost to the taxpayer caused by family breakdown. Taking only the costs incurred by the MoJ in running an over-burdened family court, we believe there would be significant savings made by diverting those families who do not need legal intervention away from court and into other supportive services.

50. The financial recession caused by COVID-19 will require belt-tightening by all. Never was there a more appropriate time to see a reduction in the overall government spend caused by family breakdown. The costs we recommend to support families in the aftermath of relationship breakdown are, we believe, wise investments to reduce the overall national cost caused by fractured families.
51. In Chapter 2 we summarise the fragmented nature of political responsibility for separating families in England before considering the needs, in the pre-court space, for services for children and young people (Chapter 3) and services for parents (Chapter 4). In Chapter 5, we discuss the role of family law professionals in implementing the changes we seek before reflecting on the interface of the pre-court space with the court and the MIAM procedure (Chapter 6). We also include a number of annexes which deal with specific areas in more detail.
52. We appreciate that some of the changes we are suggesting, though falling short of systemic change, will be costly and we therefore outline throughout the report some suggested pilots for the changes we seek.

## CHAPTER 2: POLITICAL RESPONSIBILITY FOR THE SEPARATING FAMILY

### A. Political Responsibility

53. Our remit is to provide recommendations for immediate improvements to support the separating family, but there is one issue which repeatedly arose whatever we were considering: there is no single government department with responsibility for couples and families when they separate. We believe this to be a fundamental reason why so many families struggle to access the support they need.
54. It is difficult to assess accurately the number of children affected by the separation of their parents each year. It has been estimated that around two per cent of families with dependent children in the UK separate each year.<sup>23</sup> In 2017, 14 million dependent children were living in families.<sup>24</sup> Assuming that the number of children is spread evenly across families, this equates to approximately 280,000 children whose parents separate each year in the UK.<sup>25</sup> Official statistics on the number of young people affected by family breakdown are scarce. Changes introduced by the Children and Families Act 2014 mean that couples divorcing are no longer required to provide information on children as part of the divorce process. It is notoriously difficult to track the number of cohabiting couples with dependent children whose relationships breakdown.
55. What we do know is that:
- In 2013, the last year in which data on the numbers of divorces in which the couple had children was collected, almost half of divorces (48%) involved children less than 16 years.<sup>26</sup> The parents of 94,864 children aged under 16 divorced that year.<sup>27</sup> If the number of children per couple (0.83) was unchanged over time, the number of children aged under 16 whose parents divorced in 2018 would be 75,422.<sup>28</sup>

<sup>23</sup> Bryson, C., Purdon, S. and Skipp, A. (2017). *Understanding the lives of separating and separated families in the UK: what evidence do we need?* (Bryson Purdon Social Research).

<sup>24</sup> See Office for National Statistics. (2017). *Families and Households in the UK, 2017*. Available at: <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2017>.

<sup>25</sup> This figure remains unchanged from the estimate of Christina McGhee in 2008, see McGhee, C. (2008). *Separation and Divorce. Helping Parents to help Children*. Published and Produced by Resolution,

<sup>26</sup> Office of National Statistics. (2015). *Divorce in England and Wales, children of divorced couples: historical data*. Available at:

<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/datasets/divorcesinenglandandwaleschildrenofdivorcedcouples>.

<sup>27</sup> Ibid, Table 2, children of divorced couples (numbers), 1957 to 2013'

<sup>28</sup> In 2013 there were 114,720 divorces and the number of children per couple was 0.83. In 2018 there were 90,871 divorces which would equate to 75,422 children at 0.83 children per couple.

- In 2013-14, 29% of all children aged 16 and under were not living with both of their birth parents.<sup>29</sup>
  - By the time a child is 7, 12% of couples who were married and 32% of couples who were cohabiting when their child was born have experienced a period of separation.<sup>30</sup>
  - Evidence from the Millennium Cohort Study in 2014 indicates that 37% of children were not living in the same household as their father by the age of 14.<sup>31</sup>
56. The UK has lagged behind other jurisdictions in addressing problems of family breakdown, particularly concerning the impact on children. Notwithstanding the high numbers and the cost to the public purse, there is no coordinated oversight of the needs of parents and children following separation. It falls to MoJ to provide information to those thinking of turning to court; to DWP and its partners across England to provide initiatives to reduce parental conflict in low-income families and to the Department for Education (DfE) to set up Family Hubs (with no specific mandate for separating families) There have also been calls for Cafcass to extend its work to support families before they turn to court. For our part, we support others who argue that the needs of the separating family fit best within a public health approach.<sup>32</sup>
57. The DWP Reducing Parental Conflict (RPC) programme is a dedicated policy aimed at tackling the fallout from broken relationships and unresolved emotional conflict in low-income families and promoting the wellbeing of children. This programme is partnered with a range of external providers and government departments. We quote from their webpage: *'The government wants every child to have the best start in life. Parental conflict, and the poorer child outcomes which stem from this, is an issue which affects departments across government.'*
58. The DWP RPC programme is doing valuable work but more is needed. It has a limited budget, and it is focussed on low-income families in England, so it is not an overarching response to the needs of separating families. The problems caused by unresolved emotional conflict and the risks to children apply across the whole of society. Children of high net worth families are at risk from conflict exacerbated by privately funded legal proceedings.

<sup>29</sup> Department for Work and Pensions. (2016). *Social Justice Outcomes Framework: Family Stability Indicator, Table 1: The percentage of children living with both birth parents, by age of child.*

<sup>30</sup> Crawford, C., Goodman, A., and Greaves, E. (2013). *Cohabitation, marriage, relationship stability and child outcomes: final report: IFS report R87.*

<sup>31</sup> Fitzsimons, E and Villadsen, A. (2019). 'Father departure and children's mental health: How does timing matter?' *Social Science & Medicine*, 222: 349-358.

<sup>32</sup> Williams, n 15 above.

59. We had the benefit of the parenting policy lead in Welsh Government, Julia Letton, join us for one of our meetings. She referred us to the official Welsh Government policy document '*Parenting in Wales: Guidance on engagement and support*'.<sup>33</sup> This includes information and guidance for the 22 Welsh local authorities on how parenting support should be delivered and provides comprehensive service mapping of what is currently available for parents. It is produced (and is shortly due to be updated) by the Children and Families Department in the Welsh Government. In response to the PrLWG's recommendations for a 'Supporting Separating Families' Alliance' (SSFA),<sup>34</sup> the Welsh government has already commissioned research into what an SSFA could look like in Wales.
60. There is no equivalent department in Westminster to oversee and monitor dedicated provision for children or adults following family separation before they turn to court. There is a ministerial role held by the Parliamentary Under Secretary of State for Children and Families, but the many responsibilities of the role do not include separated families. A child of separated parents falls into a political void.
61. The invitation of the President of the Family Division, Sir Andrew McFarlane to take up the call of identifying, developing and then funding a better way to achieve good enough co-parenting between separated parents<sup>35</sup> is a call which has been made over many years. The 2013 report of the Private Law Working Group report to the President of the Family Division<sup>36</sup> made a similarly strong call for centralised provision for separating families.
62. In February 2019, the government announced its proposal to explore 'better signposting and join up of support services' to 'provide routes for those seeking help and guidance to resolve their problems'.<sup>37</sup> This is encouraging but 18 months on there is no clarity over which government department will lead on this.
63. We add our voice to the many calls in the past. We recommend that the government establishes clear policy objectives and allocated funding to support the needs of the separating family. Pending a long-term public health approach, a family lead is needed to pull together all the government strategies and provide coherent oversight.

<sup>33</sup> <https://gov.wales/sites/default/files/publications/2019-10/parenting-engagement-and-support-guidance-for-providers.pdf>

<sup>34</sup> Private Law Working Group. (June 2019), n 11 above.

<sup>35</sup> Sir Andrew McFarlane, President of the Family Division, keynote address, Resolution Conference 2019

<sup>36</sup> Private Law Working Group. (2013). *Final Report to the President of the Family Division of the Private Law Working Group Child Arrangements Programme: Resolution of 'Private Law' (children) disputes in and out of Court* at para. 17.

<sup>37</sup> Ministry of Justice. (February 2019). *Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)*, CP37, at para. 27

## B. UN Convention on the Rights of the Child

64. We were also mindful of Article 12 of the United Nations Convention on the Rights of the Child which:
- ‘establishes the right of every child to freely express her or his views, in all matters affecting her or him, and the subsequent right for those views to be given due weight, according to the child’s age and maturity.’
65. Wales has a legal requirement on government ministers to have due regard to the UNCRC and it is the responsibility of the Minister for Health and Social Services to ensure compliance. In England, Child Rights Impact Assessments are being introduced across government but calls from children’s charities<sup>38</sup> and the Children’s Commissioner<sup>39</sup> to introduce a bill to incorporate the UNCRC into domestic law have so far been resisted. The Government’s stated position in 2015 was that existing law and policies were ‘strong enough to comply with the Convention’.<sup>40</sup> However, research shows that young people are seldom heard in out-of-court processes in England such as mediation<sup>41</sup> despite their Article 12 right to be heard.
66. The system is focused on parents rather than children. We adopted the Article 12 diagram (Figure 1 below) of compliant support services for children and young people as a framework for considering the development of services for families following separation. This diagram divides children who experience family breakdown broadly into 4 cohorts. The remit of the Family Solutions Group is to look at improving services for children and families out of court, in cohorts 1 and 2. If families access the right support before turning to court, that will influence the numbers arriving in cohort 3 who seek the intervention of the family court.

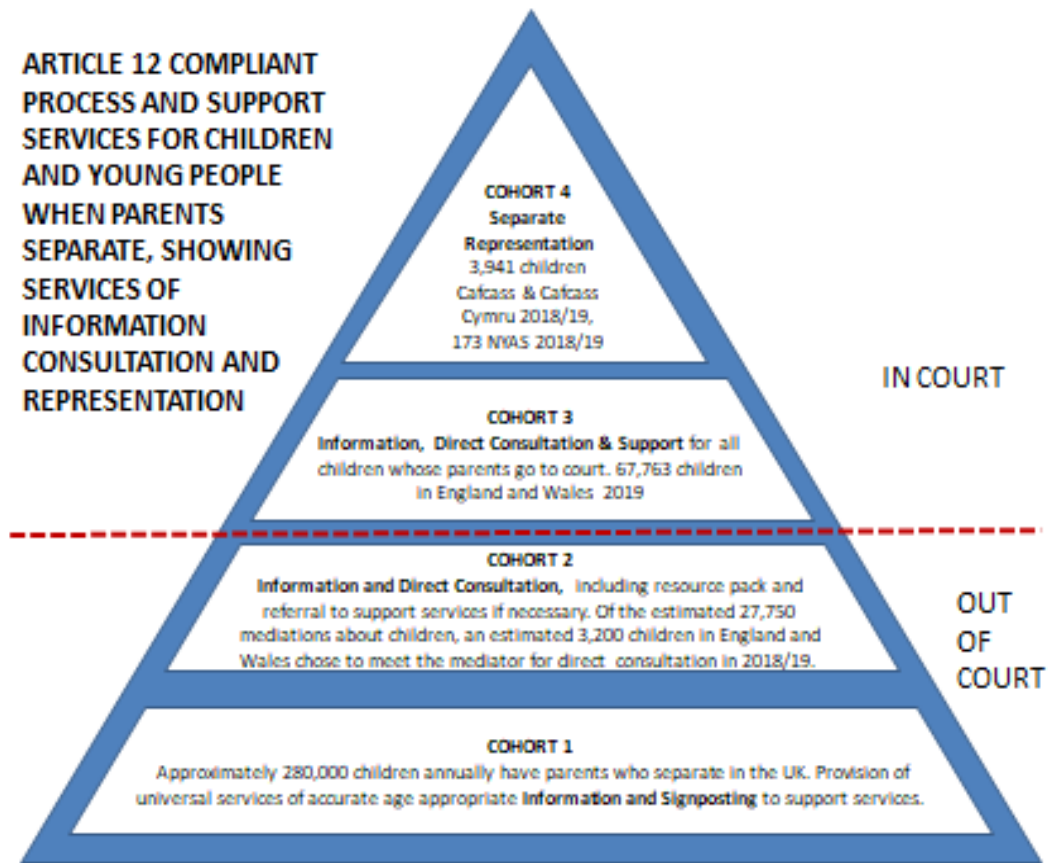
<sup>38</sup> House of Lords and House of Commons Joint Committee on Human Rights. *The UK’s compliance with the UN Convention on the Rights of the Child. Eighth Report of Session 2014–15* at para. 23-24.

<sup>39</sup> UK Children’s Commissioners’ UNCRC mid-term review November 2019.

<sup>40</sup> House of Lords and House of Commons Joint Committee on Human Rights, n 38 above, para. 33.

<sup>41</sup> Walker, J. and Lake-Carroll, A. (2014). ‘Hearing the Voices of Children and Young People in Dispute Resolution Processes’ in *Report of the Mediation Taskforce*, June 2014

Figure 1



NOTE 1. Cohort 4 refers to the numbers of children who are made parties to s8 applications with respect to children in family proceedings under the provisions of r16.4 Family Proceedings Rules 2010. These include child arrangements, specific issue and prohibited steps orders. CAF/CASS, CAF/CASS CYMRU and the National Youth Advocacy Service (NYAS) are the only bodies able to represent children in these proceedings.

67. At present, there is no national strategic approach for the many families in cohort 1. Neither central nor local government take responsibility for them. **There is a need for an overarching strategy and framework to inform the development of services going forwards, both now in the short-term and to lay the foundations for the longer-term changes which are needed.**
68. The same applies at a local level, as local authority support is geared to cohorts 3 and 4; there is no standard provision for cohorts 1 and 2. Most local authorities have adopted the UNCRC, but the problem lies in the lack of meaningful implementation. Legislation is in place for children's needs to be met by the local authority under Schedule 2 of the Children Act 1989; again, it just needs to be consistently implemented.

### C. Family Hubs

69. In recent years, the potential to meet the needs of families through a national network of Family Hubs has gathered momentum. In July 2016, the All-Party



Parliamentary Group for Children (APPG) recommended that the Government should give full consideration to augmenting Children’s Centres into Family Hubs as part of its ‘Life Chances’ agenda. The APPG envisaged Family Hubs operating as “nerve centre(s)” for statutory, voluntary and specialist family support both on-site and signposted.<sup>42</sup> This was a manifesto commitment in the 2019 election for England, although Family Hubs do not operate in the same way in Wales. The DfE was charged with setting up Family Hubs. Funding has also been provided by the DWP (under the Troubled Families initiative), and the MoJ is considering how they might be used to support families before turning to court. The Relationships Alliance, a consortium of four charities with expertise in relationship support,<sup>43</sup> has called for the establishment of Family and Relationship Hubs to provide relationship counselling and, for parents who separate, mediation services.<sup>44</sup>

70. There are now some 150 Hubs operating and responding to local needs, each operating differently through partnerships at a local level. Some are led by the local authority in accordance with their responsibility under the Children Act<sup>45</sup> to provide family centres; some are hosted in churches, others in contact centres or community venues. Family Hubs are an opportunity to fulfil combined policy objectives, but there is no single model and they are not, as yet, commissioned by all local authorities. They operate in a variety of community-based and faith-based models. It is encouraging to hear that DWP/MoJ/DfE/the Ministry of Housing, Communities and Local Government are in discussions about the role of Family Hubs in supporting separating families. However, they have the potential to be far more effective if they were to operate under a single government department overseeing the needs of families before, during and after any separation. We say more about the potential use of Family Hubs in paragraphs 166-169 below.

#### **D. Data**

71. A consequence of the lack of political oversight is the absence of precise data about parents and children following separation. Research into out-of-court dispute resolution options was published in 2014 by Exeter University (Mapping Paths to Family Justice). This remains the authoritative research into pre-court DR options for families, providing survey data from 6700 respondents on awareness of process options and rich qualitative data on individuals’

<sup>42</sup> All-Party Parliamentary Group on Children’s Centres Family Hubs. (July 2016). *The Future of Children’s Centres Strengthening family relationships to improve Life Chances for everyone*, p. 8.

<sup>43</sup> Relate, OnePlusOne, Tavistock Relationships, and Marriage Care.

<sup>44</sup> The Relationships Alliance. (2015). *Putting relationships at the heart of family support – a new vision for children’s centres*. Available at: <https://www.relate.org.uk/sites/default/files/publication-relationships-alliance-family-hubs-briefing-2015.pdf>

<sup>45</sup> Children Act 1989 Schedule 2, Part I, Section 9

experiences of out-of-court processes following separation.<sup>46</sup> However, in the context of the overall numbers of separating families<sup>47</sup> there is a need for a broad data-gathering exercise.

72. The Family Mediation Council (FMC) has been asked to provide data about the extent of mediation taking place, and a voluntary survey with 122 respondents in December 2019 suggested the following statistics for the mediation profession, as regulated by the FMC:

- The percentage of cases which converted to mediation when both parties attended a MIAM was 73%.
- Mediation resulted in a whole or partial agreement in 73% of cases.
- Assuming that those who responded are representative of the workloads of other mediators then, based on the number of mediations conducted by the respondents (2161) over the previous six months, and the number of those which involved children's issues, the number of mediations conducted by registered mediators per annum can be estimated to be 37,000. An estimated 27,750 mediations per annum will include discussions about children.
- One third of all cases involved children aged 10 or above still living at home. Children were consulted in 26% of those cases. Based on the above estimates, this equates to 3206 children consulted in mediation per annum.
- Of those responding to the survey, 49% worked in a service which had a legal aid contract and in 44% of cases one or both parties had public funding. This suggests that in around 21.5% of mediations, one or both parties are eligible for legal aid.

73. Mapping Paths provides survey data on awareness of process options and qualitative data on the experiences of individuals' who engaged in out-of-court processes following separation, and the FMC survey provides helpful indicators on current mediation statistics, yet **we know very little** about the parents of the young people in cohort 1 who do not engage in **any** out-of-court or court process following separation. We know that this cohort makes up the majority of the 2.5 million separated families in Great Britain.

<sup>46</sup> The researchers conducted interviews with 40 DR practitioners and 95 clients who had experienced out-of-court DR and recorded 5 first meetings between solicitors and their client, 5 mediations and 3 collaborative law processes.

<sup>47</sup> A study by the Social Security Advisory committee published in October 2019 quoted DWP figures of 2.5m separated families involving 3.9m children. Theresa Williams estimates 125,000 separations a year and states that Cafcass dealt with 42,000 new private law applications in 2018 in England: Williams, n 15 above.

74. We invite the Nuffield Family Justice Observatory or similar to lead on a project to understand the differing pathways for parents in the aftermath of relationship breakdown and before any court application is made, particularly those parents who do not engage in any out-of-court process. What agreements do these parents typically reach and how do they reach them? What norms inform the agreements reached? What can we learn from parents who separate and do not resort to court? What forms of support are effective and at what stage? For families who did make court applications, what was their perception of the offer of services away from court? Did they know about them? What would have helped them resolve their issues together? How do the choices made by parents for resolving issues impact their children? What are children's experiences of their parents' separation, based on the differing pathways taken by their parents?
75. Quite apart from the quality of lives for children and parents following parental separation, the cost to the taxpayer is enormous. Comprehensive data and research are needed on a large-scale to formulate policy and ensure any future 'Family Solutions system' fulfils its objectives.
76. **We recommend detailed data is sought and research conducted** into the issues faced and options for parents (and children) following parental separation and before entering the family justice system, to include an examination of the pathways taken and resulting outcomes.

## E. Other Jurisdictions

77. We believe that parents should be encouraged to address their parenting responsibilities when they separate. There are many jurisdictions which require some form of mandatory parenting education or parenting plan as part of obtaining a divorce. We give a brief outline of our understanding of some of these jurisdictions as follows: -
- **Canada** – Separating parents are required to attend a 'Parenting After Separation' programme, in which they are informed of the possible impact of a divorce on children, and how they can protect their child as much as possible. Before separating parents will be granted a divorce, they must include an outline of their parenting agreement. A free information session is made available for parents and other family members, which deals with issues and advice around guardianship, parenting arrangements, contact, child support and spousal support.
  - **Italy** – Separating parents with young children are required to go to family mediation which they must pay for, where they are required to draw up a parenting plan deciding everything from residence to schooling, holidays and all other details of their children's care.

- **The Netherlands** - Parents are required to make arrangements for their children through the creation of a mandatory Parenting Plan before divorce proceedings can take place – encoded into law as a requirement for divorce in 2009. Parents can construct these plans on their own or with consultation from a lawyer, notary or mediator. The court will usually refer parents to mediation if they are unable to draft a Parenting Plan on their own.
- **New Zealand** – The government offers 'Parenting Through Separation' programmes which are free to attend, and each parent attends separately. They also provide several online resources to help with parenting after separation, such as a parenting plan template that parents can use to come up with an agreement for care and contact. The family court will expect parties to have taken part in a 'Parenting Through Separation' course and tried family dispute resolution mediation before they ask the court to settle their dispute regarding children.
- **Norway** – Separating parents are required to take part in three 4-hour parenting sessions before they go to court. These sessions are free. In addition, separating parents are required to attend mandatory mediation to make arrangements for their children. It is not referred to as divorce or family mediation, rather as parental mediation (when applicable) to emphasise parental responsibility. This is applicable to both married and cohabiting couples who separate. If parents are still unable to make arrangements they can submit their case to the court with their certificate of attempted mediation to have their case heard by a family court judge.
- **Australia** – Interactive educational programmes and information sessions are run by Family Relationship Centres (FRCs). These educational programmes are aimed at keeping separating parents focused on their children when making arrangements and are attended separately by former partners. FRCs also offer parenting plans and re-partnering and stepfamily arrangements in addition to a vast number of other educational programmes. FRCs offer both individual and joint sessions with separating parents to help them create parenting arrangements for their children.
- **Scotland** – The Scottish system offers separating couples an online resource of a Parenting Plan to help them make arrangements for their children post-divorce/separation. The Scottish government funds 'Parenting Apart' a service operated by Relationships Scotland. It offers both group and one-to-one sessions for separating parents for free. This service is not mandatory, but it is strongly encouraged by the judiciary. The Scottish government provides a document called 'Your Parenting Plan' to help separating parents devise a system together to

arrange care and support for their children. Couples are encouraged to seek the help of a mediator or collaborative law practitioner to make arrangements for the children.

78. In this jurisdiction, there are no requirements to draw up a parenting plan, no required attendance at any parenting programme, no promotion of the welfare of children post-separation or divorce. As stated earlier, we believe this falls to the political void for separating families.

## **F. Political Responsibility - Summary of Recommendations**

### **CORE RECOMMENDATION**

We recommend that the government should establish a family lead to provide coherent oversight of the provision for children and parents in England. The needs of the separating family extend beyond access to justice as provided by the Ministry of Justice (MoJ). (Para. 63).

In addition, we recommend that:

79. A national strategic approach is needed for families who do not engage in out-of-court dispute resolution policies or make an application to the court. An overarching strategy and framework are required to inform the development of services, which will lay the foundations for the longer-term changes which are needed. (Para. 67).
80. Data is sought, and research conducted, into the issues faced and option choices made by parents (and children) following a family separation and before entering the family justice system to include an examination of the pathways taken and resulting outcomes. (Para. 76).

## CHAPTER 3: SERVICES FOR CHILDREN AND YOUNG PEOPLE

81. This section of the Family Solutions Group report sets out a summary of a more detailed paper prepared by the sub-group tasked with considering the needs of children and young people. Our full paper is included at Annex 2.

### A. Policy Context

82. Although the welfare of the child is theoretically of paramount importance in law, in practice, as Sir James Munby - former president of the Family Division, has pointed out:

*the court proceeds, if one bothers to think about what is going on, and most of the time we do not, on the blithe assumption that the truth - and a proper appraisal of what is in the child's best interests - will in some mysterious way emerge from the adversarial process between the parents.*<sup>48</sup>

83. Traditionally the state has been extremely reluctant to intervene in private family life and this has led to different approaches to hearing the voice of the child in public and private law matters. The ingrained culture of traditional welfare protectionism has inhibited understanding of the central role children's views can play in improving outcomes for them. In public law, there is a clear process through which the rights and welfare of children are protected and represented. By contrast, in private law there is no comparable process; nor is there a universal overarching child-centred strategy or route map which is accessible and intelligible to the children who may need to use it. This is despite the numbers of private law applications involving children annually far exceeding those of public law. In 2019 there were 30,333 individual children in public law applications and the number of individual children in private law applications was 83,974.<sup>49</sup>
84. The corollary of this dichotomised approach, which is not recognised in many other countries, is that in private law proceedings there has been a lack of clear policy on both child protection issues and on hearing the voice of the child. Although direct services do exist, such as the Separated Parents Information Programme (or Working Together for Children in Wales) and Parenting after Parting (all excellent initiatives) they are primarily services for adults, which, it is hoped, will result in certain (unspecified) benefits for their children.
85. When parents separate, current government policy relies heavily on the achievement of parental agreement as the primary objective, based on the

<sup>48</sup> Munby, Sir James. (2015). 'Unheard Voices: the involvement of children and vulnerable people in the family justice system'. *Family Law* 45(8): 895-902

<sup>49</sup> Family Court Tables October-December 2019, Table 2: Public and Private (Children Act) cases started and disposed, counted by case, court event and children involved, in England and Wales, annually 2006 - 2019 and quarterly Q1 2011 - Q4 2019

assumption that parental agreement will always be in the best interests of their children. The government's principal response to any form of safeguarding of children who experience negative effects of family breakdown has been to introduce the statutory MIAM when parents apply to court, in the hope that this will lead to the diversion of disagreements and contested issues away from the court process. This is happening against a background of the withdrawal of legal aid from the vast majority of private law disputes.<sup>50</sup> The current arrangements are particularly concerning given that the incidence and impact of domestic violence in private law cases, as revealed in the MoJ Risk of Harm report has been consistently and dangerously underestimated.<sup>51</sup> **We recommend there be an urgent review of the arrangements for hearing children's voices and protecting the welfare of children who are living or who have lived in violent households.**

86. The UK has lagged behind other jurisdictions in addressing problems of family breakdown, particularly concerning the impact on the 280,000 children whose parents separate each year. Historically there has been no clear national (England and Wales) policy direction on hearing the voice of the child in private law issues. The lack of an overarching cross-departmental strategy has resulted in fragmented approaches, which are neither productive nor cost-effective. The Family Justice Review, reporting in 2011, endorsed the importance of 'child friendly' and 'child inclusive' approaches. It called for a clearer focus on the child and better training for professionals to make sure children's voices are heard. The Review also proposed that children and young people should, as early as possible in a case, be offered a menu of options laying out ways in which they could if they so wished, make their views known.<sup>52</sup> Unfortunately, since then, little progress has been made.

## **B. Hearing the Voice of the Child**

87. What is most striking in looking at the current arrangements for hearing the voice of the child is how many children experience parental separation and how few services exist for them. The sheer numbers involved may go some way to explaining the lack of progress in this area as the provision of services will have considerable resource implications which successive governments have been loath to address. Consequently, very few of the children and young people who are centrally concerned have the opportunity to be consulted or to have any agency in the decisions made about their lives. In the absence of any clearly identifiable policy framework, there has been a series of scattergun initiatives. One of the prime aims of state intervention into family breakdown is to limit, so

<sup>50</sup> See Legal Aid, Sentencing and Punishment of Offenders Act, 2012.

<sup>51</sup> Hunter et al, n 14 above.

<sup>52</sup> Ministry of Justice, Department for Education and the Welsh Government. (2011). *Family Justice Review*. (Chair – David Norgrove) – see, [www.gov.uk/government/.../family-justice-review-final-report.pdf](http://www.gov.uk/government/.../family-justice-review-final-report.pdf).

far as possible, collateral damage to children. However, there has been limited analysis of the effectiveness of available interventions for the children concerned. In practice, the notion that a child's rights and welfare can be protected in absentia - as part of an indirect adult-driven agenda - is fundamentally flawed. The time for rhetoric is over. Our remit does not extend to calling for statutory change. However, we are mindful that the non-legal presumption that young people aged 10 and above be heard in out-of-court dispute resolution processes recommended in the Voice of the Child Dispute Resolution Advisory Group's Final Report has not brought about the desired change in culture and practice whereby 'all dispute resolution practitioners, including mediators, collaborative practitioners and others... consider how they can embrace child inclusive practice as the norm in order to uphold children's rights to have a voice in decisions which affect them and fulfil Government policy.'<sup>53</sup> **We strongly endorse the recommendation of the Voice of the Child Dispute Resolution Advisory Group that there should be a presumption that all children and young people aged 10 and above be offered the opportunity to have their voices heard directly in all processes for resolving issues between parents, including mediation and solicitor-led processes. We call for a review to consider whether this presumption should be a statutory one to ensure compliance. Our view is that this should be the case.**

88. To ensure that this presumption is complied with, we recommend that those conducting processes such as solicitor negotiation, collaborative law and arbitration must ensure that children are offered a process for their voice to be heard by a suitably trained professional<sup>54</sup> (unless there are agreed upon contra-indications). There should be a requirement to maintain annual statistics for each case on the offer made, whether the offer was taken up and, if not, the reason why it was declined (where known).

89. The MoJ Risk of Harm report states,

more should be done to accord children the opportunity to be heard in these (private law) proceedings, in accordance with Article 12 on the UNCRC... The panel believes that its recommended reforms to the Child Arrangements Programme... will provide an important framework for enhancing children's voices in private law proceedings. The panel recommends that the range of options for hearing from and advocacy, representation and support for children be explored more fully as part of the work of elaborating and piloting the reformed Child Arrangements Programme.<sup>55</sup>

<sup>53</sup> Final Report of the Voice of the Child Dispute Resolution Advisory Group, n 8 above.

<sup>54</sup> This could be a mediator accredited to meet with children, a child consultant, child advocate or a professional otherwise trained in child welfare.

<sup>55</sup> Hunter et al, n 14 above at para. 11.6.



We support this recommendation. In cases where abuse is alleged, a separate voice for young people, including separate representation in cases of severe abuse, is vital. As Fiona Morrison and colleagues have recently argued forcefully, we require 'a system of child advocacy, that ensures independent advice, ongoing support and trusting relationships and information, that children repeatedly tell researchers they need.'<sup>56</sup>

90. Primary legislation is already in place to achieve the greater separate representation of young people that the MoJ Risk of Harm report seeks. The Adoption and Children Act 2002, s 122 extends the list of specified proceedings in which a child may have tandem representation under s41 Children Act 1989 to include private law s8 Children Act 1989 proceedings. S122 has been implemented but lacks the necessary court rules to activate it. **We recommend that urgent consideration is given to laying the requisite court rules to accompany the Adoption and Children Act 2002, s 122 so that private law applications pursuant to the Children Act 1989, s 8 become 'specified proceedings' in which children may be separately represented if needed.**
91. The recent evaluation of the DWP funded Mediation in Mind pilot confirmed the benefits for children of being consulted.<sup>57</sup> Children who were consulted over or influenced the making of contact and residence arrangements report higher degrees of satisfaction with the arrangements.<sup>58</sup> Giving children a voice can lead to more durable agreements; improved parental alliances; better father–child relationships and more cooperative co-parenting.<sup>59</sup> Feeling listened to, by a mediator or a counsellor, empowers young people and helps them to cope better with the breakdown of their parents' relationship.<sup>60</sup> Young people who are listened to report that it is a 'cathartic' experience: it makes them feel respected; they feel that their parents care about their opinions, it gives them an outlet to discuss their concerns and to understand what is happening and gives them 'a sense that somebody is there for them'.<sup>61</sup> To promote greater uptake of child-inclusive mediation (CIM) where it is appropriate, **we recommend that funding mechanisms should be put in place urgently to provide for publicly funded CIM.**

<sup>56</sup> Morrison, F., Tisdall, K. and Callaghan, J. (2020). 'Manipulation and Domestic Abuse in Contested Contact - Threats to Children's Participation'. *Family Court Review* 58 (2): 403-416.

<sup>57</sup> Barlow, A. and Ewing, J. (2020). *An Evaluation of 'Mediation in Mind': Final Report – June 2020*. (Exeter: University of Exeter)

<sup>58</sup> Butler, I., Scanlan, L., Robinson, M., Douglas, G. and Murch, M. (2002). 'Children's involvement in their parents' divorce: implications for practice'. *Children and Society* 16(2): 89.

<sup>59</sup> Walker and Lake-Carroll, n 41 above.

<sup>60</sup> Barlow and Ewing, n 57 above.

<sup>61</sup> Ewing, J. (2020). 'The Healthy Relationship Transitions (HearT) Project: Child-inclusive mediation – overcoming barriers to greater uptake'. *Family Mediators Association's Annual Conference, Mediating in a Time of Change*. Online: 30 September 2020, outlining the preliminary findings from 'The Healthy Relationship Transitions (HearT) Project'.

92. Children who experience family breakdown may be broadly divided into four groups or cohorts (see Figure 1 above paragraph 66):

- Cohort 1 - children of parents who agree their care arrangements outside of state services/ intervention.
- Cohort 2 - children of parents who engage in mediation services, some of whom are consulted as part of the mediation process (CIM). It is not known how many children are consulted within other processes such as solicitor negotiations (in the very unlikely event that the child is separately represented), collaborative law or arbitration, but the numbers are thought to be very small.
- Cohort 3 - children of parents involved in 'in-court dispute resolution' services and applications pursuant to Children Act 1989, s 8 (or the tiny minority of young people who are granted leave of the court to make an application pursuant to Children Act 1989, s 10(1)), and
- Cohort 4 - the very few children, (around 1%) who may be made parties to the proceedings pursuant to Family Procedure Rules (FPR) 2010 r 16.4. These children will be separately represented by both a children's lawyer and a children's guardian, in the same way as children in public law proceedings have tandem representation.

93. We know little about how parents make arrangements outside of the court. Currently, almost all resources are focused on the relatively small number of children in cohort 3 and 4. Public funding is not available to support CIM for children in cohort 2. Those in cohort 1 have no universal provision of information or support. The role of Cafcass/Cafcass Cymru is limited to safeguarding and promoting the welfare of children, and providing information, advice and other support for children and their families only once these children are involved in family proceedings.<sup>62</sup> **To fill this gap we recommend that there be a dedicated section for children on 'The Separated Families Hub', and information and resources provided to other 'touchpoints' for children (recognising that services and 'touchpoints' for young people may look different in England and Wales).**

94. The involvement of Cafcass in pre-proceedings work in public cases has been piloted.<sup>63</sup> We believe that the 's' for 'support' in Cafcass should extend to pre-proceedings in private law cases but we recognise that both Cafcass and Cafcass Cymru are currently stretched beyond limits and could not realistically take on this extra role without funds. This falls back to the need for both English and Welsh administrations to acknowledge the needs of all children

<sup>62</sup> Criminal Justice and Court Services Act, 2000, s 12 (1)(a) and (d).

<sup>63</sup> Broadhurst, K., Doherty, P. and Yeend, E. (2013). *Coventry and Warwickshire Pre-Proceedings Pilot Final Research Report*.

whose parents separate and put in place coordinated policy and funding to address those needs. **On an interim basis, and pending the establishment of ‘The Separated Families Hub’ we recommend the Co-Parent Hub should include a dedicated, age-appropriate space with information and support for young people and funding provided to facilitate this. Until the systemic change that we call for is a reality, we recommend that consideration is given to ring-fencing a dedicated funding allocation, to extend the remit of Cafcass to oversee support for all young people in England whose parents separate, with equivalent funding and arrangements to support young people in Wales.**

95. To provide a more nuanced picture of the numbers of young people who speak to a mediator per annum, we recommend that mediators be required to supply to the FMC annual statistics on the number of children invited to a consultation and the number of CIMs carried out each year. In a case involving a child over the age of 10, if the mediator decides that CIM is not appropriate, the mediator should record the reason. Where the mediator proposed CIM but it did not go ahead then there should be a record of whether the mother, father and/or child declined.
96. Figure 1 at paragraph 66 above suggests a matrix of universal, non-stigmatising, well-signposted services providing information, consultation, and if necessary, representation, which could be coordinated through a ‘Supporting Separating Families Alliance’.<sup>64</sup> The services would be UN Convention compliant, meet modern-day standards of ethical practice with children, and be effective in developing a coherent framework of direct support services to those children and young people who need to access them. This is not just at the time of parental separation and court proceedings but afterwards, when professional attention has waned, and the child is left to live the life which has been agreed for them.
97. **We strongly recommend that the Article 12 UNCRC compliant matrix in Figure 1 (above at paragraph 66) be adopted as a framework for the development of services for children and young people whose parents are divorcing or separating.**

<sup>64</sup> The proposal for the development of a range of Article 12 compliant services for children and young people whose parents separate was developed and is supported by the Interdisciplinary Alliance for Children (IAC) in 2015. Members of the IAC include the British Association of Social Workers (BASW), the Law Society the Association of Lawyers for Children (ALC), VOICE, the National Youth Advocacy Service ( NYAS), the Family Law Bar Association, the Professional Association for Children’s Guardians, Family Court Advisers and Independent Social Workers (NAGALRO), Children’s Rights Alliance for England (CRAE), the National Association of Probation Officers (NAPO) Family Courts Division and the Law Society.

### C. Impact on Children and Young People of the Parent Relationship

98. How parents separate has been proven to have a significant impact on the childhood experience that follows. Following parental separation, 'warmth and parental support are linked with social competence, subjective wellbeing, and lack of externalising problems [in young people].'<sup>65</sup> Relationships matter, not only between mothers, fathers and their children, but also between mothers and fathers.<sup>66</sup> Good relationships between parents in intact or separated families are a protective factor for children.
99. By contrast, the impact of inter-parental conflict that is frequent, intense and poorly resolved leads to poorer outcomes for children now and into their future. Children recognise negative communication between their separated parents and are affected by it, with increased risk that the parental conflict casts a long shadow over the child's life course. **We recommend that continuing inter-parental conflict is recognised as an 'adverse childhood experience'.**
100. Research by Professor Gordon Harold at the University of Sussex found that the quality of the inter-parental relationship, specifically how parents communicate and relate to each other, is increasingly recognised as a primary influence on effective parenting practices and children's long-term mental health and future life chances.<sup>67</sup> We do not believe this is widely understood; many parents focus on the quality of their own relationship with their child, without taking sufficient account of how the quality of relationship with the other parent impacts their child. **We recommend that the government funds a campaign aimed at the promotion of awareness in society of the harm to children from parental conflict, and the benefit to children of parents behaving respectfully and cooperatively towards each other.**
101. Children have a fundamental need for their parents to behave with reasonable respect towards each other as they transition from partnering to co-parenting. It has been suggested that adults should be polite and, as a minimum standard, establish eye contact during routine handovers.<sup>68</sup> Where there are no safety issues, we suggest this should be a culturally expected standard of behaviour between parents who live apart.
102. The experience of the National Youth Advocacy Service (NYAS) in representing children in FPR 2010, r 16.4 applications demonstrates the long-term corrosive

<sup>65</sup> Hawthorne, J., Jessop, J., Pryor, J. and Richards, M. (2003). *Supporting Children through Family Change*, available at: <https://www.jrf.org.uk/sites/default/files/jrf/migrated/files/1842630857.pdf>.

<sup>66</sup> Eisenstadt and Oppenheim <https://blogs.lse.ac.uk/politicsandpolicy/parents-poverty-state/>

<sup>67</sup> Harold, G., Acquah, D., Sellers, R. and Chowdry, H. (2016). *What works to enhance inter-parental relationships and improve outcomes for children*. Department for Work and Pensions.

<sup>68</sup> Woodall, K. and Woodall, N. (2009). *The Guide for Separated Parents. Putting Your Children First*. Piatkus Books Ltd.

effects of a childhood punctuated by a series of high conflict court battles between implacably hostile parents. Parental separation, although always experienced by children as a crisis point in their lives, need not in itself be the source of lasting emotional scars. Much depends on the willingness and ability of parents to be sensitive to the impact of their separation on their children and prepared to work together in the children's best interests.

103. The Family Justice Young People's Board (FJYPB) has emphasised the importance of the Cafcass/Cafcass Cymru 'child impact' statement being made available in court so that parents can see what impact the proceedings are having on their children. We have considered whether a similar 'child impact' statement should be prepared much earlier in the process of parental separation. Anything which encourages parents, and the professionals tasked with assisting them, to think about the impact on the child of the parenting relationship and of the decisions being made is welcome. However, in most processes the child's views are not sought directly so any assessment of impact would be through the parents and they are not always the best judge of how the child is coping. In the absence of the involvement of an independent professional (such as Cafcass/Cafcass Cymru), it begs the question as to who should draw up the child impact statement. For these reasons we have decided against making a recommendation for 'child impact statements' in cases which are not decided by the court.

#### **D. Information and Signposting Services**

104. Although there are numerous websites which have been produced by a miscellany of organisations, there has been little or no systematic evaluation of how much they are used and how useful they are for the children who access them. **We recommend that universal, non-stigmatising 'kite marked' information on law and policy for children and young people affected by parental separation be developed and made available online. In addition, there should be a coordinated strategy to ensure that these resources are made available in schools as part of PSHE, and other touchpoints with whom children and young people come into contact (sports centres, youth centres, gyms, GP surgeries, cinema complexes etc.)**
105. This framework should be clearly identifiable and accessible to all children and young people. Models might be ChildLine or BBC Bitesize, both tried and trusted by young people. One option is to use the existing network of the National Association of Child Contact Centres (NACCC) as part of a nationally coordinated, age-appropriate information dissemination strategy. Another option is to make greater use of the Family Hubs network in England. The framework may look different in Wales. Teachers, GPs and youth workers should also be given information and training on Article 12 services for children,

and all family professionals involved with the parents should be able to give information to parents for their children to access Article 12 services. This dissemination of information to children will require an identified coordination strategy.

106. Resource pack - The Divorce, Dissolution and Separation Act 2020 could provide an excellent opportunity to require mandatory, age-appropriate information to be given to children whose parents are filing a divorce application. This could be in the form of a resource pack, which would assist the 75,000, plus children whose parents divorce each year, many of whom will have no information given to them. The pack could include information on child advocacy and CIM together with signposting to Article 12 compliant services of information and consultation with route maps to local, regional and national services. This would provide some 'safety netting' for children in need or at risk. **We therefore recommend that resource packs be provided to children whose parents divorce, as part of the new legislative requirements.**
107. Data - Given the difficulty in obtaining accurate statistics on the numbers of children involved in their parents' separation or divorce, **we recommend that the regulations introduced with the Act could include a requirement that the divorce application records the number of children the couple have, their ages and whether they are the children of both spouses.** This could also help record the number of times that children have gone through the process of family transition and parental separation. An estimated 20,000 are going through this process for the second or third time during their childhood. These children could be considered a priority for direct support services.

#### **E. Children and Young People's Access to the court**

108. It is the case for children in cohorts 1 and 2, just as those in 3 and 4, that once their parents have agreed arrangements, children are effectively locked into those arrangements and have no legislative route to whistle-blow about what may be a highly dangerous situation.
109. We would recommend that the Children Act 1989, s 10 leave requirements are reviewed and relaxed to enable competent children who are in need or at risk to find a route back to court of their own volition. This would acknowledge and address children and young people's lack of ability to initiate change and provide them with a failsafe route to a possible variation of Children Act 1989, s 8 Child Arrangements orders.

## F. Services for Children and Young People - Summary of Recommendations

### CORE RECOMMENDATION

The establishment of a framework of direct support services of information, consultation, support and representation for children and young people whose parents separate, based on the Article 12 UNCRC compliant matrix in Figure 1 above. (Paras. 96 and 97).

In addition, we recommend that:

110. There be an urgent review of arrangements for hearing children's voices and protecting the welfare of children who are living or who have lived in violent households. (Para. 85).
111. There should be a presumption that all young people aged 10 and above be offered the opportunity to have their voices heard directly in all processes for resolving issues between parents, including mediation and solicitor-led processes. (Para. 87).
112. Those conducting processes such as solicitor negotiation, collaborative law and arbitration must ensure that children are offered a process for their voice to be heard by a suitably trained professional (unless there are agreed upon contra-indications). There should be a requirement to maintain annual statistics for each case on the offer made, whether the offer was taken up and, if not, the reason why it was declined (where known). (Para. 88).
113. The range of options for hearing from and advocacy, representation and support for children to be explored more fully as part of the work of elaborating and piloting the reformed Child Arrangements Programme as recommended by the MoJ in the 'Assessing Risk of Harm to Children and Parents in Private Law Cases' Review. (Para. 89).
114. Urgent consideration is given to laying the requisite court rules to accompany the Adoption and Children Act 2002, s 122 so that private law applications pursuant to the Children Act 1989, s 8 become 'specified proceedings' in which children may be separately represented if needed. (Para. 90).
115. Funding mechanisms should be put in place urgently to provide for appropriate new funding levels for publicly funded CIM. (Para. 91).
116. A dedicated 'Children' section of 'The Separated Families Hub', and information and resources provided to other 'touchpoints' for children (recognising that services and 'touchpoints' for young people may look different in England and Wales). (Para. 93).

117. Pending the establishment of the 'Separated Families Hub', the Co-Parent Hub should include a dedicated, age-appropriate space with information and support for young people and funding provided to facilitate this. (Para. 94).
118. Consideration is given to ring-fencing a dedicated funding allocation, to extend the remit of Cafcass to oversee support for all young people in England whose parents separate, with equivalent funding and arrangements to support young people in Wales. (Para. 94).
119. Mediators should be required to supply to the FMC annual statistics on the number of children invited to a consultation and the number of CIMs carried out each year. In a case involving a child over the age of 10, if the mediator decides that CIM is not appropriate, the mediator should record the reason. Where the mediator proposed CIM but it did not go ahead then there should be a record of whether the mother, father and/or child declined. (Para. 95).
120. Continuing inter-parental conflict be formally recognised as an 'adverse childhood experience'. (Para. 99).
121. The government funds a campaign aimed at the promotion of awareness in society of the harm to children from parental conflict, and the benefit to children of parents behaving respectfully and cooperatively towards each other. (Para. 100).
122. Universal, non-stigmatising 'kite marked' information on law and policy for children and young people affected by parental separation be developed and made available online. In addition, there should be a coordinated strategy to ensure that these resources are made available in schools as part of PSHE, and other touchpoints with whom children and young people come into contact (sports centres, youth centres, gyms, GP surgeries, cinema complexes etc.) (Para. 104).
123. Resource packs be provided to children whose parents divorce, as part of the new legislative requirements. (Para. 106).
124. The regulations introduced with the Act could include a requirement that the divorce application records the number of children the couple have, their ages and whether they are the children of both spouses. (Para. 107).
125. The Children Act 1989, s 10 leave requirements are reviewed and relaxed to enable competent children who are in need or at risk to find a route back to court of their own volition. (Para. 109).



## CHAPTER 4: SERVICES FOR PARENTS

### A. Overview and Principles

126. The following pages address the services needed by parents. We set out our views under the following headings:

- Public Education;
- Access to Information and Support;
- Early Information and Assessment Meetings;
- The Right Pathway
- Safe Screening for Domestic Abuse
- A Holistic Approach
- Parenting Programmes.

Before addressing each in turn, there are three principles to bear in mind in every aspect of the pre-court space.

#### **Principle 1 - 'Working Together' or 'Working Apart'**

127. A distinction in the pre-court space occupied by cohorts 1 and 2 needs to be made between a 'working together' approach, and a 'working apart' approach.

128. There are cases which require the protection of a formal court process in which the adults cannot reasonably be expected to 'work together'. These cases must be identified and directed to specialist support and/or the court, rather than burdened with inappropriate expectations to 'work together'. The MoJ Risk of Harm report<sup>69</sup> is a timely reminder of the vulnerability of those in abusive relationships, and the important role of the court in protecting them and their children. Safety is of paramount importance for these cases.

129. For cases which do not require this protection, a shift in emphasis and expectations is needed towards one of 'working together' to resolve parenting issues.

130. In 2019, Anthony Douglas, the retiring head of Cafcass, suggested that at least 25% of families in court have no child protection or welfare issues, and warned against a risk of the court becoming 'the third parent'.<sup>70</sup> Quite apart from the benefit to children and families, removing cases which do not need the court's

<sup>69</sup> Hunter et al, n 14 above.

<sup>70</sup> Douglas, n 15 above.

intervention will enable a better resourced court service for those families who do.

131. Equally, there will be some families who have domestic abuse or child protection issues who need to be in court and currently are not.
132. For any system to work effectively, it is essential at an early stage to identify which families need the safety pathway, and which families need support to resolve issues themselves.
133. Those cases where the safety pathway is not the driving focus need encouragement to engage in a 'working together' approach, and not to be drawn into adversarial legal disputes as a matter of culture (as opposed to need). The challenge is to change societal attitudes and expectations. **We need to move away from old assumptions that family breakdown is automatically a legal issue in which parents work against each other and towards an acceptance of 'working together' as the norm where appropriate, with professional support alongside to resolve issues.**
134. At the heart of our recommendations, therefore, is an emphasis that most parents can find their own answers to their issues, if given the appropriate advice, support and boundaries to help them work them out together. This has of course been the message sent out by Judges and by Cafcass for many years, not least from the group (including the current President) that prepared the now-amended Midland Judges Statement of Expectations, appended to the Private Law Working Group report published in April.<sup>71</sup>

## **Principle 2 - A Longer-Term Perspective**

135. This distinction between a 'working together' approach and a 'working apart' approach will have long-lasting implications for those families in which domestic abuse is not a factor.
136. The building of a successful co-parenting relationship takes time after any relationship breakdown. The transition from a couple relationship (whether long-term or a one-night-stand) into a separated but functioning parenting relationship which works well for the child is complex, takes time, and requires personal commitment alongside professional support of various types. This sensitive time for the separating family is as much about personal transitions as it is about dispute resolution. It is unhelpful for it to be viewed simply through a lens of legal disputes.
137. It is inevitable that the quality of the post-separation parenting relationship – which lasts for the rest of the family's lives – is affected by how the issues are resolved during the relatively brief period of arranging the separation itself. The

<sup>71</sup> Private Law Working Group. (March 2020), n 6 above

old adage that it is not the parental divorce that affects children but the way that divorce is handled, remains true.

138. The needs of the separating family go beyond 'dispute resolution' of a particular issue; they are the long-term needs for parents to rebuild a 'good enough' cooperative parenting relationship for their children, through childhood and the decades thereafter (even to be cooperative grandparents).

### **Principle 3 - The Power of language**

139. There is much work to be done to improve the language used around children disputes. While the legal profession has embraced changes since the Children Act around 'custody', lawyers can still slip into 'residence' and 'contact', rather than considering child arrangements. How can we expect parents to work together collaboratively if the language and context of the system are adversarial? References to 'parties' and 'contact' derive from the court arena; a different language is to be encouraged if we are to support parents make sustainable arrangements with each other. Indeed, whilst we were tasked to consider the 'pre-court space' this term in itself is loaded, implying the space preceding an [inevitable] court application. Perhaps the 'alternative to court space' or 'the non-court space' more accurately describes the area with which we are concerned.
140. It is not surprising that the public does not naturally approach the arrangements for their children in terms of co-parenting. The term 'co-parenting' is confusing in itself: some parents believe it means a 50/50 division of time. The MoJ response to the Divorce Bill refers to **cooperative parenting** rather than **co-parenting**, which we believe is more easily understood.
141. There is also work to be done with the court forms. The adversarial term 'versus' in the court heading is inappropriate. This point was specifically raised by FJYPB representatives in January. One option is for the case name to be the child's name, rather than the parents, drawing everyone's focus to the interests of the child. It would be interesting to seek the views of FJYPB members on this suggestion. Another option would be simply to use the parents' names, and not label them within the constructs of an unnecessary legal vocabulary.
142. The task of parenting a child continues from birth until well into adulthood. This task continues for parents who are together, for parents who are separating and for parents who have separated. The end of a couple relationship does not mean an end to parenting responsibilities; they may be exercised differently post-separation but they continue, nonetheless.
143. In short, we need to reframe language in the information and support which precedes the justice system, to that of two parents who, where safe to do so,

will continue the task of parenting from birth until adulthood, whether together, separating or separated.

## **B. Public Education**

144. A starting point to improve how parents understand their options and access the right support, and to improve the experience for children and young people, is education. The Children Act 1989 and the Children and Families Act 2014 serve families well and new legislation is not required, but the philosophy behind them has not permeated into society. We need our existing legislation to be better understood through improved and effective education.
145. There have been many calls from those working in the family justice system for a public education campaign, including by the President of the Family Division in his keynote speech to Resolution last year:  
‘There is a need for wider public education about how parents should separate in a child-focussed way; and the damage to children of parenting disputes post-separation.’
146. Too often we are working with families who have little understanding of the expectations upon them as parents bestowed by the Children Act and the Children and Families Act.
147. To be effective, MoJ has suggested that any such campaign would be dependent on targeted research into the behaviour drivers of parents who turn to court. We considered this point but do not agree. A campaign is needed not simply to target parents who turn to court, but to educate society as a whole.
148. The ‘Varying Paths to Justice’ report<sup>72</sup> found evidence that social networks play a key role in the choices made by participants in the justice system with friends and family providing guidance on where to look for help as well as providing advice themselves.
149. The position of the Family Solutions Group, representing stakeholders across the family justice system, is that a public education campaign is needed, to reach not only parents who separate but also the wider public. This will begin to effect a change in societal attitudes to parenting and relationship breakdown.
150. **Timing is now critical.** The divorce reform will generate considerable media interest. Preparations are needed to manage the public focus on divorce and family issues when the new divorce legislation is passed.

<sup>72</sup> Pereira, I., Perry, C., Greevy, H. and Shrimpton, H. (2015). *The Varying Paths to Justice: Mapping problem resolution routes for users and non-users of the civil, administrative and family justice systems.* (Ministry of Justice Analytical Series).

151. Lessons need to be learned from the failures of the Family Law Act 1996. The media attention focused on the past: on the reasons for the marriage breakdown, and issues of fault. This only cemented the unhelpful societal attitudes towards separating parents that we still see played out now, 25 years later. This time, the public focus needs to be directed to a wider understanding, and in particular to a general appreciation that an acrimonious divorce causes harm to couples and children.

152. We recommend:

- an overarching national publicity campaign with a strapline;
- supported by promotion via online media; and
- backed up by strapline, branding and key phrases being used in all official sources of information, online or otherwise (see below).

153. We believe this is a government responsibility and invite MoJ to confer with other departments and Welsh government and respond to this proposal. Whoever manages this, it is vitally important that the opportunity provided by the divorce reform is not missed.

## **C. Information and Support**

### **Online information**

154. Parents lack a reliable source of clear information about their options. Both 'Creating Paths to Family Justice'<sup>73</sup> and 'Varying Paths to Justice'<sup>74</sup> found that parents turn to the internet for information; this will have only increased since COVID-19. There is a strong appetite for clear, authoritative, accessible online information. At present, there is a vast amount of information online, but it is confusing and overwhelming; Creating Paths found that online information is of variable quality and is provided mostly by unregulated providers.

155. Multiple recommendations dating back to the Family Justice Review call for a central reliable online source of information. More recently, Creating Paths, building on the research from 'Mapping Paths to Family Justice' proposed:

- An authoritative and trusted 'one-stop-shop' website needs to be developed by the government as a priority, where clear, unambiguous information can be accessed.
- The website would need adequate long-term funding to ensure that it remains relevant and accurate.

<sup>73</sup> Barlow et al, (Creating Paths), n 7 above.

<sup>74</sup> Pereira et al, n 71 above.

- There needs to be a joined-up approach by key family justice organisations and those working with separated families, to ensure that parents are consistently signposted to the ‘one-stop-shop’ website, with links from it out to other suitable kitemarked services and organisations.
- Ongoing research as to how users engage and stay engaged and how they apply this information must inform the development of the online service.

156. Shortly after the start of the COVID-19 crisis, Cafcass relaunched their Co-Parent Hub, to provide information and support to parents. This website is specifically addressed to parents regarding their children and, while helpful, is not an overarching authoritative website for all who separate or for the children of separated parents.

157. **We recommend an overarching website** (for present purposes termed ‘The Separated Families Hub’) from which and to which all roads would lead. Parents could be directed to the co-parenting section, or information about resolving finances, children could be directed into a child-centred space and there could be a third section for professionals. It would need to be coordinated and accessible from a variety of routes so that any relevant searches would lead to it. This could also be a resource for non-legal professionals (GPs, youth workers, schools), who are on the front line with separating families and currently have little guidance. The Separated Families Hub would need to be coordinated with other resources, ensuring synergy with any public education, any physical resource or mobile app, and with all branding and promotion.

### **General information**

158. In addition to an authoritative central website, parents need to find the same consistent information elsewhere, be that in written form and/or in other media forms.

159. In their study of litigants in person (LiPs) in private family law cases, Liz Trinder and colleagues reported that the main support-needs identified by LiPs were for information about process and procedure, emotional support, practical support and tailored legal advice. The legal advice needed would cover broad questions about their entitlements and specific questions about tactics and tasks. Parents attempting to resolve their family law issues without going to court are likely to have similar needs for information, support and advice.<sup>75</sup>

<sup>75</sup> Trinder, E., Hunter, R., Hitchings, E., Miles, J., Moorhead, R., Smith, L., Sefton, M., Hinchly, V., Bader, K. and Pearce, J. (2014). *Litigants in person in private family law cases*. (London: Ministry of Justice).

160. There are different levels of information which may be needed at different stages. **We recommend the following:**

- **An overarching strapline or key messages**, which are widely understood by society in general. These could be provided by a national campaign, backed up with online media messaging.<sup>76</sup>
- **Headline principles for parents who live apart**, which can be easily understood – such as the FJYPB top tips/FJYPB top tips for LGB. These principles would apply generally to parents who live apart and would not be specifically aimed at those with serious disputes who may be thinking of a court application. The language must be framed in the context of long-term parenting, and not framed in the shadow of a justice system. As well as accessing this information online, it could be provided by Family Hubs, CABs, GPs, therapists, school Family Liaison Officers, libraries or other community venues. It could also be annexed to any documentation sent to parents who issue divorce proceedings.<sup>77</sup>
- Linked to that, **parents need a clear understanding of what ‘Cooperative parenting’ means in practice**, with different media resources made to illustrate that this is very different from simply dividing time. Film is more powerful than words, **so we recommend creating short film clips** (e.g. #SeeItDifferently by DWP RPC partner Good Things Foundation,<sup>78</sup> or the Fegans’ co-parenting clip<sup>79</sup>) to illustrate the goal of cooperative parenting, with voiceovers by children. This would be an easy and inexpensive way to reach many parents. This point is also made in the section on Digital Information below at paragraph 241 and a pilot on the effectiveness of digital media is proposed.
- **Parents need clear, authoritative information on the different processes and their options.** They need practical information on the court’s role in protecting those who are victims of domestic abuse and how to access that without delay. Otherwise, they need to know about the range of options available to support them to resolve parenting issues. For this latter category, the emphasis is on working together to resolve issues rather than against each other. Again, film is a helpful medium

<sup>76</sup> E.g. ‘Clunk Click Every Trip’ for the safety belt campaign

<sup>77</sup> In the Lords debate on the Divorce Bill, Baroness Butler-Sloss stated: “Parents who are deciding to divorce—the petitioner and the respondent—should be given an information pack which would explain the impact on the children of disagreements between the parents.... Such an information pack would be extremely helpful.” *Hansard* HL Deb. vol.802 col.532, 3 March 2020. [Online]. [Accessed 11 August 2020]. Available from: <https://hansard.parliament.uk/lords/2020-03-03/debates/2599D6D6-26C3-49F6-AB22-6AC5657169F9/DivorceDissolutionAndSeparationBill>

<sup>78</sup> <https://www.goodthingsfoundation.org/projects/crossroads-reducing-parental-conflict>

<sup>79</sup> [https://www.fegans.org.uk/campaign/co\\_parenting/](https://www.fegans.org.uk/campaign/co_parenting/)

and the clips produced by Creating Paths<sup>80</sup> could be much more widely used.

- At the next level, **information is needed for parents who are struggling to resolve issues and may be considering a court application.** The PrLWG's Second Report<sup>81</sup> includes at Annex 2 an excellent update of the old Midlands expectations document, a new 'Family Court Information Sheet'. Any parent considering a court application should have access to this information at an early stage of any issue arising. In addition to accessing this information online, parents could be given this when consulting a mediator, a solicitor, CAB, Family Hub or attending any magistrate or other family court.
- Finally, and again for those who are thinking of a court application, **detailed information is needed about factors applied by the court in considering child arrangements.** Much like the Family Justice Council's 'Guidance on Financial Needs on Divorce' a similarly detailed guide is suggested for parents who cannot agree child arrangements, which explains the principles upon which any decision will be made. Several family professionals have offered to be part of a working group to work with judiciary and provide a draft for consideration.

161. **We recommend that communications experts are consulted** to ensure that these different levels of information are consistent and complement each other, and that they all tie in with the public education campaign and the centralised one-stop-shop website.

### **Local Information and the 'Supporting Separating Families Alliance'**

162. In addition to online information and general information, parents need information about what support services are locally available. A joined-up approach by family organisations and those working with separated families is needed to ensure that parents are offered the full range of support needed, kitemarked to an established standard. Hence the proposals by the PrLWG of a 'Supporting Separating Families Alliance'. We fully support the PrLWG recommendation for SSFAs at local levels with a nationally consistent blueprint. As the second PrLWG report acknowledges, this will require careful costing and analysis of need, likely uptake and effectiveness.<sup>82</sup>

163. The development of a network of SSFAs will take time and resources and, we hope, will be included in the remit of the Family Justice Reform Implementation Group. First steps in setting up a local alliance have been taken in Dorset,

<sup>80</sup> University of Exeter. (2019). [Family mediation experiences](#)

<sup>81</sup> Private Law Working Group. (March 2020), n 12 above.

<sup>82</sup> Ibid at p. 26



Kent and West Midlands (more is said in Annex 5 on parenting programmes) but the implementation of a national network of SSFAs is beyond our remit of quick-fixes to improve the pre-court landscape now.

164. We refer to the Welsh government policy document with comprehensive service mapping for parents across Wales, overseen by the Welsh Children and Families Dept.<sup>83</sup> We lack an equivalent department at Westminster to take responsibility for this vital work.
165. There are multiple sources of help or advice from a large number of organisations, some national and others local. These may be local government initiatives, partners with the DWP RPC programmes, the charitable sector, initiatives run by private practices, faith groups, and so on. Pending the SSFAs coming into being, this fragmented and unmappable range of provision could be registered by reference to geographical area on the Separated Families Hub referred to above: a centralised, uniform and trusted resource centre. **We recommend reinstating the HSSF mark, so local organisations could apply to be kitemarked and then registered on the Separated Families Hub.** From there, a database of local resources would grow.
166. In the meantime, we believe that in England Family Hubs could be used as a local source of information and to signpost appropriately to reliable providers of services in the area. As stated above, they are part community-based and part faith-based and there is no single model. They are unlikely to be staffed to the level of providing safe screening or triaging of needs, but they can be a source of information and signposting and provide a venue for others to deliver more focussed support. Many Family Hubs are used by early years support teams and are empty from mid-afternoon onwards. These could be used in the afternoon and/or evenings as a venue for the conduct of early Information and Assessment Meetings (IAMs) (more below), parenting programmes, mediation or CIM, counselling, therapeutic programmes and so forth.
167. Dissemination of information and support is also possible through the national network of child contact centres run by the National Association of Child Contact Centres (NACCC). Having such good coverage across England and Wales means they may be able to provide the infrastructure to support the development of Family Hubs. They could provide not only child contact but become **one-stop shops**. Services available could include direct services to children and young people as well as parents including information, counselling and advocacy as well as mediation and CIM, parenting programmes, Domestic Abuse Perpetrator Programmes, children's groups, women's groups, legal information and relationship support.

<sup>83</sup> <https://gov.wales/sites/default/files/publications/2019-10/parenting-engagement-and-support-guidance-for-providers.pdf>

168. Crucially, the Family Hub, whether in a contact centre or elsewhere, could provide the signposting and gateway to the range of other direct support services for children which are so sadly lacking at present.
169. We recommend a pilot to assess the extent to which Family Hubs may be used as a specialist local resource to support families in the aftermath of separation, and to review funding options.
170. For now, as an interim measure, **we recommend that all Local Family Justice Boards (LFJBs), mediators and solicitors should ensure they remain informed** of the full range of support services available locally, including the existence of a Family Hub and knowledge of how it operates.

**Other Touchpoints: Schools, GPs, Health Visitors, Youth Workers, CABs, Libraries, Community Centres, Family Hubs**

171. Parents need to access the same information and guidance about their separation and their child(ren) wherever they turn. As well as relying on online information, there are other points of societal contact which also need to be provided with sufficient information and resources to give to parents or young people at the critical time of family breakdown.
172. A holistic approach to family breakdown requires a joined-up approach between the legal and non-legal professionals working with these families. Teachers, GPs, health visitors, youth workers and other professionals working on the 'front line' of family breakdown need resourcing if they are to respond to the needs of families in crisis.
173. Often, schools may be the first to learn of a family separation yet awareness of the availability of information, guidance, support and mediation for separating families amongst teaching professionals is low. The recently completed DWP pilot 'Mediation in Mind' found that training on the mediation process and how parental conflict and separation affects children delivered to professionals working with disadvantaged families, particularly teachers, increased awareness of and confidence in the process and willingness to refer parents to mediation. As one experienced teacher put it:

... very often [when parents separate] it's just been, "oh I'm sorry to hear that"... We have never really been able to say, "have you considered mediation? ...Here's a leaflet that might be of some use to you". We have not had that tool in our toolkit.<sup>84</sup>

174. **We recommend the production of training material to be made available to teachers** online and offline and a 'space' on the Separated Families Hub website dedicated to resources for professionals. In time, this training could be

<sup>84</sup> Barlow and Ewing, n 57 above, at p. 15.

included in core training programmes for teachers. The statutory guidance on Relationship and Sex Education (RSE) in schools requires teachers to be aware of how family breakdown may be affecting their pupils.<sup>85</sup> The training will help teachers to meet this requirement and will provide clearer routes to information and support for young people of school-age whose parents separate.

175. **We recommend similar training for other non-legal professionals** who encounter separating parents, such as GPs, health visitors and youth workers. Particularly when responding to the needs of patients/clients who are the victims of domestic abuse, GPs and other health professionals need clear referral pathways to specialist advocacy and support.
176. The lack of coordination for non-legal professionals to provide information and signposting to separating families falls to the political vacuum for the separating family. The provision of information to non-legal professionals need not be expensive and would tie in well with the new divorce legislation coming into force, and our recommended public education campaign. However, it will take someone in government to take responsibility to coordinate the dissemination of clear and consistent information to non-legal professionals.

#### **D. Early Information and Assessment Meetings**

177. The PrLWG supports the notion of early intervention, and its members are keen to see some form of ‘triaging’ of services for families.
178. At present, attendance at the statutory MIAM is a pre-requisite for an application to court and so by definition is attended by a person who is considering making a court application. This is a very late stage to impose a requirement to meet a family professional to assess the family situation and discuss non-court options.
179. In common with many of the PrLWG consultation responses last year, we suggest that this important discussion to review options should happen at the earliest opportunity. **We recommend that an early ‘Information and Assessment Meeting’ (IAM) happens as soon as possible after relationship breakdown or separation, before issues escalate and positions harden.** The aim is for parents to access tailored support to address issues before they turn into court applications.
180. We believe the consequence of this meeting taking place at an earlier stage, with the right network of support alongside, will divert many couples away from

<sup>85</sup> Department for Education. (2019). *Relationships Education, Relationships and Sex Education (RSE) and Health Education Statutory guidance for governing bodies, proprietors, head teachers, principals, senior leadership teams, teachers* at para. 102.

contested court proceedings and towards better outcomes for their families. The meeting would seek to shift mindsets away from the context of disputes and towards a child-focussed and future-focussed goal of cooperative parenting.

181. An early 'IAM' would give parents the following:

181.1 An opportunity to meet a family professional face-to-face (in person or online) for a confidential meeting. While the provision of generic information or signposting may be helpful, research has shown that parents want a bespoke face to face meeting with a family professional.<sup>86</sup> This enables them to speak about their family situation, have their needs accurately assessed and receive tailored information about their options.

181.2 An assessment of pathways at an early stage:

- For domestic abuse cases, the case must immediately follow an established pathway, with a primary focus on safety for vulnerable family members. The language of working together or cooperative parenting is not appropriate unless and until support is in place and it is safe to have any form of engagement with the perpetrator. Depending upon the nature of the abuse and whereabouts it falls on the spectrum of abuse, children may still benefit from a 'working together' approach where this is safe. For some cases, this will never happen; for others, this may be possible at some later stage, with the right support, and with a carefully managed process. Please refer to Section F below on domestic abuse and Annex 4.
- For cases in which domestic abuse is not a factor, the needs of the family can be reviewed, to include services for children, parenting, psychological, conflict resolution, legal and/or other needs, and the options for addressing them. The following paragraphs set out the benefits of an early IAM for families suitable for the cooperative parenting pathway.

181.3 Presentation of a future-focused and child-focused narrative and an introduction to the concept of cooperative parenting. This will involve reframing the language of dispute and positions into one of a common interest in their child's wellbeing; distinguishing between parental disagreement (normal and healthy) and parental conflict (harmful to a child). It will encourage the client to take up his/her parental responsibility to make decisions for the child as cooperative parents.

<sup>86</sup> Ministry of Justice. (2016). *Family Justice Out of Court Pathway Team Presentation at Out of Court Pathway Showcase, 31st August*. (Ministry of Justice, London).

181.4 An introduction to the legal expectations upon parents to exercise their parental responsibility. Included in the understanding of legal expectations is the understanding that a child has a right to a relationship with both parents and parents have a responsibility to make proper arrangements to enable this. In the absence of safety concerns, one parent does not have a right to prevent a child from seeing the other parent and there is a presumption of contact. Our NACCC representative spoke of the extreme distress for children caused by the loss of a relationship with a parent. This element of 'parental responsibility' is not widely understood. The current President of the Family Division put it this way, when the CAP was first presented in 2014:

*In the past the focus was about making contact work. Now it's about making Parental Responsibility work. It's a phrase which trips off the tongue – it is the responsibility which we all have because we're parents. We need to encourage and assist parents to take responsibility for their children, so that they can make the decisions for their child.*

181.5 Importantly, a consideration of the UNCRC Article 12 services available for children to express their views at an early stage, and to have them taken into consideration in any decision-making.

181.6 An introduction to the differing types of professional support available, and the options for resolving issues between parents.

182. This early IAM will act as an early 'triage' of the family's needs. We are against calling it a 'pre-application protocol' or similar: this speaks of a court process rather than a parent in need; also, the aim is that this does not precede a court application, but that for the majority of parents there will be no application. When parents separate, the new norm should be to attend an IAM, to address the points in the paragraph above. Parents would learn about this meeting from the proposed 'Separated Families Hub' online or through Family Hubs, schools, GPs, CABs, or other touchpoints, or by contacting any mediator or solicitor.

183. An early IAM would be similar to the statutory MIAM in the exchange of information and an open assessment of available options. There are two main differences: first, it would not take place in the shadow of a court application, so no court form would be signed; secondly, the modified name would remove the suggestion that parents are being told to mediate and would emphasise the early consideration of options and sources of support. When in conflict with another, being told to resolve issues together is an unwelcome message. Hence the importance of changing societal expectations to be more child aware, and of having a one-to-one meeting to discuss the nature of the issues, the harm to children from parental conflict and the long-term benefits to their

child of cooperative parenting. **Parents do not want to be told to mediate; they need information and encouragement to choose a non-adversarial route themselves.**

184. Early IAMs will have a narrative of parenting being a continuing role from birth to adulthood, by parents who are together or apart, and where issues need to be resolved by the parents. It is an understandable reaction following separation to want a professional who is 'on your side'. However, the use of different legal advisers can promote attitudes of sides, of positions, of disputes which have winners or losers, and this is ultimately unproductive in the long term if it sets parents against each other.
185. The emphasis will be on providing legal information alongside other relevant information, rather than a specific focus on legal advice (more on this below). This will rebalance any current presumption that a legal response is required when separated parents have disagreements about a child.
186. Early IAMs promote a holistic, integrated and joint approach to positive parenting; having separate independent advisors for each parent sets up a disconnected process in which there is no independent overview of the family needs.
187. Early IAMs will be both child-focussed and family-focussed, creatively looking at options for transitioning into a differently-shaped family model. Representing parents against each other is not in the interests of the child nor the interests of the whole family.
188. Early IAMs will encourage parents from the outset, where appropriate, to 'work together' to resolve issues, rather than adopt a 'working apart' approach.
189. Early IAMs offer an essentially relational approach, addressing the child's long-term need to have parents who will communicate with each other over the years ahead – including important aspects like managing positive eye contact at handovers. This may not be possible at a time of relationship breakdown, but may be a goal that they can both work towards over the months or years ahead.
190. We recommend advice from the Behavioural Insights Team,<sup>87</sup> to determine what this early IAM be called.
191. We note the recommendations in some of the PrLWG consultation responses for the restoration of early legal advice. We welcome any offers of funding by the government to support those who separate, be that for legal advice and

<sup>87</sup> The Behavioural Insights Team – also known as the Nudge Unit – is a social purpose company. It is partly owned by the Cabinet Office, employees and Nesta. It applies behavioural insights to inform policy, improve public services and deliver positive results for people and communities.

information, counselling or mediation. Making decisions about finances following separation in a legal advice vacuum is difficult for some and can lead to unjust outcomes or, for others, recourse to court where settlement without court proceedings might have been achieved.<sup>88</sup>

192. However, when disputes arise over their children, provided there are no allegations of abuse, legal information, funded counselling (where needed) and mediation would better suit the needs of most families.
193. As stated above, individuals should not be expected to make decisions concerning finances following separation without legal advice. However, for arrangements for their children, while legal information may be helpful to understand the legal context, being directed to a legal professional enhances the view that parenting disputes are legal issues. In private law children cases where there are no safety issues, the aim is to reframe disputes away from being 'legal issues' and into 'parenting disagreements' instead.
194. In practice, the free legal advice available pre-LASPO used to be how many parents were directed into mediation. When it was withdrawn, many mediation services went out of business with the dramatic drop in solicitor referrals, and the numbers of those turning to court as litigants in person began to rise. Rather than restore legal advice as the entry point for families to learn about their parental responsibility, funded efforts to bring about the sort of culture change we are seeking will reframe the way that 'parenting disagreements' are considered in society generally (hence our recommendations above). The accepted first port of call will, over time, become an early IAM at which the goal of cooperative parenting and the offer of free mediation (for those eligible) can be provided in a tailored way.
195. The evaluation of the DWP Mediation in Mind pilot<sup>89</sup> confirmed that a holistic approach to meeting the needs of parents following separation is beneficial. The pilot provided bundled support of legal information to both parents individually (as distinct from legal advice), alongside counselling and mediation, with significantly higher success rates for parents in resolving issues themselves. The evaluation of the DWP Mediation in Mind pilot indicates that the ideal funding package is a holistic approach, offering a combination of legal information, counselling and mediation (more below in Part G: A Holistic Approach, and Chapter 5: Family Professionals).
196. In cases where a legal issue arises, rather than a parenting issue, the parent can be directed to seek independent legal advice. We believe funding should be provided for free legal advice for those who have been assessed at an IAM as needing it.

<sup>88</sup> Barlow et al, (Mapping Paths), n 3 above.

<sup>89</sup> Barlow and Ewing, n 57 above.

197. There is an important distinction between legal information and legal advice. Parents understandably want to know what their legal position is, and this can be explained in general terms by providing legal information; this could be at an IAM, online on the suggested 'Separated Families Hub', from local touchpoints or from a mediator.
198. The skills required to provide legal information on a mutual basis are different from those required to give legal advice. Legal advice requires legal training and should only be given by qualified legal professionals. A mediator should never give legal advice, but regularly gives legal information on a mutual basis. The solicitors in the Family Solutions group suggest there are important issues of training, safeguarding, and professional responsibility to address before solicitors who are not also trained mediators meet with clients to provide legal information on a mutual basis.
199. The provision of legal advice from a solicitor as a first step is wholly different. This sets in place a structure where different solicitors have to be consulted, with neither having the opportunity to meet the other parent, and potentially conflicting advice given. This creates a disconnected process. For the many cases where unresolved emotional issues lie at the heart of the dispute (see below at paragraph 223) the consultation of separate solicitors to advise parents against each other potentially adds fuel to the fire. Whether or not the legal advice is provided in a child-focussed and sensitive way will depend entirely on the child-awareness, conflict resolution and relational skills of the solicitors advising. None of these are professional requirements to become a solicitor. Resolution, with its code of practice<sup>90</sup> and the various training and initiatives it has developed, has taken a lead in encouraging the solicitors' profession to develop these skills. However, it is still a lottery as to whether the parent sees a solicitor with those necessary skills and therefore whether the family is supported to resolve the issue together or the approach adopted drives them further apart. (See below in Chapter 5 on Family Professionals).
200. Our view is therefore that **all parents should have access to legal information at an early IAM**. Where a genuine legal issue is identified, the parents should be referred to a solicitor for legal advice and this should be funded for those who are financially eligible.
201. The range of professional skills, knowledge and experience required to undertake early IAMs is presented in Annex 3. FMC accredited mediators already have the necessary training and skills to conduct early IAMs, as they do to conduct the statutory MIAM. This is not because these meetings are to be treated as a pre-cursor to mediation; it is about the training, demonstrated skills

<sup>90</sup> In joining Resolution, members agree to abide by a Code of Practice: '... which emphasises a constructive and collaborative approach to family issues and encourages solutions that take into account the needs of the whole family, particularly in the best interests of any children'.



and experience of the mediator to gain FMC accreditation. A mediator has to evidence compliance with formal standards of knowledge, understanding and practical experience of fields which go beyond pure mediation skills, including:

- Screening for domestic abuse (see further at Part F below and Annex 4)
- The impact of separation, loss and conflict on families
- The assessment of emotional readiness to engage in resolving issues
- Child development and the impact of separation and other family changes on children and young people
- An ability to present legal information in a mutual way
- Providing information and assessing potential suitability for the full range of support options
- Management of conflict, cooperation and competition, reframing family disputes into joint child-focussed decision-making
- Identifying and signposting to appropriate involvement from the whole range of family professionals and others; counsellors, mediators, solicitors, social workers, accountants etc.

202. The Family Mediation Standards Board (FMSB) has been tasked with establishing standards for the effective conduct of statutory MIAMs, ensuring that the quality of the delivery of MIAMs is established, rigorously monitored and consistently maintained. If early IAMs come into being, FMC could invite FMSB to consider how, if at all, the standards for the conduct of IAMs by mediators should differ from those for the statutory MIAM.

203. **We recommend a pilot** whereby all family professionals and local GPs, Health visitors, Schools, CABs, Family Hubs, Local Authority teams and RPC partners in a defined area are asked to direct parents who separate to attend an IAM at the earliest opportunity.

## E. Choice of Pathway

204. The difference between domestic abuse and high conflict separations must be understood by family professionals from the outset. In the former, there is a perpetrator and a victim, and this should be evident if any one of the approved screening tools is used (see below). In the latter, mediation can potentially help to reduce conflict and improve communication between the parents, provided the mediator has the necessary skill and experience to deal with the conflict. Such cases may be better suited to co-mediation.<sup>91</sup>
205. **It is of fundamental importance that the case is correctly identified for the two different pathways: the safety pathway, or the cooperative parenting pathway.** Those needing the safety pathway are to be immediately signposted to appropriate legal and other support; those on the cooperative parenting pathway are to be supported in understanding the long-term needs of the child and offered options for resolving issues with the other parent.
206. Just as these cases are to be treated differently in the court process, they also need to be treated differently before or outside of any court process. From their first point of contact with any family professional (or linked professional such as a GP, school staff, CAB advisors or professionals connected to Family Hubs), any disclosure of abuse needs to be addressed. The language of ‘working together’ and ‘cooperative parenting’ must not be used. Instead careful assessment needs to be made as to the suitability of any process, even contact, with that perpetrator.
207. Avoidance of harm to children and young people is the basis of both the above pathways. Children and young people are harmed emotionally and significantly by unresolved parental conflict. To address the harm caused by domestic abuse without giving the same sense of urgency to the effect on ongoing high levels of conflict between parents post-separation would be an abrogation of our responsibility to young people.
208. **The two pathways cannot become mutually exclusive.** As the pendulum rightly swings towards greater attention to the prevention of abuse suffered by adults, children and young people, it must not swing away from prevention of emotional harm from unresolved family conflict. The development of safe processes, with appropriate screening and safeguards, in cases of family conflict where abuse has been suffered is not ruled out by the court-based pathway; the two interventions must keep talking to one another, at a strategic level and in individual cases.

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<sup>91</sup> For the distinction between high conflict cases and domestic abuse see Hunter n 14 above, p.56. For a discussion of when high conflict or domestic abuse cases may be suited to mediation, other non-court processes or adjudication see: Barlow, A., Hunter, R., Smithson, J. and Ewing, J. (2014). Mapping Paths to Family Justice: Briefing Paper and Report on Key Findings. (Exeter: University of Exeter)

## F. Domestic Abuse

209. At the start of any consideration of support for parents following relationship breakdown, there needs to be a safe system in place for those who are or have been vulnerable to domestic abuse. Any abuse victim needs to have their vulnerabilities fully understood by whichever family professional they consult, and they need a court system that offers the protection they and their children need. We have focused here on mediators carrying out 'statutory MIAMs', to reflect the law, with the same standards framework applying to any IAM conducted by a mediator at an earlier stage. The safeguarding standards for accurately identifying domestic abuse are a necessary skill for any family professional who conducts an information and assessment meeting.
210. The MoJ Risk of Harm report addresses issues within the court process mostly. However, at paragraph 7.4.1 on page 88 regarding pre-court options, despite the mandate in PD12J, it found evidence of mothers who were the victims of abuse feeling required or directed to engage in conciliation or mediation despite the risks to them physically and psychologically and the likely furtherance of unequal power relationships. We endorse the report's recommendation that at the first hearing, since allegations of domestic abuse are yet to be determined:  
'the court should take a precautionary approach unless there is positive evidence that alleged abuse has been acknowledged and addressed and that parties are able to speak and negotiate freely on their own behalf.'<sup>93</sup>
211. It is alarming to read reports of unsafe mediation and community dispute resolution practices. We are aware that Mapping Paths also found examples of unsafe mediation practice.<sup>94</sup> Those who need protection and specialist support must be signposted appropriately, and pressure must not be put on them to resolve issues directly with their abuser. Within the mediation community, there has perhaps been a history of some mediators being too willing to offer mediation in situations where it is unsafe. This may stem from an instinct to 'help' clients, without sufficient understanding of how to screen effectively and safely assess whether or not mediation is possible.
212. Mediators must also trust the family court to provide a safe court process for the client, physically, psychologically and in outcome. The mediators on the Family Solutions Group have experience of domestic abuse victims leaning upon them to agree to mediate as the lesser of two evils, with the victim being more afraid of court than of mediation. We welcome the findings of the MoJ

<sup>93</sup> Hunter et al, n 14 above.

<sup>94</sup> Barlow et al, (Mapping Paths), n 3 above.

Risk of Harm report and hope that this will translate into safe court processes for all victims of domestic abuse. Mediators need to provide reassurance to victims that their cases will be handled safely and that this is the safer route for them.

213. If we are to learn from past mistakes, it would be helpful to hear from former domestic abuse victims what their experiences have been. We are not privy to the consultation responses received by the MoJ panel in their work, and we understand that they will largely have been related to the court process.
214. We have discussed the idea of a simple survey to be sent out to survivors via the Women's Aid network. What were they offered in terms of mediation, how did any assessment take place, what worked, what didn't work and what would they have liked? Work has begun on drafting a simple questionnaire, and we hope this may follow later this year.
215. We have been grateful to have input from Dickie James MBE<sup>95</sup> and Dr Liza Thompson of SATEDA ('Support & Action to End Domestic Abuse'). Their input has been invaluable in informing our discussions and helping us understand best practice for the safe conduct of assessment meetings with victims of domestic abuse.
216. Ms James MBE told us that the Domestic Abuse sector has historically held a deep-seated antagonism towards mediation, in her view understandably. However, she told us that her attitude has mellowed as mediation practices have changed and she has seen some highly effective and empowering examples of mediation, at the right time, in the journey for those recovering from abusive relationships. She believes there is a need for the Domestic Abuse (DA) sector to work with mediators to serve the needs of *some* clients, once they are safe and in a position to make choices for their future. A blanket refusal to consider mediation for any client at any stage would prevent some clients from taking part in a potentially empowering process for them.
217. However, this critical distinction must be understood at the outset:
  - mediation is never the answer in an abusive relationship; but
  - in *some* cases, mediation *may* have an important role to play in the recovery journey, once the victim is safe and with the right support.
218. We address detailed proposals for managing safe and reliable screening for domestic abuse in Annex 4. This covers our recommendations for the following:
  - Understanding key areas of knowledge, with reference to the MoJ Risk of Harm report

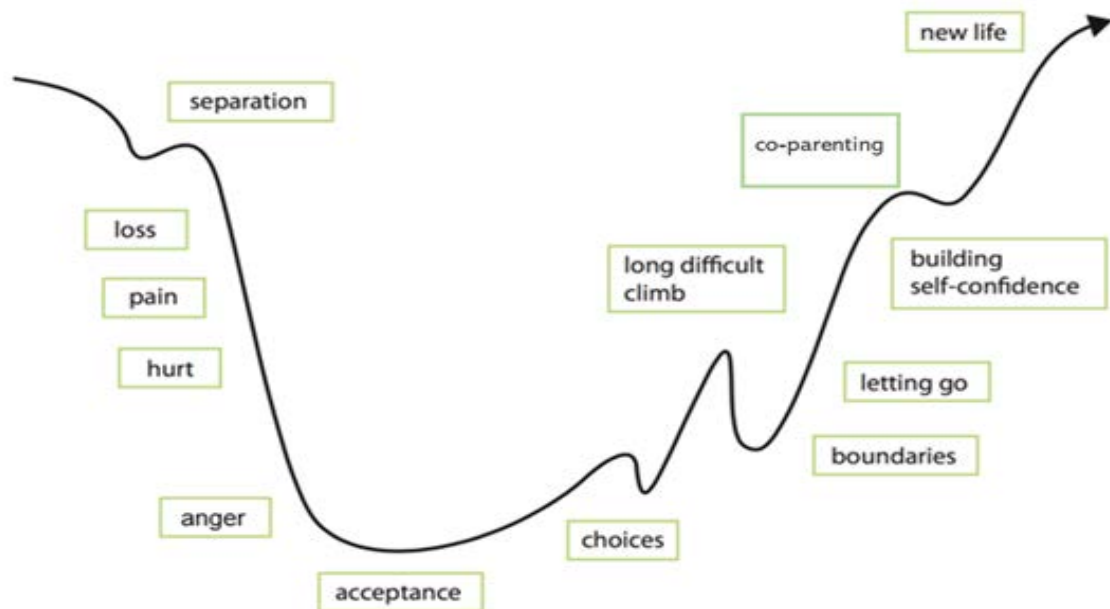
<sup>95</sup> Chief Executive Officer of Staffordshire Women's Aid, and a member of the National Body of Women's Aid.

- Ensuring a safe screening process
  - Whether there should be a specialist domestic abuse accreditation (we believe not)
  - Assessing mediation as unsuitable – the importance of saying no
  - Understanding other pathways
  - Providing a ‘Statement of Practice’ as recommended by the MoJ Risk of Harm report for the family court, adapted for mediation practice.
219. In separate discussions with Dr Liza Thompson of SATEDA in Kent, we discussed plans for a jointly hosted workshop for Kent mediators and the Kent domestic abuse sector. This followed on from a training event hosted by the Kent Supporting Separating Families Alliance. The workshop would address the need to understand the complexities and effects of domestic abuse and especially coercive control, along with the identification of these behaviours, and how mediation can exacerbate them.
220. Following the workshop, the hope is for a project plan in Kent to link domestic abuse services with local mediation services to enable partnership working and coordinated responses in cases where abuse is a factor. The domestic abuse sector can provide valuable assistance in handling difficult assessments, and a co-working approach will enable the involvement of specialist domestic abuse providers to support abuse victims if, at an appropriate time, they decide to engage in mediation. As a first step, we considered the idea of there being a key worker in the domestic abuse sector, who could be contacted by a mediator at any stage with queries or concerns about a client with domestic abuse. This could provide support in ensuring accurate assessments, and also enable the ‘managed handover’ which is needed if the case is deemed unsuitable for mediation.
221. Dr Thompson expressed interest, if funding permits, in developing a simple and consistent assessment tool specifically designed for managing the assessment process safely.
222. The Family Solutions Group has provided a valuable platform to begin discussions between the two sectors. It has been encouraging that both Ms James CBE and Dr Thompson are keen to see their sector move on from historical differences and promote stronger working alliances between the two sectors. **We hope the FMC will continue these discussions going forward.**

## G. A Holistic Approach

223. An emotional journey lies at the heart of many conflicted disputes and must be taken into account in the provision of support available. Unresolved emotional conflict has to be addressed if parents are to be supported towards cooperative parenting over the longer-term. 'Conflict' embraces the notion of unresolved feelings being played out between ex-partners, so meaningful help needs to be directed to those unresolved feelings, often the real problem. 'Dispute' describes the symptom rather than the problem.
224. An understanding of the emotional landscape is important in meeting the needs of families going through a loss and bereavement experience. Parents who are at different stages are more likely to play out those differences angrily or be more adversarial than a separating couple who are both at the latter stage. The Creating Paths Briefing paper argues that since intimate partners tend to uncouple 'asymmetrically', asymmetry in emotional readiness to mediate is likely to be commonplace, leading parties to become polarised in their positions.<sup>96</sup> The graph below at Figure 2 represents an example of the emotional journey of relationship breakdown, although it is different for all.

Figure 2



225. Court is not the right setting for emotional issues to be played out between separating couples. As Sir Andrew McFarlane, President of the Family Division, stated in his Resolution keynote speech in April 2019 the 'clunky legalistic approach' of the court in cases that do not involve abuse or a need for

<sup>96</sup> Barlow et al, (Creating Paths), n 7 above, p. 6.

protection is unlikely to be the best place to achieve lasting resolution or be of benefit to parents or their children. Rather, 'in some cases, it may simply provide a pitch and a referee for them to play out further rounds in their adult contest.'<sup>97</sup>

226. If we are to support families in cohorts 1 and 2 to resolve issues and avoid contested proceedings, then greater awareness of their 'emotional readiness' is needed. The key messages from Creating Paths, **which we endorse** on this are that:

- Asymmetry between parties in readiness to engage in DR processes is normal
- Clients' emotional state needs to be factored into information delivery about options
- Attempting DR before both parties are emotionally ready may lead to rejection of the process, delay, the process breaking down or unjust outcomes
- Where one party is emotionally unready to negotiate, it may be necessary to make temporary arrangements only
- Passage of time is sufficient for some parties to feel ready to enter a DR process but for others, therapeutic intervention is required
- Parties may be emotionally ready to deal with one issue but not another
- The pacing of DR process engagement is critical to success

227. Mapping Paths found that non-court family dispute resolution processes often broke down and a court application ensued when parents engaged in non-court family dispute resolution processes, particularly mediation, before both parents were emotionally ready and practically prepared to engage in the process.<sup>98</sup> Supporting parents to be emotionally ready is therefore key to the successful resolution of issues away from court.

228. This issue is powerfully summarised by Brian Cantwell<sup>99</sup> in an article in Family Law in which he argues persuasively that the 'great gap' in the current offering to parents following separation is in the area of emotions associated with family breakdown. **There is a failure to take sufficient account of the emotional dimension of separating adults which often manifests as anger and**

<sup>97</sup> Available at : <https://www.judiciary.uk/wp-content/uploads/2019/04/Resolution-Key-Note-2019-final.docx-8-APRIL-2019.pdf>.

<sup>98</sup> Barlow et al, (Mapping Paths), n 3 above.

<sup>99</sup> A family practitioner with a 30-year career in the field of separation and divorce: initially a social worker with the Family Court Welfare Service; then a family mediator, CAMHS practitioner, freelance trainer with Cafcass and family consultant with Resolution.

**conflict.** This is particularly so when participants are ‘at different emotional places in this process of psychological and emotional “coming to terms”’.<sup>100</sup>

229. A holistic approach to the family has the potential to transform the futures of the parents and children involved. It is also likely to lead to significant costs savings. The evidence from the Mediation in Mind initiative funded by the DWP’s ‘Reducing Parental Conflict Challenge Fund’ is that providing disadvantaged separated parents with triage and signposting, legal information, communication sessions and counselling increases engagement in mediation and the likelihood of reaching settlement in mediation leading to reduced recourse to court. The conversion rate from MIAM to mediation starts for legally aided clients in 2018-19 was approximately 62%.<sup>101</sup> The conversion rate in the ‘Mediation in Mind’ initiative was 72%, notwithstanding working with a disadvantaged client group who would normally have a lower take-up of mediation. Parents who took part in the initiative were also more likely to reach full or partial agreements in mediation; 68% compared to the national average of 62%.<sup>102</sup> Lastly, whilst recent estimates put the number of separating parents who make an application to court at around one third,<sup>103</sup> only 6% of parents whose mediations had concluded by the end of the initiative (31 March 2020) were known to have made an application to court following the breakdown of mediation.<sup>104</sup>
230. **We recommend that best practice for parents struggling to agree child arrangements is formally recognised as a bundled package** of legal information, counselling and mediation. We recommend piloting a scheme available to all separating parents for such a bundled package to be provided.
231. **We recommend basic training in the emotional issues arising on separation or divorce for all family practitioners** (see Annex 7, training required for legal professionals). There needs to be greater awareness by courts and legal professionals of the value of suggesting therapeutic support, either on its own or alongside another process for resolving issues.
232. Many services exist in the private sector specifically to support parents with emotional issues alongside the process of divorce or separation. **We recommend greater use of the Resolution accredited Family Consultants, working within and alongside legal practices.** Various resources have also been developed in the voluntary sector to meet the needs of those struggling to come to terms with relationship breakdown. One such example is ‘Restored

<sup>100</sup> Cantwell, n 22 above.

<sup>101</sup> In 2018-19 mediation assessments were 10,508 and mediation starts were 6535 - see [Legal aid statistics England and Wales, tables October to December 2019](#), Tables 7.1 and 7.2 (last accessed 09.06.20)

<sup>102</sup> [Legal aid statistics England and Wales, tables October to December 2019](#), Table 7.2 (last accessed 09.06.20).

<sup>103</sup> Williams, n 15 above.

<sup>104</sup> Barlow and Ewing, n 57 above.



Lives'<sup>105</sup> which has been running for over 20 years and provides a 6-session course based around group work. Post COVID-19 this is now running online. **We recommend a pilot to assess the effectiveness of this type of provision.** As an interim measure pending further developments for local support, we recommend that all LFJBs, mediators and solicitors should ensure they remain informed of the full range of therapeutic and other support services available to parents, outside of the provision of legal services.

## H. Parenting Programmes

233. There is clear research, internationally and nationally<sup>106</sup> that the quality of the relationship between parents impacts children. How parents communicate and relate to each other is increasingly recognised as a primary influence on effective parenting practices and children's long-term mental health and future life chances. Parents/couples who engage in frequent, intense and poorly resolved inter-parental conflicts put children's mental health and long-term life chances at risk.
234. Destructive inter-parental conflict can affect children of all ages, with effects evidenced across infancy, childhood, adolescence, and adulthood. Parents need to know how their interactions impact on children and that a reduction in their conflict can be a protective factor for children. Any programme for separating or separated parents must include action to improve communication and reduce conflict between them.
235. A range of parenting programmes are used internationally, with a common element of an integrated national approach, to enable planned parenting and child arrangements following parental separation. We recommend that attendance by parents at a registered parenting programme should become the norm following separation. We would welcome this as part of the implementation of the new divorce legislation.
236. In England, several programmes exist in the public and private sector which seek to support parents in conflict, post-separation, to improve their parental relationship and help them secure the best outcomes for their children. There are many programmes of different types, disparate and diverse. One such programme, the 'Separated Parents Information Programme' (SPIP), can be mandated and funded, but ironically it is only funded if ordered by the court. **We recommend a self-regulated, standardisation of parenting programmes in England**, to ensure consistent and quality parenting information and support across the country.

<sup>105</sup> <https://www.restoredlives.org/> A recent participant fed back: "The course helped me to see a bigger better world out there, helped me get out of my sorry hole that was all about pity and hurt and anger about what has been done to me.... It has given me hope..."

<sup>106</sup> Harold et al, n 67 above.

237. Under the proposed banner of ‘Supporting Cooperative Parenting Programmes’ (SCPP), recommendations are made in the following areas:

- Reduction in court use by funded programmes in the pre-court space, and increased accessible digital information for parents
- Identification of key components/elements of programmes
- Identification of best practice from existing diverse programmes, and specifically the interface with Supporting Separated Families Alliances
- Development of programme standards for use by providers
- Creation of a self-regulatory standards/accrediting body
- Development of initial and ongoing programme/provider accreditation processes
- The creation and communication of a national programme directory
- Raising awareness and benefits of programmes amongst family professionals (including the legal and mediation professions), and encouraging close collaboration
- Consideration of measures to encourage/require attendance at programmes, specifically and especially through mediation meetings

#### Universal Name – Supporting Cooperative Parenting Programmes (SCPP)

238. There is a diverse availability of SCPPs. We are aware of 8 programmes being funded by DWP and being trialled in 30 local authorities, plus an additional 10 other programmes known to us, with the likelihood that there are many others not known to us.

239. With the diverse array of parenting support available, all using differing titles, we recommend that ‘**Supporting Cooperative Parenting Programmes (SCPP)**’ should be the term used for all recognised programmes which seek to support parents in conflict, post-separation, to improve their parental relationship and help them secure the best outcomes for their children.

#### Before/during/after court access to SCPPs

240. Currently, the way to access funded ‘Parenting Programmes’ is to have this support ordered by the court. We recommend the removal of this perverse incentive for a court intervention to secure funded parenting support. Parents need a universal offer that is available before, during and after court that secures the best outcomes for children. To achieve this, funding for SCPPs should be available before, during and after court. In particular, **we**

**recommend** an evaluated pilot to ascertain whether the use of funded SCPP in the pre-court space leads to a reduction in court applications.

### Digital Information

241. There is an increase in the provision of digital information for separating parents, in particular through Cafcass and local authorities encouraged by the DWP, but also the voluntary sector and private organisations. This digital content is readily available, is easily accessed, engaging, and effective, whilst also being affordable. This development could be better coordinated in future as there is some risk of duplication and confusion between departments and organisations. **We recommend an evaluated pilot to assess available digital content and to ascertain whether requiring engagement with digital sources leads to the reduction in court applications.**

### Our Recommendations for SCPPs

242. We have set out comprehensive recommendations in Annex 5 for SCPPs. These include:

- Establishment of a self-regulatory body to set standards for SCPPs
- Creation of a list of accredited SCPP providers
- Promotion of SCPPs
- Professional Collaboration and Mapping
- Professional Referral Pathways
- ‘Supporting Separated Families Alliances’ and SCPPs
- Criteria for the development of the content of SCPPs
- Summary of Recommendations for SCPPs

## **I. Services for Parents – Summary of Recommendations**

### Language and Process

#### **CORE RECOMMENDATION**

We recommend a shift in language away from legal disputes towards a language of supporting parents to resolve issues together. (Para. 133).

243. We recommend distinguishing between processes which support parents to resolve issues together, and processes which set them apart. Where safe to do so, the focus should be on the long-term needs for parents to rebuild a 'good enough' cooperative parenting relationship for their children, through childhood and the decades thereafter (even to be cooperative grandparents). (Para. 138).

244. The language and expectations should be that of two parents with 'parental responsibility' who will, where safe to do so, continue the task of cooperative parenting from birth until adulthood, whether together, separating or separated. (Para. 143).

245. For those families on the cooperative parenting pathway, we recommend introducing an expected definable threshold of parenting to promote child welfare; we recommend adopting as a basic threshold that parents manage positive eye contact with each other at handovers of the children. (Para. 189).

## Education

### **CORE RECOMMENDATION**

We recommend a wide public education campaign, to reframe family breakdown away from justice language, and towards an understanding of child welfare. (Para. 149).

246. We recommend:

- an overarching national publicity campaign with a strapline;
- supported by promotion via online media; and
- backed up by the strapline, branding and key phrases being used in all official sources of information, online or otherwise. (Para. 152).

We invite MoJ to confer with other departments and Welsh Government and respond to this proposal. It is vitally important that the opportunity provided by the divorce reform is not missed. (Para. 153).

**CORE RECOMMENDATION**

We recommend an authoritative website, we suggest 'The Separated Families Hub' to provide clear and accurate information, from which and to which all roads would lead. (Para. 157).

247. In addition, we recommend widespread dissemination of information at different levels:

- An overarching strapline or key messages, widely understood by society in general
- Headline principles for parents who live apart, which can be easily understood (e.g. FJYPB Top Tips)
- The creation of short film clips to illustrate the goal of cooperative parenting so that parents gain a clear understanding of what 'cooperative parenting' means in practice
- Clear, accessible and authoritative information on the different processes and options for parents
- Information for parents who are struggling to resolve issues and may be considering a court application (Family Court Information Sheet)
- Detailed information for parents about factors applied by the court in considering child arrangements. (Para. 160).

248. We recommend that communications experts are consulted to ensure that these different levels of information are consistent and complement each other, and that they all tie in with the public education campaign and the centralised one-stop-shop website. (Para. 161).

249. We recommend reinstating the HSSF mark, so local organisations could apply to be kitemarked and then registered on the Separated Families Hub. (Para. 165).

250. We recommend a pilot to assess the extent to which Family Hubs may be used as a specialist local resource to support families in the aftermath of separation, and to review funding options. (Para. 169).

251. As an interim measure, we recommend that all local Family Justice Boards (LFJBs), mediators and solicitors should ensure they remain informed of the full

range of support services available locally, including the existence of a Family Hub and how it operates. (Para. 170).

252. We recommend basic training and resourcing for ‘touchpoints’ for the family; teachers, GPs, health visitors, CAB, Family Hubs, so that the same consistent and authoritative information is given to parents from multiple sources. (Paras. 174 and 175).

#### Early Information and Assessment Meeting (IAM)

### **CORE RECOMMENDATION**

We recommend triaging the family circumstances and needs at an early ‘Information and Assessment Meeting’ (IAM) as soon as possible after family separation before issues escalate and positions harden. (Para. 179).

253. We recommend introducing an established pathway for all parents who separate to attend an early IAM conducted by a mediator or other suitably trained professional. This will have many benefits, a key one being to screen at an early stage which families need the safety pathway, and which families need support to resolve issues themselves. (Para. 181).
254. We recommend advice from the Behavioural Insights Team to determine what this early IAM be called. (Para. 190).
255. We make a distinction between legal advice (from a solicitor) and legal information provided on a mutual basis (from a mediator or other sources). For disputes about children, we recommend that all parents should have access to legal information. (Para. 200).
256. We recommend a pilot whereby all family professionals and local GPs, Health visitors, Schools, CABs, Family Hubs, Local Authority teams and RPC partners in a defined area are asked to direct parents who separate to attend an IAM at the earliest opportunity. (Para. 203).

## The Right Pathway and Safe Screening for Domestic Abuse

### **CORE RECOMMENDATION**

We recommend that a clear distinction is understood between two possible pathways:

- The safety pathway - those needing safety to be immediately signposted to appropriate legal and other support.
- The cooperative parenting pathway – parents to be supported in understanding the long-term needs of the child and offered options for resolving issues with the other parent. (Para. 205).

257. Approved screening tools must be used so that the case is correctly identified for the two different pathways. (Para. 204).

258. We make detailed recommendations for managing safe and reliable screening for domestic abuse in Annex 4 with enhanced training requirements set out in Annex 7 for mediators carrying out the assessments.

## A Holistic Approach

### **CORE RECOMMENDATION**

Addressing the emotional landscape in family disputes has the potential to transform the futures of the parents and children involved. We recommend a holistic approach which takes into account the emotional state of the parents. (Para. 229).

259. We recommend bundled support packages of legal services, mediation and counselling to be recognised as best practice. We suggest piloting a scheme available to all separating parents for such a bundled package of professional support. (Para. 230).

260. We recommend basic training for all family practitioners in the emotional issues arising on separation or divorce and greater promotion by courts and legal professionals of the value of suggesting therapeutic support, either on its own or alongside another process for resolving issues. (Para. 231).

261. We recommend greater use of the Resolution accredited Family Consultants, working within and alongside legal practices. (Para. 232).

262. We recommend a pilot to assess the effectiveness of available programmes which support parents who are struggling with difficult emotions. (Para. 232).

263. As an interim measure pending further developments for local support, we recommend that all LFJBs, mediators and solicitors should ensure they remain informed of the full range of therapeutic and other support services available to parents, outside of the provision of legal services. (Para. 232).

### Parenting Programmes

#### **CORE RECOMMENDATION**

We recommend the establishment in England of a self-regulated body of parenting programmes, kite-marked to an agreed standard. (Para. 236).

264. We recommend that attendance by parents at a registered parenting programme becomes the norm following separation. We would welcome this as part of the new divorce legislation. (Para. 235).

265. We recommend a self-regulated, standardisation of parenting programmes in England, under a proposed banner of ‘Supporting Cooperative Parenting Programmes’ (SCPP). We have set out comprehensive recommendations in Annex 5 for SCPPs. (Parenting Programmes are a devolved matter and there is already work underway on this in Wales.) (Paras. 236 and 237).

266. We recommend an evaluated pilot to ascertain whether use of funded SCPPs in the pre-court space leads to a reduction in court applications. Within this pilot, we recommend assessing available digital content and to ascertain whether requiring engagement with digital sources leads to a reduction in court applications. (Paras. 240 and 241).



## CHAPTER 5: THE ROLE OF FAMILY PROFESSIONALS

267. In this chapter we review the important role which ‘family professionals’ play alongside the separating family. The time following a relationship breakdown is one of vulnerability, anxiety, fear, anger, loss and so on. Those to whom the separating parents turn have a vital role to play in understanding the family needs and ensuring the right support is accessed. By ‘family professionals’ we refer to solicitors, barristers, mediators, therapists, parenting experts, child consultants; all those who specialise in offering services to parents and/or children when a family separates.
268. **A Broader Understanding of ‘Dispute Resolution’ Options**
268. The term Alternative Dispute Resolution (ADR) is widely used in the context of all legal proceedings, including in family law. In their most simplistic form, they are often summarised in a family context as being either mediation, collaborative law or arbitration.
269. We invite a different language and broader understanding of how parents may be supported to resolve issues following separation.
270. First, **we recommend the language of ‘resolving issues’ rather than ‘dispute resolution’**. Dispute Resolution infers a specific dispute which needs to be resolved. Also, as stated previously (paragraph 223) a ‘dispute’ in a family case may be a symptom of a deeper problem of conflict caused by unresolved emotions between parents.
271. Parenting following separation continues for many years, even decades, if later years are to be included as well as future roles as grandparents. It is not helpful to use the language of a ‘dispute’, as one would in other legal fields. Instead, there is a continuum of resolving issues as the months and years pass, just as parents manage issues when they stay together to raise a child. For separated parents, how issues are resolved in the early stages of a separation could set the example for the years which follow. Hence the importance for family professionals to use appropriate language and offer the longer-term perspective right from the outset.
272. It is also important to distance private law children disputes from the context of other legal proceedings, to rebut the understanding which many parents have that an argument about their child’s arrangements following separation is predominantly a legal issue.
273. Second, as to the differing methods of resolving issues between parents, **we recommend a broader understanding of the options available**. Many family professionals are looking creatively to find ways to support clients to resolve issues away from court proceedings, with Resolution having a long

history in leading the way. We set out below a table of options which we do not suggest is fully comprehensive; other initiatives and processes will evolve as the profession continually strives to find new and creative solutions to the needs of families. For each process, the family professional must be mindful of the three principles set out at the start of the last chapter to ensure a child-focussed approach:

- Are parents working together in this process or working apart?
- Is the issue being framed in the context of the long-term family relationships to follow?
- What language is being used in this process?

274. Given the well-established advantages for children of parents who communicate and manage successful cooperative parenting, it is important to distinguish between a process in which parents are working together to find a resolution and those in which the parents are set against each other. Solicitors may have a good working relationship and manage a civilised process between them for resolving their clients' issues, but the process itself might be one where the parents are represented against each other.

<b>Process</b>	<b>Are parents working together? Or working apart?</b>
Parents agree issues themselves The proverbial 'kitchen table'	Together
Joint consultation of a child psychologist or other expert	Together
Parents consult the same professional for legal information (not legal advice) Could be in person or online (e.g. Amicable)	Together
Mediation in the same space (physical or online)	Together
Mediation in separate spaces (separate physical rooms, or separate times/telephone calls/online meetings)	Together
Hybrid mediation in separate spaces with professionals attending in support, such as a solicitor, family consultant, pension expert	Together
Collaborative law, with or without the support of a family consultant	Together

Early Neutral Evaluation	Together
Jointly obtained advice from counsel (e.g Divorce Surgery model or direct access joint instructions to advise)	Together
Parenting Coordination – joint appointment of a Parent Coordinator to support them to resolve issues	Together
Round table negotiations with clients and solicitors together	Represented apart but working together in the meeting
Mediation followed by arbitration: Partial agreement reached in mediation; outstanding points referred to arbitration	Partly together, Partly apart
Arbitration – appointed directly by clients Quasi-judicial process	Process agreed together, Arguments apart
Arbitration – instructed by solicitors	Apart
Solicitor negotiations by correspondence	Apart
Direct access to separate counsel	Apart
Court proceedings	Apart
Conciliation in court Dependent upon both parents' agreement to engage	Court application – Apart In-court conciliation - Together

275. Good practice by all family professionals will look beyond the particular issue in question and consider how the process will affect the parent relationship. Will it rebuild parent communication and their ability to resolve issues in the future, or will it diminish them? As the family professionals close their files, in what state do they leave the parent relationship? Will they be able to manage eye contact at handovers?

276. These are uncomfortable questions for family professionals, given that our clients come to us at a time of emotional vulnerability and anxiety. They need the trust and support of those to whom they turn to ensure a fair outcome, that they and their children are safe and that they have appropriate arrangements in place. It falls to the professionals to provide a gentle and consistent voice towards a functioning future cooperative parenting relationship and to

encourage processes which support that goal, rather than set parents against each other.

277. In a private family law dispute where legal representation can be afforded privately, the interests of the two parents are legally represented, but the child(ren)'s interests are not, generally, legally represented. It may well be reassuring for parents to have a professional 'on their side' but this leads to a parent-centric system rather than one centred on the overall family needs.
278. It is worth noting the comment by one young person at the FJYPB meeting hosted by Cafcass in January 2020 who suggested that there should be a 'threshold' of seriousness below which private law cases should simply not be allowed in court. This evolved into discussion about national guidance (it was suggested from the President of the Family Division) about the types of case which should be in court and those which should not (i.e. should be disposed of in non-court dispute resolution). This has transformed into a statement of expectation which (if not met) could/should be visited in some sort of costs penalty for the parent who did not cooperate.<sup>107</sup>
279. The closer the parents are to the door of the court, the further away from cooperative parenting they move. However, even if a third party is needed to make a decision, there are still options for managing this in a less adversarial process than court.
280. Arbitration, for example, can play a valuable role in enabling parents to resolve a particular issue between them when they are stuck, with supportive encouragement alongside them to manage other issues themselves. This avoids them becoming entrenched in lengthy and protracted court proceedings with all the consequent harm to their parenting relationship. Details of the Institute of Family Arbitrators (IFLA) Children Scheme are included at Annex 6. This makes the compelling point that the process of arbitration is much more collaborative than court proceedings, even though a decision is sought from a third party. There have to be a number of decisions made together, on the appointment of an arbitrator and on the process; in all of this, the parents are working together. It is much faster than the court process and it does not require expensive representation by solicitors; far from it, the process is well-suited to LiPs. IFLA, in collaboration with Resolution, has already published several webinars explaining the benefits of arbitration, particularly in conjunction with mediation. IFLA and Resolution are also working on a training film which will be made available to mediators, lawyers and the judiciary.

<sup>107</sup> Private Law Working Group (March 2020), n 6 above, para. 161.

## B. Family Professionals Working Together

281. The Creating Paths team recommended joined-up support by family professionals, and the establishment of cooperative relationships between mediators, lawyers, the third sector, counsellors, financial advisors and child consultants.<sup>108</sup> Other jurisdictions have moved towards an integrated approach to family breakdown and we should follow their lead.<sup>109</sup>
282. We fully support this recommendation. Separating families in conflict have multiple needs that no one set of professional skills can adequately meet.
283. That proposition being accepted, one faces challenging questions around delivery: Who is best qualified to do what? How do different professions best work together? What common language is required? How are the related training needs to be met?
284. Many of the options for resolving issues set out above involve collaboration between mediators, solicitors, counsel and arbitrators; with therapists and Independent Financial Advisers also having an important role to play. For example, the option of mediation with arbitration could have a far more prominent role to play in the continuum of options to resolve issues. To quote from the IFLA Annex:
- Arbitration and Mediation – A Match Made in Heaven. Mediation often breaks down as a consequence of the parties failing to agree all issues. This is where arbitration works well with mediation. The parties can refer a single issue to arbitration, and this is a quick, efficient and cost-effective way of resolving the dispute without having to ‘throw out the baby with the bathwater’. Any agreements reached in mediation can form part of the determination.*<sup>110</sup>
285. Initiatives between mediators and arbitrators to work alongside each other could provide tailored solutions to families who mediate but get stuck on some issues.
286. **We recommend a move towards local networks of ‘family professionals’** (referred to as ‘DR professionals’ by Resolution): collaborative practitioners, mediators, arbitrators, family consultants, child consultants and local therapists who specialise in family separation. Resolution has recommended that local collaborative pods be opened up to those offering non-court DR processes, so this may be a practical way forward in parts of the country where there are

<sup>108</sup> Barlow et al, (Creating Paths), n 7 above, p. 23.

<sup>109</sup> Modern Families, Modern Family Justice. St George’s House Consultation in partnership with Relate and the Association of Family and Conciliation Courts (AFCC). February 2018: “*Interdisciplinarity is a key feature of the legal process in Germany, so that counsellors, mediators, custody evaluators, contact supervisors and lawyers work together to reach agreement with the parents.*”

<sup>110</sup> Annex 6, Nadia Beckett, The Institute of Family Law Arbitrators (IFLA).

active collaborative pods. An alternative would be for a local mediator/solicitor/arbitrator to take the lead in coordinating the local network. One successful example is that of the Manchester DR pod. Here, a non-legal mediator from a therapeutic background chairs the pod, thereby building close working relationships with fellow family professionals, all committed to supporting their clients to resolve issues away from court.

287. With the current absence of dedicated training in options for resolving issues (hitherto DR options) for solicitors and barristers, it has been suggested<sup>111</sup> that family law practices (solicitors and barristers) should be encouraged to nominate a DR specialist within their organisations. The DR specialist would be part of the local network of family professionals and responsible for knowing the options locally available, or more widely available online. This person would ensure that all clients of the practice are properly informed, at the outset, of all of the options available to resolve their issue. We support this suggestion although, whether or not this is implemented, we also recommend extending training for legal professionals to a much wider understanding of the family needs, to include the range of options available to them to resolve their issues (see Annex 7 below).
288. An ideal model is for a range of support to be offered to families in-house within one practice. Earlier research, FAInS<sup>112</sup> and Family Matters<sup>113</sup> and now Mediation in Mind,<sup>114</sup> all indicate that in-house services via lawyers or mediators and counsellors or other therapeutic services are an effective model. In-house is best-suited to the holistic teamwork way of working.
289. We are conscious of our instruction to consider immediate improvements to the pre-court space and not to extend into the longer-term. We hope the Family Justice Reform Implementation Group will consider the nature and role of family professionals within their discussions. The professionals – mediators, solicitors, barristers, therapists, parenting experts – have different codes of conduct which have evolved in separate and distinct professional spaces. The separating family needs multi-disciplinary support, which is very unlikely to be found in one person. We would welcome a move towards an overarching ‘family profession’ with differing specialisms within it, but with shared standards and a common goal to meet the wider needs of the separating family, with the emphasis on safety, child welfare and a cooperative parenting approach.

<sup>111</sup> IFLA.

<sup>112</sup> ‘The Family Advice and Information Service: A Changing Role for Family Lawyers in England and Wales?’ [http://www.legalservices.gov.uk/docs/fains\\_and\\_mediation/LSCSummary\\_of\\_findings\\_FAInSreport\\_\(55.4Kb\).pdf](http://www.legalservices.gov.uk/docs/fains_and_mediation/LSCSummary_of_findings_FAInSreport_(55.4Kb).pdf).

<sup>113</sup> Skinner, C. and Forster, I. *Guiding parents through separation: Family Matters - an innovative support service from Resolution*. Available at: [https://www.familylaw.co.uk/docs/pdf-files/resolution\\_family\\_matters\\_research.pdf](https://www.familylaw.co.uk/docs/pdf-files/resolution_family_matters_research.pdf)

<sup>114</sup> Barlow and Ewing, n 57 above.

290. In the meantime, there are various training issues to be addressed to ensure a safe level of understanding between the different professions, and to protect children and parents at this most vulnerable of times. We have set out our training recommendations for mediators, legal professionals and judges in Annex 7. For each of these, a practising mediator/legal professional/judge has suggested the training recommendations.

### **C. Accountability**

291. In joining Resolution, members agree to abide by a Code of Practice: ‘... which emphasises a constructive and collaborative approach to family issues and encourages solutions that take into account the needs of the whole family, particularly in the best interests of any children.’

292. The Resolution Code of Practice is endorsed and referred to within the Law Society’s Family Law Protocol (first published in 2002, latest edition, 4th edition 2015). This good practice guide:

- has had to date the endorsement of all the Presidents of the family court;
- applies to all family practitioners; and
- emphasises the need to achieve resolution by non-court routes, with court proceedings being the last resort.

The Law Society’s Family Law Protocol should be the standard.

293. In practice:

- the Law Society Family Law Protocol is not enforced;
- it is rarely referred to by the overall legal profession, including the judiciary;
- enforcement by Resolution to sanction members for breaching its Code of Practice is limited.

294. The consequence of this is a profession with unenforced regulations, responding to unresolved emotions presented by their clients and owing no professional duty to any child/ren of the family.

295. We believe any practice, legal or other, which has the potential to harm children should be regulated, with practitioners held to account for their conduct. We invite both the Law Society and the President of the Family Division to introduce accountability to legal professionals to adhere to the Law Society’s Family Law Protocol.

296. Please see Annex 10, which refers to a proposed new Part 3 Protocol currently being trialled in Surrey.

#### **D. Finance Cases**

297. The discussions in our group have focussed entirely on the issues which arise between separated parents concerning their children. However, it is impossible to ignore the impact on the parent relationship caused by the way in which they resolve their finances.

298. Those representing parents in addressing the financial implications of separation owe a duty to their client, the parent, to achieve the best financial outcome for that parent. The child is not represented in the process. An industry exists to promote the best financial outcome for parents following separation.<sup>115</sup> The wider, possibly non-financial, benefits to the family in securing mutually beneficial financial arrangements are easily lost in the professional pursuit of the best deal for the client.

299. When assessing claims for financial remedies, s.25(1) Matrimonial Causes Act requires that *'first consideration [is] given to the welfare while a minor of any child of the family'*. **We invite a broad understanding of a child's 'welfare' in financial remedy cases**, to extend beyond a child's need for housing and financial support, and encompass the child's overall welfare. This must include the impact upon the child of conflict between the parents, no doubt exacerbated by the financial remedy proceedings.

#### **E. The Role of Family Professionals - Summary of Recommendations**

##### A Broader Understanding of 'Dispute Resolution' Options

#### **CORE RECOMMENDATION**

We invite a different language and broader understanding of how parents may be supported to resolve issues following separation. We recommend the language of 'resolving issues' rather than 'dispute resolution'. (Paras. 269 and 270).

300. We recommend a broader understanding of the options available. For each we recommend the following factors are taken into account:

- Are parents working together in this process or working apart?

<sup>115</sup> For example, an advertisement for a legal firm with the caption: "Thinking of separating? Make sure you contact us before your ex does."



- Is the issue being framed in the context of the long-term family relationships to follow?
- What language is being used in this process? (Para. 273).

301. Good practice by family professionals will look beyond the particular issue in question and consider how the process will affect the parent relationship. (Para. 275).

### Family Professionals Working Together

#### **CORE RECOMMENDATION**

Separating families in conflict have multiple needs which cannot be met by one set of professional skills. We recommend local networks of 'family professionals' to promote an integrated approach to problem-solving issues between parents, with therapists, parenting specialists, mediators and legal services. (Paras. 282 and 286).

302. We welcome creative collaborations between mediators, solicitors, counsel and arbitrators; with therapists (and Independent Financial Advisers in finance cases) also having an important role to play. (Para. 284).

303. We have set out our detailed recommendations for further training for mediators, solicitors and judiciary in Annex 7. We recommend enhanced training for mediators, specifically in safe screening for domestic abuse, and understanding the full range of options available to resolve issues.

304. We believe that all legal professionals who practice with families with children should have mandatory core training in the following main areas:-

- Effects of on-going parental conflict on children
- The screening and impact of domestic abuse (including controlling and coercive behaviour)
- The psychological effects on parents of relationship breakdown
- Mental health issues, including personality disorders and addiction
- The non-court options available to parents to resolve family issues (finance and children) (Annex 7).

305. We invite both the Law Society and the President of the Family Division to introduce accountability to legal professionals to adhere to the Law Society's Family Law Protocol. (Para. 295).

306. We invite a broad understanding of a child's 'welfare' in financial remedy cases, to extend beyond a child's need for housing and financial support, and encompass the child's overall welfare. (Para. 299).

## CHAPTER 6: THE INTERFACE WITH THE FAMILY COURT

### A. The Statutory MIAM

307. The initial CAP review published last summer recognised that the statutory MIAM system is not working as intended and proposed that it be revitalised. This was the subject of many consultation responses, both for and against. Overall, sufficient support for the MIAM was forthcoming to retain the proposal. There was a distinction made between the meeting itself (which is seen to be helpful), and the system in which it operates (which is widely understood to be flawed). Several issues were identified, the three principal ones being:

- cost;
- lack of engagement of the Respondent; and
- A failure by many courts to enforce the MIAM requirements as set out in statute and in the FPR.

308. While attendance at an early Information and Assessment Meeting is recommended as the preferred route (above at paragraphs 177-203), **we recommend retention of the statutory MIAM for those parents who are thinking of making an application to court.**

309. We attach at Annex 8 a detailed paper about statutory MIAMs, which begins by considering the three issues above and then sets out the additional points which we were asked by the PrLWG to address, as follows:

- Standards for the practice and procedure of conducting MIAMs
- Capacity to engage in mediation
- Numbers of mediators available to conduct MIAMs
- Whether the C100 section about MIAMs should be rewritten
- Interaction with the Court
- Whether there should be changes to the identity of MIAM providers

310. The statutory MIAM can catch cases and divert them into mediation or another process as the 'last-chance saloon'. We recommend that families are supported at a much earlier process by attendance at an IAM. However, for those wanting to apply to the family court, the statutory MIAM has an important role to play. If the system in which it operates is improved to ensure that both parents attend, then the chances of the issue being resolved together away from court will be much higher than the current rate. The FMC survey

conducted in December 2019 showed that the percentage of cases which converted to mediation when both parents attended a MIAM was 73%.

## **B. Other Suggestions to Improve the Take-up of Out-of-Court Processes**

311. There are several suggestions to improve the take-up by parents in processes to resolve their issues away from the family court. We include in Annex 10 a summary of our views and recommendations concerning the following points:

- At Court Statutory MIAMs and At Court Mediation
- Making Parenting Agreements Legally Binding
- Part 3 Family Procedure Rules and a new proposed Part 3 Protocol

## **C. The Eye Contact Threshold**

312. As stated, there are cases in which legal intervention is required. For cases that do not need the family court for safety reasons, their access to court may undermine the very welfare principle which the family court seeks to uphold. While the welfare of the child is theoretically of paramount importance in law, in practice the system makes this difficult. As the former President of the Family Division, Sir James Munby, reminded us, a proper appraisal of the child's best interests is unlikely to emerge, mysteriously, from the adversarial process.<sup>116</sup> As the adversarial process ends, what impact does it leave upon the family for its future?

313. It may be helpful for the family court to create a more definable welfare threshold in cases suitable for cooperative parenting. **Where safe to do so, we recommend adopting a threshold of parents making positive eye contact with each other at handovers of the children<sup>117</sup> as a good working test.** As outlined in paragraph 101 above this could be the culturally expected standard of behaviour between parents who live apart, in the absence of safety issues. The 'silent treatment' or ignoring the other parent is a sign of parental conflict and will increase the risk of harm to a child if it continues.

314. Thus all family professionals may reflect, as they complete their work and close their files: 'In what state do we leave the parenting relationship? Will parents be able to make positive eye contact at handovers?' If they can, it is more likely that they will also be able to attend their children's weddings or other important family events down the years and even, in time, be cooperative grandparents. Reframing support for families when parents separate in the ways we suggest should make these goals all the more attainable.

<sup>116</sup> Munby, Sir James, n 48 above.

<sup>117</sup> Woodall and Woodall, n 68 above.

## D. The Interface with the Family Court - Summary of Recommendations

### CORE RECOMMENDATION

While attendance at an early Information and Assessment Meeting is the preferred route, we recommend retention of the statutory MIAM for parents who wish to make a court application. (Para. 308).

315. For the MIAM system to operate as intended, the current costs disincentive must be addressed. (Annex 8).
316. Solicitors, court staff, and judges must understand the expectation that both parents attend a MIAM. (Annex 8 and training requirements in Annex 7).
317. Family courts must enforce the MIAM requirements as set out in statute and the FPR. (Annex 8 and training requirements in Annex 7).
318. We recommend a free-standing MIAM form to be used in all finance and children cases. (Annex 8 and Annex 9).
319. We believe parenting agreements can and should be made open, if the parents so choose. In this regard, we recommend:
  - FMC provide standard wording to be used by a mediator.
  - The President's guidance be invited on this point or an amendment to the rules, to the effect that a parenting agreement reached in mediation will be upheld unless there has been a change of circumstances, or the welfare of the child requires different arrangements to those agreed. (Annex 10).
320. We suggest a register of parenting agreements similar to that of Parental Responsibility agreements and invite MoJ to consider whether this is feasible. (Annex 10).
321. We recommend a small multi-disciplinary working party is set up to consider the various issues concerning parenting agreements. (Annex 10).
322. We recommend piloting the suggested Part 3 Protocol, to assist family courts in fulfilling their responsibility to consider whether non-court dispute resolution is appropriate. (Annex 10).
323. Where safe to do so, we recommend adopting a threshold of parents making positive eye contact with each other at handovers of the children as a good working test. (Paras.101 and 313).

## **CONCLUSION**

324. As stated earlier, this report only touches the surface of the work to be explored in the 'pre-court' space for families who separate. We hope there is enough said to stimulate debate, research, review and ultimately change, to reframe current attitudes and provision. We look forward to a time when society's response, politically, culturally and professionally, keeps child welfare and children's voices centre-stage through the vulnerable transition time which follows parental separation.

## ANNEX 1

### Terms of reference of the Family Solutions Group

Mr Justice Cobb set up a multidisciplinary Family Solutions Group with the specific purpose of looking at the 'pre-court' space for families when they separate. In addition to some specific queries from the Private Law Working Group about the operation of MIAMs and the interface with the family court, the terms of reference for the group are to consider what improvements can be made now, within existing legislation, to meet the needs of children and parents following family breakdown.

The Family Solutions group has focused on changes which:

- are centred around safety as being of primary importance;
- are child-focussed, promoting an understanding of children's rights and child welfare;
- can be achieved within existing legislation;
- make use of existing provision; and
- can be achieved without incurring substantial costs.

### Membership of the Family Solutions Group

Helen Adam (Chair) – Mediator, Solicitor (non-practising)

Karen Barham – Mediator, Parent Coordinator, Solicitor

Caroline Bowden – Mediator, FMC board member, Solicitor (non-practising)

Charlotte Bradley – Solicitor, Mediator

Brian Cantwell – Family Therapist, Resolution Family Consultant

Elizabeth Coe – National Association of Child Contact Centres

Mike Coote - Cafcass

Adrienne Cox – Mediator, former FMSB board member, Solicitor (non-practising)

HHJ Martin Dancey – Designated Family Judge for Dorset

Jan Ewing – University of Exeter

Claire Field – Parenting Apart Programme

Dickie James MBE – Staffordshire Women's Aid

Mary Mullins – National Youth Advocacy Service (until 31.07.20)

Patrick Myers – DWP Reducing Parental Conflict Programme

Chris Palmer – Ministry of Justice

Beverley Sayers – Mediator, FMC board member, Therapist

Anna Sinclair – Cafcass Cymru

Debbie Singleton – National Youth Advocacy Service (from 01.08.20)

Judith Timms – National Youth Advocacy Service

Jane Wilson – Mediator, Solicitor-Advocate, FMC board member

## ANNEX 2

### SERVICES FOR CHILDREN AND YOUNG PEOPLE

Judith Timms, Jan Ewing, Elizabeth Coe and Mary Mullin

#### SUMMARY OF RECOMMENDATIONS FOR CHILDREN

##### CORE RECOMMENDATION

- 1 The establishment of a framework of direct support services of information, consultation, support and representation for children and young people whose parents separate, based on the Article 12 UNCRC compliant matrix in Figure 1 below.**

*In addition, we recommend that:*

- 2 There be an urgent review of arrangements for hearing children's voices and protecting the welfare of children who are living or who have lived in violent households. (Para 1.5).
- 3 There should be a presumption that all children and young people aged 10 and above be offered the opportunity to have their voices heard directly in all processes for resolving issues between parents including mediation and solicitor-led processes. (Para 2.3).
- 4 Those conducting processes such as solicitor negotiation, collaborative law and arbitration must ensure that children are offered a process for their voice to be heard by a suitably trained professional (unless there are agreed upon contra-indications). There should be a requirement to maintain annual statistics for each case on the offer made, whether the offer was taken up and, if, not, the reason why it was declined (where known). (Para 2.4).
- 5 Mediators should be required to supply to the FMC annual statistics on the number of child inclusive mediations (CIMs) carried out each year. In a case involving a child under the age of 10, if the mediator decides that CIM is not appropriate the mediator should record the reason. Where the mediator proposed CIM, but it did not go ahead, there should be a record of whether the mother, father and /or child declined. (Para 2.5).
- 6 The range of options for hearing from and advocacy, representation and support for children to be explored more fully as part of the work of elaborating and piloting the reformed Child Arrangements Programme as recommended by the MoJ in the 'Assessing Risk of Harm to Children and Parents in Private Law Cases' Review. (Para 2.6).
- 7 Funding mechanisms should be put in place urgently to provide for appropriate new funding levels for publicly funded child-inclusive mediation. (Para 2.8).



- 8 On an interim basis, and pending the establishment of 'The Separated Families Hub' we recommend the Co-parent Hub should include a dedicated, age-appropriate space with information and support for young people and funding provided to facilitate this. (Para 2.10).
- 9 Until the systemic change that we call for is a reality, we recommend that consideration is given to ring-fencing a dedicated funding allocation, to extend the remit of Cafcass to oversee support for all young people in England whose parents separate, with equivalent funding and arrangements to support young people in Wales. (Para 2.10).
- 10 The Children Act 1989, s 10 leave requirements are reviewed and relaxed to enable competent children who are in need or at risk to find a route back to court of their own volition. (Para 2.15).
- 11 Urgent consideration is given to laying the requisite courts rules to accompany s122 of the Adoption and Children Act 2002 so that private law applications pursuant to the Children Act 1989 s8 become 'specified proceedings' in which children become separately represented if needed. (Para 2.17).
- 12 The government funds a campaign aimed at promotion of awareness in society of the harm to children from parental conflict, and the benefit to children of parents behaving respectfully and cooperatively towards each other. (Para 3.1).
- 13 Continuing inter-parental conflict be formally recognised as an 'adverse childhood experience'. (Para 3.1).
- 14 Universal, non-stigmatising 'kite marked' information on law and policy for children and young people affected by parental separation be developed and made available on line. In addition, there should be a coordinated strategy to ensure that these resources are made available in schools as part of Personal, Social, Health and Economic (PSHE) education, and other touch points with whom children and young people come into contact (sports centres, youth centres, gyms, GP surgeries, cinema complexes etc.) (Para 5.1).
- 15 Resource packs be provided to children whose parents divorce or separate as part of the legislative arrangements accompanying implementation of the Divorce, Dissolution and Separation Act 2020 (DDSA). (Para 6.1).
- 16 The regulations introduced with the DDS Act should include a requirement that the divorce application records the number of children the couple have and their ages. (Para 6.2).

## 1 POLICY CONTEXT

- 1.1 Traditionally the state has been extremely reluctant to intervene in private family life and this has led to very different approaches to hearing the voice of the child in public and private law matters. The ingrained culture of traditional welfare protectionism has inhibited understanding of the central role children's views can play in improving outcomes for them. In public law there is a very clear process through which the rights and welfare of children are protected and represented. By contrast, in private law there is no comparable process; nor is there a universal overarching child-centred strategy or route map which is accessible and intelligible to the children who may need to use it. More than twice the number of children are the subject of private law applications in England and Wales each year than public ones (83,974 compared with 30,333 in 2019 respectively)<sup>118</sup> yet little is known about the families who bring private cases to court.
- 1.2 The corollary of this dichotomized approach, which is not recognized in other countries, is that in private law proceedings there has been a lack of clear policy on both child protection issues and on hearing the voice of the child. This means that although the direct services which do exist, such as Separated Parents Information Programs and Separating Parents after Parting (or Working Together For Children, in Wales) are excellent initiatives, they are primarily services for adults, which, it is hoped, will result in certain (unspecified) benefits for their children.
- 1.3 When parents separate, current government policy relies heavily on the achievement of parental agreement as the primary policy objective based on the assumption that parental agreement will always be in the best interests of their children. The government's major response to any form of safeguarding children who experience negative effects of family breakdown has been to introduce the statutory MIAM when parents apply to the courts, in the hope that this will lead to the diversion of disagreements and contested issues away from the court process. It has therefore invested in the expansion of mediation services and the diversion of disagreements and contested issues away from the court processes. This is happening against a background of the withdrawal of legal aid from the vast majority of private law disputes.<sup>119</sup> The current arrangements are particularly concerning given the findings of a recent Ministry of Justice (MoJ) report, 'Assessing Risk of Harm to Children and Parents in Private Law Children Cases, Final Report.' ('The MoJ Risk of Harm report'). This found that the incidence and impact of domestic violence in private law cases has been consistently and dangerously underestimated, with allegations or findings of domestic abuse in samples of private law child arrangements/contact cases ranging from 49% to 62%.<sup>120</sup> Mediators come from a variety of professional backgrounds, which may not include any qualification

<sup>118</sup> Family Court Tables, n 49 above.

<sup>119</sup> See Legal Aid, Sentencing and Punishment of Offenders Act, 2012.

<sup>120</sup> Hunter et al, n 14 above.

or experience in working directly with children or of undertaking a risk assessment.

- 1.4 There are particular concerns about the identification of significant harm or the risk of harm to children, which may arise, for example, as a result of domestic abuse and violence - including harm from witnessing interfamilial violence within the meaning of s120 Adoption and Children Act 2002 which amended the meaning of harm in s31 Children Act 1989 to include '*impairment suffered from seeing or hearing the ill-treatment of another*'. Research by Women's Aid found that in 2013/14 domestic violence services were supporting 74,500 women and 13,701 children.<sup>121</sup> For these children, there is a shocking paucity of direct services and they have little or no opportunity to be consulted or represented within the meaning of Article 12 of the UNCRC.
- 1.5 Despite the amended Adoption and Children Act 2002, s 120, there appears to have been little appetite, or perhaps spare capacity among family justice professionals, to explore the potential of this legislative change in the identification of children who may be at risk in private law proceedings. Not all children in need or at risk within the meaning of the Children Act 1989, as amended, will be within court proceedings. Recent estimates put the number of separating parents who make an application to court at around one third.<sup>122</sup> Many of the children of the approximately two-thirds of parents who do not make a court application may be at risk, but the risk to this 'hidden' cohort is difficult to quantify and may be exacerbated by the systemic emphasis on the assumption of reasonable contact with both parents.  
**We recommend that there be an urgent and specific review of the arrangements for hearing children's voices and protecting the welfare of children who are living or have lived in violent households.**
- 1.6 Although the welfare of the child is theoretically of paramount importance in law, in practice, as Sir James Munby, former president of the Family Division, has pointed out '*the court proceeds, if one bothers to think about what is going on, and most of the time we do not, on the blithe assumption that the truth - and a proper appraisal of what is in the child's best interests - will in some mysterious way emerge from the adversarial process between the parents.*<sup>123</sup>
- 1.7 Quite apart from the human cost to parents and their children, the cost to the public purse of family breakdown is huge, costing the taxpayer an estimated £51 billion a year, more than the entire defence budget. This figure, which has risen from £37 billion ten years ago, considers the cost to the taxpayer of families splitting up across areas including tax, benefits, housing, health, social care, civil and criminal justice and education.<sup>124</sup>
- 1.8 Policy decisions aimed at supporting young people whose parents separate must consider the seismic changes in the way in which families are structured

<sup>121</sup> Women's Aid Annual Survey 2014 – see, [www.womansaid.org.uk](http://www.womansaid.org.uk).

<sup>122</sup> Williams, n 15 above.

<sup>123</sup> Munby, n 48 above.

<sup>124</sup> Relationships Foundation, n 4 above.

over time. Increasingly family members and constellations change requiring children to adapt as their parents transition into new relationships. Cohabiting couples were the fastest growing family type over the last decade. Between 2009 and 2019, the number of cohabiting couples with dependent children increased by more than a quarter compared to an increase of 4.8% in the number of married or civil partner couples with dependent children. In 2019, married and civil partner couple families accounted for 61.4% of families with dependent children, followed by lone parent families (22.3%) and cohabiting couples (16.3%).<sup>125</sup> In 2018, 48.4% of live births were outside of marriage.<sup>126</sup> The rate of breakdown of cohabiting parental relationships is significantly higher than those of married parental relationships.<sup>127</sup>

- 1.9 It is difficult to accurately assess the number of children affected by the separation of their parents. It has been estimated that around two per cent of families with dependent children in the UK separate each year.<sup>128</sup> In 2017, 14 million dependent children were living in families.<sup>129</sup> Assuming that the number of children is spread evenly across families, this equates to approximately 280,000 children whose parents separate each year in the UK.<sup>130</sup> Official statistics on the number of young people affected by parental separation are scarce. Changes introduced by the Children and Families Act 2014 mean that couples divorcing are no longer required to provide information on children as part of the divorce process. Numbers of cohabiting couples with dependent children whose relationships breakdown is notoriously difficult to track. What we do know is that:
- In 2013, the last year in which data on the numbers of divorces in which the couple had children was collected, almost half of divorces (48%) involved children aged less than 16 years.<sup>131</sup> The parents of 94,864 children aged under 16 divorced that year.<sup>132</sup> If the number of children per couple (0.83)

<sup>125</sup> Office of National Statistics. (2019). *Families and households in the UK:2019*. Available at: <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2019>.

<sup>126</sup> Office of National Statistics. (2019a). *Births in England and Wales: 2018. Live births, stillbirths and the intensity of childbearing, measured by the total fertility rate*. Available at: <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/livebirths/bulletins/birthsummarytablesenglandandwales/2018>.

<sup>127</sup> Crawford et al, n 30 above.

<sup>128</sup> Bryson et al, n 23 above.

<sup>129</sup> See Office for National Statistics. (2017). *Families and Households in the UK, 2017*. Available at: <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2017>.

<sup>130</sup> McGhee, n 25 above.

<sup>131</sup> Office of National Statistics. (2015). *Divorce in England and Wales, children of divorced couples: historical data*.

<sup>132</sup> Office of National Statistics. (2015). *Divorce in England and Wales, children of divorced couples: historical data Table 2, children of divorced couples (numbers),1957 to 2013*. Available at: <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/datasets/divorcesinenglandandwaleschildrenofdivorcedcouples>.

were unchanged over time, the number of children aged under 16 whose parents divorced in 2018 would be 75,422.<sup>133</sup>

- In 2013-14, 29% of all children aged 16 and under were not living with both of their birth parents.<sup>134</sup>
- 12% of couples who were married when their child was born and 32% of couples who were cohabiting when their child was born have experienced a period of separation by the time the child is 7.<sup>135</sup>
- Evidence from the Millennium Cohort Study in 2014 indicates that 37% of children were not living in the same household as their father by the age of 14.<sup>136</sup>

1.10 The UK has lagged behind other jurisdictions in addressing problems of family breakdown, particularly concerning its impact on children. Historically, there has been no clear public policy focus on hearing the voice of the child in private law matters in either England or Wales (although the position in Wales is now improved somewhat – see paragraph 1.11 below). This is in marked contrast to the situation of children in public law. The Family Justice Review, reporting in 2011, endorsed the importance of ‘child friendly’ and ‘child inclusive’ approaches. It called for a clearer focus on the child and better training for professionals to make sure children’s voices are heard. The Review also proposed that children and young people should, as early as possible in a case, be offered a menu of options laying out ways in which they could if they so wished, make their views known.<sup>137</sup> Unfortunately, since then, very little progress has been made.

1.11 The Rt. Hon Simon Hughes MP, Minister of State for Justice and Civil Liberties in the Coalition Government (the Minister), made a public commitment in 2014 to give children who are aged 10 a voice in any type of family case including private law proceedings and to ‘to start immediately a dialogue with the family mediation profession about how we make sure that the voice of the child and young person becomes a central part of the process of family mediation too’.<sup>138</sup> In 2015, the Final Report of the Voice of the Child Dispute Resolution Advisory Group **recommended the adoption of a non-legal presumption that all children and young people aged 10 and above should be offered the opportunity to have their voices heard directly during dispute resolution**

<sup>133</sup> In 2013 there were 114,720 divorces and the number of children per couple was 0.83. In 2018 there were 90,871 divorces which would equate to 75,422 children at 0.83 children per couple.

<sup>134</sup> Department for Work and Pensions, n 29 above.

<sup>135</sup> Crawford et al, n 30 above.

<sup>136</sup> Fitzsimons et al, n 31 above.

<sup>137</sup> Ministry of Justice, n 52 above.

<sup>138</sup> The Rt Hon Simon Hughes, MP, Minister of State for Justice and Civil Liberties, speech at the Family Justice Young People’s Board’s ‘Voice of the Child’ Conference, London, 24 July 2014. Available at <https://www.gov.uk/government/speeches/simon-hughes-speech-at-the-voice-of-the-child-conference>.

processes, including mediation, if they wish.<sup>139</sup> It further recommended that *'funding mechanisms should be put in place urgently to provide for appropriate new funding levels for publicly funded child-inclusive mediation'*.<sup>140</sup> On 18 March 2015, the Minister accepted this recommendation, indicating that whilst he could not make any commitment as to funding of child inclusive mediation (CIM), he would ask that the matter be considered when the Legal Aid Agency contracts were considered later that year.<sup>141</sup> Critically, CIM remains unfunded by legal aid and there has been a lack of a strategic development plan on the part of the government. Local mediation services have been left with the task of providing CIM, often at a financial loss to the service.

We endorse the two recommendations above.

- 1.12 In 2004, the Welsh Government formally adopted the UNCRC as the basis of policy making relating to children and young people. Wales now has a legal requirement on government ministers to have due regard to the UNCRC and it is the responsibility of the Minister for Health and Social Services to ensure compliance. In England, Child Rights Impact Assessments are being introduced across government but calls from children's charities<sup>142</sup> and the Children's Commissioner<sup>143</sup> to introduce a bill to incorporate the UNCRC into domestic law have so far been resisted. The Government's stated position in 2015 was that existing law and policies were 'strong enough to comply with the Convention'.<sup>144</sup>

## 2 HEARING THE VOICE OF THE CHILD

- 2.1 What is most striking in looking at the current arrangements for hearing the voice of the child is how many children experience parental separation and how few services exist for them. The sheer numbers involved may go some way to explaining the lack of progress in this area as the provision of services will have considerable resource implications which successive governments have been loath to address. Consequently, very few of the children and young people who are centrally concerned have the opportunity to be consulted or to have any agency in the decisions made about their lives. In the absence of any clearly identifiable policy framework, there has been a series of scattergun initiatives.
- 2.2 One of the prime aims of state intervention into family breakdown is to limit, so far as possible, collateral damage to children. However, there has been limited analysis of the effectiveness of general interventions for the children concerned. Some children will be at risk; with decisions made that contact

<sup>139</sup> Final Report of the Voice of the Child Dispute Resolution Advisory Group, n 8 above.

<sup>140</sup> Ibid at recommendation 33.

<sup>141</sup> Government response to the Voice of the Child Dispute Resolution Advisory Group Final Report, 18 March 2015. Available at <https://www.gov.uk/government/publications/voice-of-the-child-government-response-to-dispute-resolution-advisory-group-report>.

<sup>142</sup> House of Lords and House of Commons Joint Committee on Human Rights, n 38 above.

<sup>143</sup> UK Children's Commissioners, n 39 above.

<sup>144</sup> House of Lords and House of Commons Joint Committee on Human Rights, n 38 above, para. 33.

should take place against the wishes of the child and in circumstances where abuse is alleged.<sup>145</sup> Others will be rendered extremely unhappy – not least by losing contact with friends and extended family and perhaps siblings who have been important to them. In practice, the notion that a child's rights and welfare can be protected in absentia - as part of an indirect adult-driven agenda - is fundamentally flawed. The time for rhetoric is over. The Children Act 1989 and Article 12 UNCRC together provide a framework of integrated rights and welfare which respects the right of the child to be consulted, whilst protecting them from both the responsibility for making the decision and the consequences of making a mistake.

- 2.3 **We recommend that there should be a presumption that all children and young people aged 10 and above be offered the opportunity to have their voices heard directly in all processes for resolving issues between parents, including mediation and solicitor-led processes. We call for a review to consider whether this presumption should be a statutory one to ensure compliance. Our view is that this should be the case.**
- 2.4 To ensure that this statutory presumption is complied with, **we recommend that those conducting processes such as solicitor negotiation, collaborative law and arbitration must ensure that children are offered a process for their voice to be heard by a suitably trained professional (unless there are agreed contra-indications) There should be a requirement to maintain annual statistics for each case on the offer made, whether the offer was taken up and, if not, why it was declined, (where known).**
- 2.5 To provide a more nuanced picture of the numbers of young people who speak to a mediator per annum, **we recommend that mediators be required to supply to the FMC annual statistics on the number of children invited to a consultation and the number of CIMS carried out each year. In the case of a child over the age of 10, if the mediator decides that CIM is not appropriate, the mediator should record the reason. Where the mediator proposed CIM, but it did not go ahead then there should be a record of whether the mother, father and/or child declined.**
- 2.6 The MoJ Risk of Harm Report panel took the view *'that more should be done to accord children the opportunity to be heard in these (private law) proceedings, in accordance with Article 12 on the UNCRC... The panel believes that its recommended reforms to the Child Arrangements Programme... will provide an important framework for enhancing children's voices in private law proceedings. The panel recommends that the range of options for hearing from and advocacy, representation and support for children to be explored more fully as part of the work of elaborating and piloting the reformed Child Arrangements Programme.'*<sup>146</sup> **We support their recommendation.** In cases where abuse is alleged, a separate voice for young people, including separate representation

<sup>145</sup> Hunter et al, n 14 above.

<sup>146</sup> Ibid. Para 11.6 *Enhancing the Voice of the Child*, p176.

in cases of significant harm, is vital. As Fiona Morrison and colleagues have recently argued forcefully, *'we require a system of child advocacy, that ensures independent advice, ongoing support and trusting relations and support that children repeatedly tell researchers they need.'*<sup>147</sup>

2.7 The very small numbers of children who are given separate representation each year depend on the secondary legislation provided by r16.4 Family Procedure Rules 2010.

2.8 The recent evaluation of the DWP funded Mediation in Mind pilot confirmed the benefits of children being consulted.<sup>148</sup> Children who were consulted over or influenced the making of contact and residence arrangements report higher degrees of satisfaction with the arrangements. Giving children a voice can lead to more durable agreements; improved parental alliances; better father-child relationships and more cooperative parenting. Feeling listened to, by a mediator or a counselor, empowers young people and helps them to cope better with the breakdown of their parent's relationship. To promote greater uptake of CIM where it is appropriate, **we recommend that funding mechanisms should be put in place urgently to provide for publicly funded CIM.**

2.9 Children who experience family breakdown may be broadly divided into four groups or cohorts (see figure 1 below):

**Cohort 1;** children of parents, who agree their care arrangements outside of state services/ intervention.

**Cohort 2;** children of parents who engage in mediation services, some of whom are consulted as part of the mediation process (child inclusive mediation). It is not known how many children are consulted within other processes such as solicitor negotiations (in the very unlikely event that the child is separately represented), collaborative law or arbitration but the numbers are likely to be very small.

**Cohort 3;** children of parents involved in 'in-court dispute resolution' services and applications pursuant to s8 Children Act 1989, or the tiny minority of young people who are granted leave of the court to make an application pursuant to Children Act 1989, s10 (1)<sup>149</sup> and

**Cohort 4;** the very small percentage of children, (around 1%) who may be made parties to the proceedings under the provisions of r16.4 Family Procedure Rules 2010. These children will be separately represented by both a children's lawyer and a children's guardian, in the same way as children in public law proceedings have tandem representation.

2.10 We know little about how parents make arrangements outside of the court, as almost all the resources are focused on the relatively small number of children

<sup>147</sup> Morrison et al, n 56 above.

<sup>148</sup> Barlow et al, n 57 above.

<sup>149</sup> The numbers are so small that the MoJ does not keep the figures but likely to be under 10 annually.



in cohorts 3 and 4. Public funding is not available to support CIM for children in cohort 2. Those in cohort 1 have no universal provision of information or support. The role of Cafcass/Cafcass Cymru is limited to safeguarding and promoting the welfare of children, and providing information, advice and other support for children and their families only once these children are involved in family proceedings.<sup>150</sup> There is a pressing need for information, advice and support for children within cohort one and two. The involvement of Cafcass in pre-proceedings work in public work has been piloted.<sup>151</sup> We believe that the 's' for support in Cafcass should extend to pre-proceedings in private law cases but we recognise that both Cafcass and Cafcass Cymru are currently stretched beyond limits and could not realistically take on this extra role without funds. This falls back to the need for both English and Welsh administrations to acknowledge the needs of all children whose parents separate and put in place coordinated policy and funding to address those needs. **On an interim basis, and pending the establishment of 'The Separated Families Hub' we recommend the Co-parent Hub should include a dedicated, age-appropriate space with information and support for young people and funding provided to facilitate this. Until the systemic change that we call for is a reality, we recommend that consideration is given to ring-fencing a dedicated funding allocation, to extend the remit of Cafcass to oversee support for all young people in England whose parents separate, with equivalent funding and arrangements to support young people in Wales.**

- 2.11 Early preventative work of this nature may help to achieve the policy objective of diverting cases away from court where appropriate, quite apart from the potential it has to transform young people's experiences of parental separation.
- 2.12 Meeting the information and support needs of children in cohort 1 and 2 will reduce the financial and human cost of cases progressing to court. This paper addresses out-of-court support and services for children in cohorts 1 and 2. However, in considering a framework of Article 12 services, it would be a mistake to assume that some of the children in cohorts 1 and 2 may not also need a route to court to review child arrangements orders, which may be putting them at risk. Although s37 Children Act 1989 provides a bridge between public and private law proceedings for those in cohort 3 and 4, it is a route that can only be accessed via existing private law proceedings.
- 2.13 It is the case for children in cohorts 1 and 2 just as those in 3 and 4, that once their parents have agreed arrangements, children are effectively locked into those arrangements and have no legislative route to whistle blow about what may be a highly dangerous situation.
- 2.14 There are, however, two existing legislative provisions, which appear to be seldom used, or which are in abeyance and which would be of considerable potential benefit to all children who may experience problems both during and after, child arrangements orders are agreed. The first is that, theoretically,

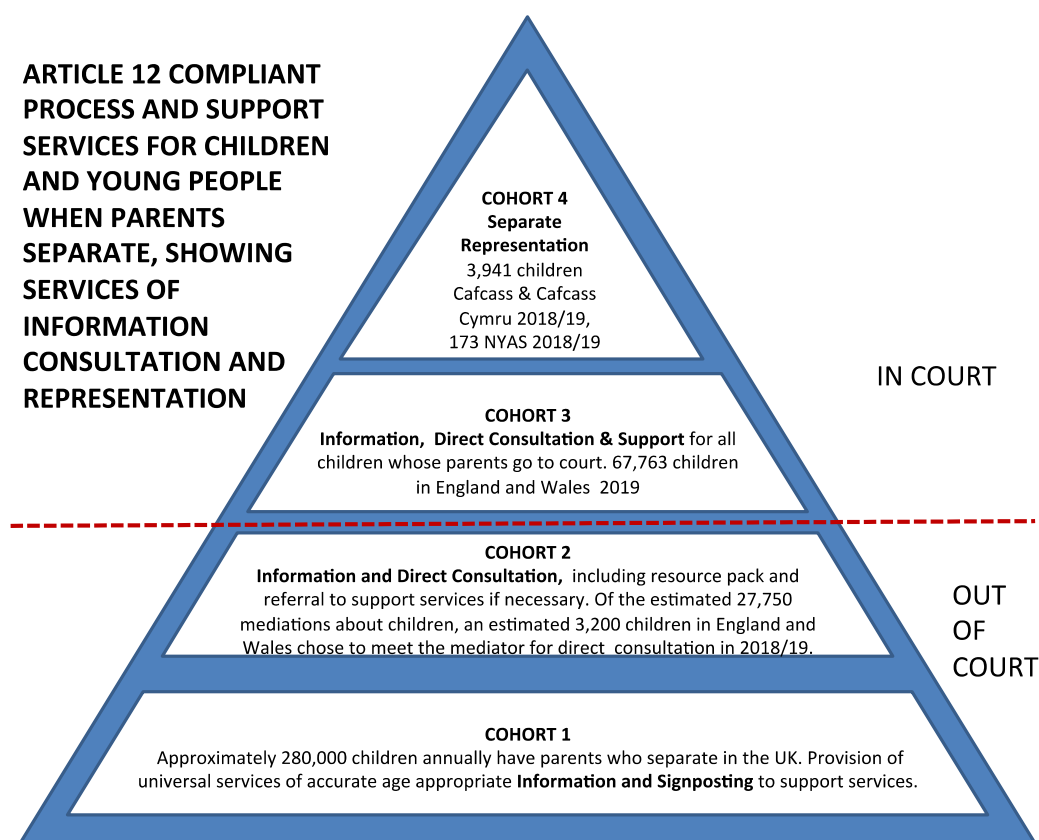
<sup>150</sup> n 62 above.

<sup>151</sup> Broadhurst et al, n 63 above.

children may seek leave under s10 Children Act 1989 to make their own applications for a variation of their s8 child arrangements orders. In practice, this is so rarely done that the MoJ does not keep figures. One reason for this is that the bar for being granted leave is set extremely high, requiring not only an assessment of the child's competence to apply but also an assessment of the competence of the solicitor representing the child to carry out that assessment.

- 2.15 **We would recommend that the Children Act 1989, s10 leave requirements are reviewed and relaxed to enable competent children who are in need or at risk to find a route back to court of their own volition.** This would acknowledge and address children and young people's lack of ability to initiate change and provide them with a fail-safe route to a possible variation of s8 CA1989 Child Arrangements orders.
- 2.16 Secondly, twice parliament has looked at the considerable body of supporting evidence and passed legislation to afford more children separate representation in private law high conflict and high conflict. Once, over 25 years ago in s64 Family Law Act 1996 Part 11 of which was subsequently shelved and once in s122 Adoption and Children Act 2002, which inserted powers into s41 (6A) Children Act 1989, to add s8 orders to the list of specified proceedings in which a child could routinely be made a party and represented by both a Children's Guardian and a solicitor. Although technically implemented, the provisions still lack the necessary court rules to activate them and children remain dependent on the weaker secondary legislation contained in r16.4 Family Procedure Rules 2010.
- 2.17 As part of the comprehensive changes advocated by the MoJ Risk of Harm report, **we recommend that urgent consideration is given to laying the requisite courts rules to accompany s122 of the Adoption and Children Act 2002 so that private law applications pursuant to the Children Act 1989 s8 become 'specified proceedings' in which children may be separately represented if needed.** This would provide such children with tandem representation by both a Children's Panel solicitor and a Children's Guardian if necessary.

Figure 1



**NOTE 1.** Cohort 4 refers to the numbers of children who are made parties to s8 applications with respect to children in family proceedings under the provisions of r16.4 Family Proceedings Rules 2010. These include child arrangements, specific issue and prohibited steps orders. CAFCASS, CAFCASS CYMRU and the National Youth Advocacy Service (NYAS) are the only bodies able to represent children in these proceedings.

**Figure 1** suggests a matrix of universal, non-stigmatising, well-signposted services providing information, consultation, and if necessary, representation formulated around Article 12 UNCRC.<sup>152</sup> The service would be both UN Convention compliant, meet modern day standards of ethical practice with children, and be effective in developing a coherent framework of direct support services to those children and young people who need to access them not just at the time of parental separation and court proceedings but afterwards when professional attention has waned and the child is left to live the life which has been agreed for them.

**We strongly recommend that the Article 12 UNCRC compliant matrix in Figure1 (above) be adopted as a framework for the development of**

<sup>152</sup> n 64 above.

## **services for children and young people whose parents are divorcing or separating.**

2.18 The UN Committee has consistently criticised the UK for its piecemeal approach to the implementation of the UNCRC particularly concerning children involved in private law proceedings. In July 2009 the UN Committee on the Rights of the Child adopted a General Comment on Article 12 UNCRC which requires states parties to ensure that children are accurately informed, consulted and if necessary, afforded representation when decisions are made about their lives. General Comment No 12 further underlines the importance of hearing the voice of the child and outlines the parameters of the right to be heard:

- *States must avoid tokenistic approaches which limit children's ability to express their views or which fail to give their views due weight.*
- *If children's participation is to be effective and meaningful it must be understood as a process and not a one-off event.*
- *Processes should be transparent, informative, respectful, relevant, child friendly, inclusive, safe and sensitive to risk and accountable.*
- *Adults should be given the skills and support to involve children.*
- *Once the child is deemed capable of forming a view, then he/she should have the option of talking directly with the judge.*

2.19 General Comment 12 also sets out the pre-conditions for the realisation of a child's right to be heard; this includes a right to express views freely in all matters affecting the child, and in conditions and with information that enables the child to make informed decisions:

- *"Freely" means the child can express his/her views without manipulation, undue influence or pressure, and*
- *Is able to express his/her own perspective - not the views of others.*

2.20 General comment 12 confirms that the right of the child capable of expressing his or her view to do so in 'administrative proceedings affecting the child' encompasses alternative dispute resolution mechanisms such as mediation.<sup>153</sup>

2.21 Feedback from the Family Justice Young People's Board to the Private Law Working Group includes the following proposals for change:

- Stronger and more coherent support services for families.
- Non-court dispute resolution should routinely involve children.
- Child inclusive mediation to enable their voice to be heard.

<sup>153</sup> UN Committee on the Rights of the Child, *The Right of the Child to be Heard*. (General Comment No 12 CRC/C/GC/12, UNCRC, 2009), at para 32.

- An advocate who is independent of any court proceedings to be available for the child. This should be nationally available and not dependent on local ad hoc services.
- There should be less pressure to see both parents, as sometimes this is not what the child wants or needs. They should have an option as to how often and for how long they see a parent and be involved in creating those options.
- A possible 'threshold' of severity below which private law cases should simply not be allowed in court. This highlights the need for national guidance (from the President of the Family Division) about what should be in court and what should not. (Currently, the markers for court proceedings are predicated around the severity of the conflict between the parents rather than the severity of the outcomes for children).
- The young people emphasised the importance of the Cafcass/Cafcass Cymru 'child impact statement' being made available in court so that the parents can see what impact the proceedings are having on their children.

### **3 IMPACT ON CHILDREN AND YOUNG PEOPLE OF THE PARENT RELATIONSHIP**

- 3.1 Research by Professor Gordon Harold at the University of Sussex found that the quality of the inter-parental relationship, specifically how parents communicate and relate to each other, is increasingly recognised as a primary influence on effective parenting practices and children's long term mental health and future life chances. **We recommend that the government funds a campaign aimed at the promotion of awareness in society of the harm to children from parental conflict and the benefit of parents behaving respectfully and cooperatively towards each other.** As a minimum, it has been suggested that adults should be polite and at least establish eye contact during routine handovers.<sup>154</sup> Where there are no safety issues, this should be a culturally expected standard of behaviour between parents who live apart. **We further recommend that continuing inter-parental conflict be formally recognised as an 'adverse childhood experience'.**
- 3.2 The experience of NYAS in representing children in r16.4 FPR 2010 applications demonstrates the long term corrosive effects of a childhood punctuated by a series of high conflict court battles between implacably hostile parents. Parental separation, although always experienced by children as a crisis point in their lives, need not, in itself, be a source of lasting emotional scars. Much depends on the willingness and ability of parents to be sensitive to the impact of their separation on their children and to be prepared to work together in their children's best interests.
- 3.3 We have considered whether a 'child impact' statement should be prepared early in the process of parental separation, prior to the issue of court proceedings. Anything which encourages parents, and the professionals tasked

<sup>154</sup> Woodall and Woodall, n 68 above.

with assisting them, to think about the impact on the child of the parenting relationship and of the decisions being made is welcome. However, in most processes the child's views are not sought directly so any assessment of impact would be through the parents and they are not always the best judge of how the child is coping. In the absence of the involvement of an independent professional (such as Cafcass/Cafcass Cymru), it begs the question as to who should draw up the child impact statement. For these reasons we have decided against making a recommendation for 'child impact statements' in cases which are not decided by the court.

#### **4 COHORT ONE (OUT-OF-COURT): CHILDREN WHO HAVE PARENTS WHO AGREE THEIR ARRANGEMENTS WITHOUT STATE INTERVENTION/SERVICES**

- 4.1 It is estimated that approximately 280,000 children per year go through the process of parental separation.<sup>155</sup> In most cases, parents will agree on the future living arrangements for their children without recourse to external help from mediators, lawyers, or the courts. Mapping Paths to Family Justice found that as many as 47% of couples divorcing or separating between 1996 and 2011 sought no legal advice about their situation, with less than 1% going directly to mediation during this period.<sup>156</sup> It is clear, both from these numbers and the experience of the last two decades that putting all the eggs in mediation's basket is an unsatisfactory approach to family breakdown and the associated problems for children and young people.
- 4.2 The vast majority of children in cohort one have no opportunity - as required by Article 12 of the UNCRC - to be informed, consulted, or if necessary represented in adult discussions and negotiations about arrangements for their future care. If things go wrong for the child at the point of decision-making or a later date there are few direct support services for children experiencing consequent difficulties. Research has demonstrated that once arrangements between parents are agreed, children are not aware of anything they can do to initiate any change and are often left to live the life that has been agreed for them. Private law practice has lagged behind that of public law in recognising the central contribution of children's views in influencing decision making, keeping them safe and improving outcomes for them.<sup>157</sup>
- 4.3 We believe that the experiences of all young people whose parents separate could be improved by better information and signposting to appropriate support. In sections 5 and 6 we outline how these improvements may be achieved before considering, in sections 7 and 8 particular considerations for CIM and concluding, in section 9, with proposals for some pilots.

<sup>155</sup> McGhee, n 25 above.

<sup>156</sup> Barlow et al, n 3 above.

<sup>157</sup> Timms, J. E., Bailey, S. and Thoburn J. (2007). *Your Shout Too! A survey of the views of children and young people involved in court proceedings when their parents divorce or separate*. London NSPCC Para 4, p72. See also Bailey, S. Thoburn. J and Timms, J. (2011). 'Your shout too! Children's views of the arrangements made and services provided when courts adjudicate in private law disputes', *Journal of Social Welfare and Family Law*, 33:2, 123-138.

## 5 INFORMATION AND SIGNPOSTING SERVICES

- 5.1 Although there are numerous of websites which have been produced by a wide range of miscellaneous organisations there has been little or no systematic evaluation of how much they are used and how useful they are for the children who access them. **We recommend that universal, non-stigmatising, 'kite marked' information on law and policy for children and young people affected by parental separation be developed and made available online. In addition, there should be a coordinated strategy to ensure that these resources are made available in schools as part of PSHE, and other touch points with whom children and young people come into contact, sports centres, youth centres, gyms, GP surgeries, cinema complexes etc.** This would involve a systematic review, evaluation and coordination of what is already available online and offline taking into account the need for some regional variations and variations in provision between England and Wales. The aim would be not to reinvent the wheel, but to knit together existing initiatives and tried and tested services into an agreed overarching national framework. This framework should be clearly identifiable and accessible to all children and young people. Models might be Child Line or BBC Bitesize, both tried and trusted by young people.
- 5.2 One option is to use the National Association of Child Contact Centres (NACCC)'s network of 313 contact centres in the UK as part of a nationally coordinated age-appropriate information dissemination strategy. Another option is to make greater use of the existing Family Hubs network in England. The framework may look different in Wales. In July 2016, the All-Party Parliamentary Group for Children (APPG) produced a report which focused on strengthening family relationships.<sup>158</sup> The report highlighted the role that Children's Centres could potentially play as hubs for local services and family support. Unfortunately, Children's Centres have been severely reduced however some contact centres, because of having such a good coverage across England and Wales, may be able to provide the infrastructure to support the development of Family Hubs and/or Supporting Separating Parents Alliances. They could provide not only child contact but become **one-stop shops**. Services available should include direct services to children and young people including information, counselling and advocacy as well as mediation and CIM, SPIP courses, Domestic Abuse Perpetrator Programmes, children's groups, women's groups, legal advice and relationship support. Crucially, the family hub could provide the signposting and gateway to the range of other direct support services for children, which are so sadly lacking at present. Each year, an estimated 20,000 children are going through the process of parental separation for the second or third time during their childhood. These children should be considered a priority for direct support services.
- 5.3 Teachers, GPs and youth workers should also be given information and training on Article 12 services for children, and all family professionals involved with the parents should be able to give information for their children to be able to access Article 12 services. This would require an identified coordination strategy. The

<sup>158</sup> *Family Hubs: the future of children's centres- strengthening family relationships to improve life chances for everybody*. APPG 20 July 2016.

adults in children's lives generally do not know what is available and often act as gatekeepers who control access to services for children. Children whose parents are separating should be allowed to talk to a children's advocate as recommended by the FJYPB.

## **6 RESOURCE PACKS AND DATA COLLECTION**

- 6.1 **The Divorce, Dissolution and Separation Act 2020** which received royal assent on 25 June 2020 could provide a good opportunity to require mandatory, age-appropriate information to be given to children whose parents are filing a divorce application. This could be in the form of a resource pack, which would assist the 75,000, plus children whose parents divorce each year, many of whom will have no information given to them. The pack could include information on child advocacy and CIM schemes together with signposting to Article 12 compliant services of information and consultation with route maps to local, regional and national services. This would provide some 'safety netting' for children in need or at risk. **We therefore recommend that resource packs be provided to children whose parents divorce as part of the new legislative arrangements.**
- 6.2 Given the difficulty in obtaining accurate statistics on the numbers of children involved in either the separation or divorce of their parents, **we recommend that the regulations introduced with the Act could include a requirement that the divorce application records the number of children the couple have, their ages and whether they are the children of both parties.**

## **7 COHORT TWO (OUT-OF-COURT): CHILDREN WHOSE PARENTS GO TO MEDIATION, INCLUDING CHILD-INCLUSIVE MEDIATION**

- 7.1 The personal and financial costs of family breakdown are extremely high. The government is keen to divert as many cases as possible away from family courts to out-of-court settlements facilitated by mediation services. Currently, it is only children whose parents agree to mediate and whose mediators offer CIM who will have an opportunity to be consulted outside court proceedings.
- 7.2 Removal of the vast majority of private law children cases from the scope of legal aid following the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) was intended to provide a powerful incentive for couples to reach out-of-court settlements. However, the number of adults attending a Mediation Information and Assessment meetings (MIAM) plummeted by 47% following the implementation of LASPO (April 2013) and although improving has still not recovered to pre-LASPO levels.
- 7.3 Instead of a steady increase in public spending on mediation, there has been a steep decline with spending down from £8 million to under £6 million per year.<sup>159</sup> Numbers are recovering slowly following the implementation of s10 of the Children and Families Act 2014 which introduced compulsory MIAMs (April 2014) – this being a pre-requisite to obtaining any legal aid for seeking help from courts to resolve disputes as well as being a requirement before the court

<sup>159</sup> *Report of the Mediation Taskforce*, June 2014 – see [www.justice.gov.uk/downloads/family-mediation-task-force-report.pdf](http://www.justice.gov.uk/downloads/family-mediation-task-force-report.pdf).



will issue an application in private law children proceedings or proceedings for financial remedy (unless falling within the categories of exemption). However, in 2014 it was estimated that only 8-10% of separating couples go to mediation; this compares with a target figure of 30%.<sup>160</sup>

- 7.4 The Legal Aid Agency statistics for July to September 2019 indicate that MIAMs increased by 20% in the previous quarter compared to the previous year and stood at just over a third of pre-LASPO levels. Starts increased by 20% although outcomes increased by 22% and are now sitting at just over half of pre-LASPO levels.<sup>161</sup> Whilst moving in the right direction, mediation starts are still only a fraction of their pre-LASPO levels. Increased uptake of CIM must be considered within the context of measures to increase mediation uptake more generally.
- 7.5 The Report of the Mediation Task Force noted that there is incontrovertible evidence from England and Wales and across the globe that children and young people feel powerless and want an opportunity to be heard, and to participate in discussions and negotiations in a variety of ways.<sup>162</sup> While some mediators have been including children in mediation from the 1980s onwards<sup>163</sup> it remains a 'minority activity'.<sup>164</sup> This is despite the evidence that children who report that they were consulted over or influenced the making of contact and residence arrangements report higher degrees of satisfaction with the arrangements.<sup>165</sup> Giving children a voice can lead to more durable agreements; improved parental alliances; better father-child relationships and more cooperative co-parenting.<sup>166</sup>
- 7.6 The Family Mediation Task Force reported in 2014 that some 396 mediators registered with the Family Mediation Council were trained to offer direct consultation with children. However, indications were that few were doing so. The reasons offered for this poor uptake included:
- *inadequate training, supervision and resources*
  - *uncertainty about the availability of legal aid for child inclusive work*
  - *out of date standards and protocols*
  - *lack of a coherent framework for hearing children's voices*
  - *concern about confidentiality and issues of professional privilege*
  - *polarised views about the efficacy and purpose of involving children in adult matters.*

<sup>160</sup> Ibid at para 21.

<sup>161</sup> Ministry of Justice and Legal Aid Agency Legal Aid Statistics quarterly, England and Wales, July to September 2019.

<sup>162</sup> *Report of the Mediation Task Force*, n 159 above, para 84.

<sup>163</sup> Parkinson, L. (2020, forthcoming). Family Mediation. *Family Law*.

<sup>164</sup> Walker and Lake-Carroll, n 41 above, see also Barlow et al, n 3 above.

<sup>165</sup> Butler et al, n 58 above.

<sup>166</sup> Walker and Lake-Carroll, n 41 above.

- *The decision to include children is driven by adults (parents and practitioners) and not by the children's right to participate in proceedings that impact on their future.*<sup>167</sup>

7.7 In 2015, the Final Report of the Voice of the Child Dispute Resolution Advisory Group Advisory Group making strong recommendations about the need for robust practice requirements for child inclusive non-court DR processes. In response, the FMC set up a CIM Working Group to draft an action plan on the recommendations of the Report, culminating in substantial changes to the FMC Standards Framework to include the duties, principles and requirements of CIM, the new competencies, the training requirements and ongoing continuing professional development (CPD) requirements including the following:

- A requirement that all mediators must attend an awareness and understanding day before their accreditation
- Improvements and strengthening of the training for CIM
- CIM training courses must now be approved by the FMC
- There are now ongoing CIM CPD and practice requirements

7.8 In January 2020 the Family Mediation Council reported that of cases conducted in the previous 6 months by mediators who responded to the Family Mediation Survey 2019,<sup>168</sup> 33% involved children aged 10 or above still living at home. Children were consulted in 26% of those cases, up from 14% on the 2017 survey,<sup>169</sup> most likely due, at least in part, to the focus on CIM brought about by the changes to the Standards Framework. However, only 122 mediators completed the 2019 survey. There are 1050 FMC accredited mediators, so this represents a 12% response rate. There are no accurate figures of the numbers of child-inclusive mediations conducted each year and therefore nothing against which to benchmark progress, as the FMC does not keep annual figures (hence our recommendation at 2.7 above). However recent estimates put the figure at around 3,200.

## **8. COHORT TWO: OUT OF COURT - INFORMATION AND CONSULTATION SERVICES.**

8.1 Children whose parents separate could be assisted either by a mediator trained in CIM or a children's advocate who is independent of the court proceedings as suggested by the FYYPB. A mandatory consultation scheme would reach many more children at a pre-court stage than is currently the case when the child's free-standing Article 12 right to be consulted is effectively dependent on the parents' consent. Pilots could compare the relative outcomes for children represented by either a mediator or an advocate. The aim would be to divert cases away from court proceedings by using the power of the child's voice to encourage parents to focus on their child's welfare at a very early stage. Following the meeting, parents could be encouraged/required to take part in the SPIP.

<sup>167</sup> *Report of the Mediation Task Force*, n 159 above, para 83.

<sup>168</sup> *Family Mediation Survey 2019*. Available at: <https://www.familymediationcouncil.org.uk/wp-content/uploads/2020/01/Family-Mediation-Survey-Autumn-2019-Results.pdf>.

<sup>169</sup> *Family Mediation Survey Autumn 2017*. Available at: <https://www.familymediationcouncil.org.uk/wp-content/uploads/2018/01/Family-Mediation-Survey-Autumn-2017.pdf>.

- 8.2 Children could be given the information resource pack recommended above. This would give them age-appropriate information about direct access support services, including information on how to find a Children Panel Solicitor and informing them of their right to seek leave to make a free standing application under s10 Children Act 1989 for an order pursuant to s8 Children Act 1989.<sup>170</sup> Children should be able to whistle blow if they are experiencing violence or abuse as a result of contact or apply to the court to maintain or re-establish contact with family members who are important to them such as siblings, grandparents and other key relatives who may have been lost as a result of parental separation. Currently, children's own free standing applications are so rare that the MoJ does not record the numbers.
- 8.3 The recommendations for funding for CIM in the Voice of the Child Advisory Group Final Report should be implemented and should include funding for children to have the assistance of a children's advocate.
- 8.4 To tie in with the PLWG recommendations around revitalising MIAMS (Recommendation 9): 'the quality and delivery of MIAMS should be more rigorously monitored and consistently maintained', the mediator could be required to confirm whether or not they have discussed CIM with the parents. There could be a box on the C100 that the mediator needs to complete to confirm this.

## **9 PILOTING SCHEMES AIMED AT ADDRESSING INFORMATION, CONSULTATION AND REPRESENTATION NEEDS OF CHILDREN**

- 9.1 Achieving the culture change required to ensure that a child's Article 12 rights to information, consultation and representation are protected and respected, will require the investment of significant resources, both time and monetary. Therefore we would propose that the Department for Work and Pensions or similar funds pilot several projects aimed at ensuring that children's Article 12 rights are protected.
- 9.2 We are conscious that in addition to information and consultation needs following parental separation, children may have significant support needs with no systematic national strategy for addressing these needs. There are well-developed and established systems in place to support bereaved children yet little for children who are grieving the breakdown of their parents' relationship.
- 9.3 **Outline pilot proposals for the wider role out of holistic services for separating parents and for counselling for children alongside cim**
- 9.4 The 'Mediation in Mind' initiative, funded by the Department for Work and Pensions' 'Reducing Parental Conflict Challenge Fund', aimed to gather learning on whether triage and signposting; counselling; communication sessions with a mediator and information on court processes, would support and encourage more parents with specific disadvantages (one parent is out of work; suffering alcohol or drug misuse etc.) to resolve issues through mediation rather than progressing issues to the family court. Given the encouraging

<sup>170</sup> Child arrangements order, specific issue order or prohibited steps order.

results reported in the evaluation of the initiative,<sup>171</sup> provision of this innovative, holistic package of support to a wider cohort of separating parents should be piloted, with eligibility not restricted to parents with prescribed disadvantages.

- 9.5 As part of the Mediation in Mind initiative, in addition to CIM, the children of separating parents were offered one-on-one support from a trained counsellor. Counselling was found to be a powerful tool in helping young people to cope better with the breakdown of their parents' relationship.<sup>172</sup> to provide counselling for children in cohorts 1 and 2.
- 9.6 **Outline pilot proposal for the development of a resource pack for children and young people affected by parental separation**
- 9.7 To establish a twelve-month pilot to develop a resource pack and app for children and young people experiencing family breakdown. The resource pack would be developed in Phase 1 of the project (months 1 to 6). It would be developed for young people by young people using the NACCC and Cafcass networks to access representative groups. In Phase 2 of the project (months 7 to 12) the resource pack would be road-tested by sending it to the children of all parents who file for divorce, attend mediation, use a contact centre or file a private law family court application. Feedback from young people would be sought and evaluated.
- 9.8 **Outline pilot proposal for an interdisciplinary pilot project using family mediators and children's advocates**
- 9.9 Mediators and Children's advocates/caseworkers would work alongside each other to examine the impact of the voice of the child on parental decision making when arrangements for the children are being made, with the aim of achieving early identification of those children who may be in need or at risk within the process of parental separation.
- 9.10 The Pilot Study would seek to identify and intervene early in the cases of children whose parents are most likely to be intractably hostile and subject their children to protracted and repeated court proceedings. The study would examine the impact of how hearing from young people within mediation alongside support for the young person from a children's advocate might assist to identify and meet the needs of children and young people following parental separation, thereby diverting cases from court.
- 9.11 Research and experience have demonstrated that separate representation of the child's views and position via r16.4 Family Procedure Rules 2010 can be a productive and cost-effective way of bringing costly and distressing proceedings to an end. The amplification of the child's voice can have a catalytic effect in breaking up the adversarial dyad of entrenched parental dispute. Further, it allows both parents to give ground and feel good about themselves as parents, not because they have lost an adversarial battle with an ex-partner, but because they have understood the position and needs of their

<sup>171</sup> Barlow and Ewing, n 57 above.

<sup>172</sup> Ibid.

children. The child-centred and child-inclusive focus can then go on to provide the basis for positive co-parenting after parting.

- 9.12 The pilot would aim to replicate this child-centred dynamic much earlier in the process, when parents are likely to be less entrenched, thus saving the courts the costs of repeated proceedings, limiting the emotional damage to the child and sparing them the chronic distress of knowing they are the subject of a bitter dispute.
- 9.13 The pilot proposals would constitute a cost-effective use of both human and financial resources, utilising the existing skills and well-established geographically dispersed networks of FMA trained mediators and NYAS children's advocates.

## **ANNEX 3**

### **Information and Assessment Meetings**

#### **A. Introduction**

- 1 There are a number of different possible 'timings' or 'types' of meetings that could be classed as an 'information and assessment' meeting. Different meetings are highlighted as follows:
  - 1.1 The meeting that clients attend because they want to try mediation (often referred to as an 'intake meeting', pre mediation meeting, or 'assessment meeting' rather than a statutory MIAM). These are often self-referrals to mediation, and currently form a large proportion of work done by mediators.
  - 1.2 The meeting that clients attend because they don't know where to turn and they need to find out about all their options. This is the one that we would hope might come very early on after separation, an Information and Assessment Meeting. This is the main focus of this Annex.
  - 1.3 The meeting that clients attend as a matter of obligation, because they are just about to or are considering launching family proceedings (the statutory MIAM). This is considered in a separate Annex 8, about statutory MIAMs.
- 2 For each of these different meetings, much of the content and associated professional skills required will be similar; for the Information and Assessment Meetings (1.2 above), some key aspects are set out below. Specifically, the 'next steps' following each meeting might differ, as might any forms to be completed. However, the chief focus of each of them is to give the client a safe and confidential space to discuss their situation, have their needs assessed and consider their options.

#### **B. The content of an Information and Assessment meeting**

- 3 The principle of confidentiality will be explained to the client in relation to the meeting (and subsequent meetings where relevant), and the exceptions applicable to confidentiality. The client will be encouraged to share the following information with the assessor:
  - 3.1 Sufficient information to enable proper screening to take place
  - 3.2 Sufficient information about the relationship prior to separation and then post separation, to assist with understanding the issues and enable accurate screening, signposting and consideration of appropriate options

- 4 The assessor will need to make an assessment of suitability for non-court or court resolution processes by screening and then assessing, in the following areas:
- Domestic abuse of all kinds, to include coercive and controlling behaviour, emotional or psychological abuse, physical abuse, financial abuse, sexual abuse
  - Child protection and safeguarding concerns
  - Emotional readiness to engage in a process to resolve issues
  - Mental capacity to engage in a process
  - Drugs or alcohol addiction
  - Support needed, including legal advice, emotional or therapeutic support
  - Appropriate help to consider how best to prepare for court or non-court resolution processes as appropriate
- 5 If screening confirms that non-court options may be appropriate, the following information should be provided to each client:
- 5.1 Once the client has had full opportunity to tell the assessor what is happening from their perspective and what the issues are, the assessor needs to provide such of the following as appears relevant in the circumstances:
- Legal information, provided in a mutual way (as distinct from legal advice).
  - Information about co-operative parenting post separation or at point of separation.
  - Information about the impact of separation on children (to include protective and risk factors to children's wellbeing).
  - Information about the importance of a child focused separation and the voice of the child.
  - Information about the services available (signposting) to separating/separated parents re co-parenting, housing, debt, finance, pensions, legal, and therapeutic support.
  - A full explanation of how financial matters are dealt with and the necessity/importance of providing full and frank financial disclosure.
- 5.2 Options for out of court resolution, to include a description of the process, the benefits, the principles, likely timeframe, likely cost and any potential disadvantages. These various options must all be fully understood by the person conducting the assessment meeting. Where the assessor assesses that a particular process is not suitable, the client must be helped to understand what other options are available.
- 5.3 After a brief outline of the relevant options, more depth/detail should be provided to enable the client to assess whether they wish to proceed with any particular process in which they are interested.

- 5.4 Cost information, provided early in the meeting if it is believed that a client may be eligible for legal aid.
  - 5.5 Information about online processes, if it is believed that this might be suitable for the client/s circumstances.
  - 5.6 The nature and likely timings of any court process, and the expectations from the court for private law children disputes.
- 6 Depending on the outcome of the screening and assessment above, the assessor will need to assess whether a particular process is more or less suitable than another. This decision will preferably be made with the client.

**C. Professional skills needed to undertake effective Information and Assessment meetings**

- 7 In order to assess whether a client will be able to engage effectively in any resolution process, the person delivering these meetings, would be expected to have:

7.1 An ability to:

- actively listen;
- build rapport quickly with client;
- remain impartial and impartially hear perspectives from both sides;
- distinguish between legal advice and legal information, evaluate what legal issues may be relevant and provide legal information in a mutual way;
- create an environment where a client feels emotionally supported;
- mutualise, summarise, reframe, acknowledge in a balanced and impartial way;
- be child focused and assist in finding child-focused, and where appropriate, child-inclusive solutions.

7.2 A good understanding of:

- child development and the effects of separation and loss for children;
- domestic abuse in all its forms, and how to assess whether there is or has been domestic abuse, using appropriate screening tools;
- risk assessment particularly in relation to assessing suitability of differing processes, either a face to face process or one undertaken online;
- attachment theory and the separation process, to assist with assessing emotional readiness;
- legal aid eligibility;
- conflict management;
- the benefits of good communication and risks of poor communication on cooperative parenting;
- the legal processes and procedures;



- mental capacity issues.

8 Where the person delivering the Information and Assessment meeting is expected to have a good understanding of a particular area, we believe they should have appropriate and specific training to provide such a skill.

## **ANNEX 4**

### **Domestic Abuse Cases**

- 1 This Annex is to be read in conjunction with our wider comments about domestic abuse in Chapter 4, section F of our report. We worked with Dickie James MBE of Staffordshire Women's Aid and Dr Liza Thompson of SATEDA in formulating our recommendations. We also took into account the findings of the MoJ Risk of Harm report published in June.

#### **A. Safe screening for Domestic Abuse**

- 2 There is a pressing need for all mediators to have detailed training in domestic abuse screening. We noted that FMC acknowledged this need in their response to the PrLWG consultation last summer and we understand they have requested FMSB to address this.
- 3 The Family Solutions Group are of the clear view that all mediators, whether accredited mediators or working towards accreditation, should have specific training in safe screening for domestic abuse, with ongoing annual CPD requirements to ensure they remain up to date.
- 4 In the MoJ Risk of Harm report, key areas of knowledge for those screening for domestic abuse are listed as the following:
  - in-depth understanding of domestic abuse
  - recognising domestic abuse
  - intersections of domestic abuse with race, religion, culture, disability and immigration matters
  - understanding false allegations
  - impact on children and how they experience domestic abuse
  - early child development and attachment theory
  - understanding of nature and prevalence of child sexual abuse
  - trauma and its effects
  - risk assessment
  - interactions between risks across abuse typologies
  - the law relating to sexual offences
  - identifying vulnerable victims
  - unconscious and confirmation bias
  - understanding abuse across diversity of clients
  - awareness of use of contact to continue abuse
  - what constitutes behaviour change in perpetrators
  - awareness of available support for victims locally and nationally and effective coordination with other agencies
- 5 Some of these key areas of knowledge can be provided by training, but knowledge has to be applied to practice and this is dependent on the effective use of screening tools.

- 6 In the College of Policing evaluation report (2018) for a revised domestic abuse risk assessment tool (DARA) for frontline police officers, it was stated that the revised risk assessment tool, in itself, is not sufficient and must be used alongside an understanding of coercive and controlling abuse and the risk these abusive behaviours pose to victims/survivors, over and above any physical incidents of abuse. **We agree and recommend a similar approach in the training of mediators, to complement their use of approved risk assessment tools.**
- 7 Correctly identifying cases of coercive control, where the abuser is likely to present as wholly reasonable, is especially challenging for all family professionals. We considered the value of checklists, such as the SafeLives DASH risk checklist, and (separately with Dr Thompson) the DARA and DART checklists. These are useful tools but, as with other risk assessments, imperfect if simply used as a checklist. Mediators need to engage with the client and build rapport; only then will the mediator be able to trust his/her own professional judgment about the dynamics in the client's relationship. A checklist is a limited resource if used simply as a list but it is an essential starting point. **We recommend training for mediators in how to use approved risk assessment tools effectively.**

#### **B. Specialist accreditation for mediators?**

- 8 Given our view that training is required, we considered the recommendation in *Creating Paths* for a specialist accreditation for mediators to work with clients in high conflict cases. We support the need for enhanced training in domestic abuse but not for specialist accreditation for high conflict/ and or domestic abuse.
- 8.1 A specialist accreditation would diminish the obligation on all mediators to have good training and understanding of domestic abuse and high conflict (and the distinction between the two) as well as an ability to assess for suitability appropriately.
- 8.2 Clients will not always make their situation clear at the point of booking, which would be necessary in order to ensure an appointment with a specially accredited mediator.
- 8.3 We were also mindful of the article by Rachael Blakey.<sup>173</sup> She analyses a shift in the role of mediators from being primarily facilitative towards being more evaluative. In cases where abuse is not proven and the threshold for legal aid is not met, clients no longer have access to legal advice and support alongside mediation, so the historic path of remaining wholly facilitative and referring a client to legal advice is not possible. Mediators are increasingly having to exercise flexibility, and adopting a more robust and evaluative approach at times to meet the

<sup>173</sup> Blakey, R. (2020). 'Cracking the code: the role of mediators and flexibility post-LASPO'. *Child and Family Law Quarterly* 32(1): 53-74.

needs of clients. In cases of past domestic abuse, we believe this broader understanding of the role of the mediator is important.

### **C. Assessing mediation as unsuitable – the importance of saying no**

- 9 Mediators must understand the importance of assessing mediation as unsuitable in certain cases, even if the client might seem willing, or even keen, to engage. **We recommend this is formally acknowledged as a MIAM standard.** If we are saying ‘no’ to mediation, then:
- We should aim to offer hope and not leave the client with a blanket rejection.
  - We must offer another pathway, be that court or some other pathway into the right support.
  - We must have good links with local services; communication between local agencies is important.
  - We discussed the need for a ‘managed handover’ and this will come from strong working relationships between a range of local agencies. We strongly encourage both local domestic abuse services and mediators to engage with each other to develop a more collaborative way of working, to support vulnerable families.

### **D. Understanding other pathways and accessing the right support**

- 10 Understanding alternative pathways is important to give mediators confidence in assessing wisely, and being clear when to say ‘no’ to mediation. If mediators have limited understanding of other options for clients, they may be more inclined to offer mediation (in their desire to help) especially if the client seems willing. Suggesting other pathways to enable clients to access the right support must therefore be part of any assessment that mediation is unsuitable.
- 10.1 Mediators must trust the family court to provide a safe court process for the client, physically, psychologically and in outcome. The mediators on the Family Solutions Group have experience of domestic abuse victims leaning upon them to agree to mediate as the lesser of two evils, with the victim being more afraid of court than of mediation. We welcome the MoJ Risk of Harm report published in June and hope that this will translate into safe court processes for all victims of domestic abuse. Mediators need to provide reassurance to victims that their cases will be handled safely and that this is the safer route for them.
- 10.2 Mediators must take responsibility for understanding local sources of support for victims of domestic abuse, including but not limited to local domestic abuse services. This will be for the FMSB to decide, but we recommend an annual CPD requirement of local engagement of some sort with those who provide support to victims of domestic abuse. Building links with the local domestic abuse sector is to be heavily encouraged.

- 11 If the client accesses the right support, then at some later stage it may be that there is a pathway back to mediation when the client is in a safe space. Ms James MBE's view is that mediation can be very empowering but only if offered at the right time and in the right way; if offered in the appropriate time and manner, it has the capacity to rebuild lives and empower the client to make his/her own choices in the recovery journey.<sup>174</sup> **We recommend training in the differing safeguards and mediation processes which can be used to ensure any mediation is conducted safely and appropriately.**

### **E. Statement of Practice**

- 12 be The MoJ Risk of Harm report recommends that a statement of practice adopted for cases raising issues of domestic abuse or other risks of harm. The President of the Family Division is invited to promote the Statement of Practice, and that it should be introduced to the Child Arrangements Programme. We believe this same level of understanding and safe practice should apply to the pre-court space, and to mediators who undertake screening for domestic abuse.
- 13 We recommend an adapted 'Statement of Practice' from that in the MoJ Risk of Harm report to reflect a mediator's practice. It should include the following points:
- Allegations of domestic abuse and other safeguarding concerns raised by parents or children will be dealt with respectfully and appropriate signposting for support will be provided.
  - The mediation process and decision-making will be free of any form of bias including gender bias, racism, stereotyping and prejudicial assumptions.
  - Both the mediation premises and the process itself aim to provide safety and security for all clients
  - Mediators will be alert to those seeking to use the mediation process in an abusive or controlling way. Such behaviour will be actively identified and the mediation will be stopped.
  - Mediators will maintain active links with local agencies to ensure coordinated signposting and support for those with issues of harm and risk to children.
  - Children's views on matters affecting them should be invited, in accordance with their rights under the UNCRC.

<sup>174</sup> 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: "Family violence is a very challenging area of practice, due to the professional and client dynamics involved.... Where mediation sessions are handled carefully, the data from parents indicate that the process can be safe and can empower parents to make appropriate arrangements for their children. Some parents reported coming out of the process with workable agreements and an improved capacity to communicate with their ex-partners."

## **Summary of Recommendations**

- 14 We recommend specific training for all mediators in screening for domestic abuse, to include the following:
- training in all forms of abuse, with a specific understanding of coercive and controlling abuse, to complement the mediator's use of approved risk assessment tools
  - training in how to use approved risk assessment tools effectively
  - training in understanding other pathways for those who are victims of domestic abuse
  - an annual CPD requirement of local engagement with those who provide support to victims of domestic abuse
  - training in the differing safeguards and mediation processes which can be used to ensure any mediation is conducted safely and appropriately
  - training in distinguishing between 'high conflict' and 'domestic abuse' cases and the appropriate responses to each

Our training recommendations for mediators are set out in Annex 7.

- 15 We recommend the adoption of a mediator's 'Statement of Practice' as proposed for the court by the MoJ Risk of Harm report, to affirm standards and safe practice when working with families for whom abuse is a factor.
- 16 We recommend that assessing mediation as unsuitable is formally acknowledged as a MIAM standard as part of the standards to be set by the FMSB.

## ANNEX 5

### **Supporting Cooperative Parenting Programmes (SCPPs)**

#### **A. Diversity of current availability of parenting programmes**

- 1 There is a wide range of parenting programmes currently on offer:
  - 1.1 **The DWP has the following programmes, for which pilots are evaluated:**
    - 4Rs 2Ss Family Strengthening Programme
    - Enhanced Triple P
    - Family Check Up Intervention
    - Family Transitions Triple P
    - Incredible Years Advanced
    - Metallization Based Therapy
    - Parents Plus-Parenting when separated
    - Within my Reach
  - 1.2 **South London & Maudsley NHS Foundation Trust has the National EPEC (Empowering Parents Empowering Communities)**
  - 1.3 **Other parenting programmes known to the group are:**
    - Separated Parents Information Programme (SPIP)
    - Parenting After Parting
    - Triple P
    - Solihull Approach
    - Incredible Years
    - Action for Children
    - Kids Come First
    - Cafcass Positive Co-Parenting Programme
    - Strengthening Families, Strengthening Communities, offered across England (not everywhere) by the Race Equality Foundation <https://raceequalityfoundation.org.uk/sfsc/>
- 2 With the diverse availability of parenting support available, all using differing titles, we recommend that **‘Supporting Cooperative Parenting Programmes’** (SCPP) should be the term used for all recognised programmes which seek to support parents in conflict, post-separation, to improve their parental relationship and help them secure the best outcomes for their children.

#### **B. Standards for SCPPs**

- 3 Development of Standards for all SCPP providers is recommended to enable the quality to be assured.

- 4 A kitemarking or quality assurance process was considered and the attendant problems with such processes were identified. Instead, **we recommend** that a body for setting Standards/Accrediting SCPPs should be developed. This would necessarily create a self-regulatory approach with associated voluntary membership of the Standards/Accrediting body. However self-regulation could provide the standards and quality assurance necessary for wider referral to SCPPs before, during and after court.
- 5 It **is also recommended** that initial accreditation is followed up with regular (yearly) monitoring of standards of SCPPs, as a requirement of ongoing membership of the SCPP membership body.
- 6 The West Midlands have commenced setting/defining a professional level of standards including the principles of how those standards are set.

### **C. List of Accredited SCPP providers**

- 7 With the development of a self-regulatory Standards/Accrediting body, an approved list of SCPPs could more easily be created and monitored. The development of an accredited list would make information about accredited SCPPs much more accessible. **We recommend** that a list of accredited and available SCPPs should be created and publicised.
- 8 The development of a self-regulatory Standards/Accrediting body and an approved list of SCPPs will, we believe, lead to an increase of providers.

### **D. Promotion of SCPPs**

- 9 We have a number of **recommendations** to promote SCPPs and ensure widespread attendance by parents:
  - renewed focus on promoting SCPPs through non court pathways, court pathways and other means and at all times, non-court/before court/during court/after court
  - the new Divorce, Dissolution and Separation Act 2020 is used to emphasise the importance of agreeing child arrangements at an early stage with the focus on Cooperative Parenting and attendance at a SCPP
  - a requirement for mandatory attendance at a SCPP alongside the mandatory attendance at a Statutory MIAM prior to an application to court.
  - those who come into contact with the separating family, schools, GPs, Health Visitors, Youth workers, CAB, Family Hub are provided with details to signpost parents to attend a SCPP
  - signposting to a SCPP at early Information and Assessment meetings
  - signposting to a SCPP as part of the Statutory MIAM and attendance at mediation
  - increased focus on educating fellow professionals in the elements/components/benefits of SCPPs



- all legal professionals, including judges, attend a shortened SCPP and child-focused course (tailored for the legal profession) so they understand the benefits and to encourage referrals before court proceedings are issued

## E. Professional Collaboration and Mapping

- 10 Collaboration between professionals such as mediators, family lawyers and parenting specialists is to be encouraged and recommended, to develop promotion of SCPPs in non-court, during court and post-court work.
- A SCPP Standards/Regulatory body should develop means to achieve this collaboration.
  - A mapping of associated professionals to participate in collaboration/referral pathways is undertaken. This could be undertaken by a SCPP Standards/Regulatory body. DWP-funded local resources are assisting in starting to map local services within specified local areas.
- 11 If there is to be a new ‘Separated Families Hub’ (or if the new Co-Parent Hub is to be extended), **we recommend** that there should be a section aimed at legal professionals which includes good local and national resources for other professionals (be it child therapists, counsellors, parenting programmes etc). It can be overwhelming, for the professional as much as the clients, to know what is available for clients. So, in line with encouraging appropriate referrals at an early stage, there needs to be access to local and national resources. A proper ‘mapping’ of what is available at a local and national level is needed and kept up to date.

## F. Professional Referral Pathways

- 12 Increasing referral pathways is seen as a way to develop the use and benefits of SCPPs.
- 13 We recommend that a SCPP Standards/Regulatory body could develop referral pathways to encourage greater cross-referral between mediation services and SCPPs. In particular it was noted from research into SCPPs that the greatest benefit from SCPPs was the learning/insight gained on a SCPP resulting in seamless and rapid referral to mediation. **We therefore recommend:**
- that referral to mediation should be embedded within SCPPs
  - that referral to SCPPs should be embedded ahead of/whilst in mediation
  - that approved SCPPs should be developed for delivery by mediation services to streamline the use and value of SCPPs alongside the use of mediation

## G. Supporting Separated Families Alliances and SCPPs

- 14 There has been a development of Supporting Separated Families Alliances in some areas of the country. An example of two is give here with recommendations for key functions that could be undertaken by Supporting Separated Families Alliances.
- 15 The **Dorset Supporting Separated Families Alliance** steering group met the Covid-19 restrictions came into force. The group consist of those involved in Early Help in Dorset Council and BCP council, those supporting the local delivery of the DWP trials in those areas and the CAB. The approach is first to understand what is available to support separating families within the area so that opportunities to signpost to this support can be made. To achieve this, the wider workforce that interfaces with families need to have the knowledge, skills, attitudes and behaviours that support separating parents.
- 16 In the **West Midlands** a Family Alliance Board is to be set up and will become a body of key stakeholders in the wider family breakdown system in the West Midlands region. Its purpose will be to ensure that the experience and expertise of professionals who work in the field of family breakdown, and children and families who experience it first-hand, are shared across all organisations throughout the West Midlands. This will help ensure that the work of the Alliance is relevant, accessible and impactful; and above all reflects the need to improve the support for children and families going through a family breakdown in the West Midlands.
- 17 The West Midlands Family Alliance Board will be engaging with Key Stakeholders and will then set an agenda to consider the local framework and develop a representative body to:
- act as a sounding board, providing intelligence and insight from those affected by family breakdown on key and emerging issues in the West Midlands
  - inform the National Alliance's strategic approach and priority setting.
  - share best practice across the region of the West Midlands
  - help the organisations within the Alliance, and those further outside the Alliance, to understand the full repertoire of support available to those experiencing family breakdown, and thereby assist the National Alliance reach a wide audience and range of areas in England and Wales
  - help to champion the work of the Alliance to other stakeholders
  - provide those involved in a family breakdown in the West Midlands with a communication channel to key stakeholders, and an opportunity to hear feedback
  - continuously strive to improve the family breakdown system in the West Midlands
  - continuously strive to improve outcomes for children and families experiencing a family breakdown in the West Midlands through raising awareness of the resources available locally and nationally
- 18 **We recommend** that that Supporting Separated Families Alliances should:

- 18.1 be required to map SCPP and interventions within their own area;
  - 18.2 ensure knowledge and access to national programmes is promoted;
  - 18.3 make information available about their local mapping of SCPPs to separated parents and family professionals within the alliance.
- 19 It was noted that Family Hubs could be used in the afternoon and/or evenings to provide venues for SCPPs to be run.

#### H. Criteria to be developed for Content of SCPPs

- 20 Professor Gordon Harold has been commissioned by the DWP's Reducing Parental Conflict programme to advise on the required components/elements of SCPPs. (This may be delayed because of Covid-19.) In addition, current evidence commissioned by the Reducing Parental Conflict Programme should inform any out-of-court pathway to resolve parental conflict.
- 21 Meanwhile, **we recommend** that all SCPPs should include the following components/elements:
- safeguarding principles and standards
  - emotional health and mental health of the child alongside psychological elements
  - discussion of lack of/no relationship with one parent
  - improving communication/reducing conflict
  - support for parents to develop and secure the best outcomes for their children
- 22 Whilst awaiting the information regarding the components/elements of SCPPs from Professor Gordon Harold we sought information from Cafcass regarding the components/elements of their Separated Parents Information Programmes.<sup>175</sup> Specifically, why and how they undertake the elements/components identified:
- a consistent focus on the child's perspective, the effects of conflict on the child, and keeping the child 'in the room'
  - both parents normally benefit from attending separate groups, to allow learning that might not otherwise take place
  - participants are likely to need preparation and clarification of the programme aims and will benefit from follow up
  - facilitators and the material need to engage with participants issues, without getting diverted by trying to solve individual issues
  - a group of mixed gender and mixed perspective participants along with material that brings out these different perspectives can be effective
  - pre-court and in-court participants can both benefit from being in the same group

<sup>175</sup> Research about SPIPs is available at

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/181695/DFE-RR140.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/181695/DFE-RR140.pdf) and [http://orca.cf.ac.uk/103374/3/spip\\_report\\_final.pdf](http://orca.cf.ac.uk/103374/3/spip_report_final.pdf)

- there is an optimal group size, probably between 8 and 12 participants (smaller groups do not find sufficient mix of perspective, and can be easily distracted by individuals)
- engaged and well-trained facilitators are important working in pairs, ideally with male and female facilitators
- an approach which blends individual and group work, face-to-face and digitally delivered material, is likely to be the most effective
- care needs to be taken to ensure that the material is relevant to BAME communities, and can be delivered to those for whom English is not their first language or who have sensory impairment
- material which includes:
  - the child's perspective, using audio visual presentation
  - the separation journey
  - emotional well being
  - self-assessment of strengths
  - activities which share and challenge perspectives, and which reframe ways of thinking about problems
  - effective next steps to start to change behaviours, for example behaviour modelling training
  - helping parents to consider support networks
  - information about help that is available
- The work does need to be delivered in a framework that supports consistent and high-quality delivery

23 Whilst awaiting information regarding the components/elements of SCPPs from Professor Gordon Harold, we sought information from an independent parenting programme provider<sup>176</sup> regarding the components/elements of their SCPPs. Their information provided the following:

- child development and the impact of parental conflict on children; attachment-strong relationships, grounding in neuroscience, child development and strengths-based parenting
- the theory of relationships, understanding conflict (constructive and destructive), and behaviour as communication
- the legislation and statutory guidance related to separated parents, understanding the law regarding child protection and safeguarding procedures
- understanding appropriate action that might be required to reduce risk and harm to children if parents are unable to successfully engage in the programme
- understanding the impact of physical and psychological harm that children can suffer before, during and after family separation and family breakdown – developing brains are sculpted by their experience in the context of relationships, functions of the neocortex and the limbic system (e.g. upstairs brain vs downstairs brain), damage from adverse experiences can be mitigated by good relationships and security

<sup>176</sup> The Parenting Apart Programme

- discovery and positioning, understanding basic therapeutic principles – empathy, congruence, unconditional positive regard; voice of the child – wellbeing, wants, wishes, worries, discovery – the current situation, and positioning – the emotional state of the parents
- changing the mindsets – educating the parents; relational re-connection, navigating conflict (constructive or destructive), bringing parents back (from conflict) – amplifying the voice of the child
- parenting: offering support to both parents together; developing a parenting partnership relationship; open-reflections and sharing ideas, maintaining a child focus, validating whilst challenging, supporting consensus around child arrangements.
- documenting and compiling a working parent agreement; relational trust and mutual respect, communicating information about children’s emotional wellbeing and positive mental health to parents.
- The importance of good record keeping, robust report writing and accurate information sharing.

## **I. Summary of Recommendations**

- 24 The term “Supporting Cooperative Parenting Programmes’ (SCPP) should be used for all recognised programmes which seek to support parents in conflict, post separation to improve their parental relationship and help them develop and secure the best outcomes for their children.
- 25 A researched pilot should be undertaken to ascertain the reduction in court use by attendance at a funded SCPP in the pre-court space.
- 26 A researched pilot should be undertaken assessing available digital information for separating parents, and to ascertain the reduction in court use through engagement with digital sources.
- 27 All SCPPs should include the five components/elements identified in para 21 above.
- 28 Standards should be developed for all providers to enable the quality of the current diverse availability of SCPPs to be assured.
- 29 A body for setting standards and accrediting SCPPs should be developed, based on a voluntary and self-regulatory approach.
- 30 Initial accreditation should be followed up with regular (yearly) monitoring of standards of SCPPs.
- 31 A listing and availability of SCPPs should be created and publicised.
- 32 There should be renewed focus on promoting SCPPs through non-court and court pathways.
- 33 There should a requirement for mandatory attendance at a SCPP alongside the mandatory attendance at a Statutory MIAM.

- 34 All mediators should signpost to a SCPP as part of the Statutory MIAM and attendance at mediation.
- 35 There should be increased focus on educating fellow professionals into the elements/components/benefits of SCPPs.
- 36 All practitioners, including judges should attend a shortened SCPP/SPIP/Parenting/ child focused course (tailored for the legal profession).
- 37 The new Divorce Act should be used to emphasise the importance of agreeing child arrangements at an early stage with the focus on Cooperative Parenting.
- 38 The proposed Standards/Regulatory body should develop the means to promote SCPPs in non-court, during court and post-court work.
- 39 Mapping of family professionals to participate in collaboration/referral pathways should be undertaken, potentially by the proposed Standards/Regulatory body.
- 40 For any new 'Separated Families Hub', or extended new Co-Parent Hub, there should be a section aimed at Legal Professionals, including local and national resources and a regularly updated 'mapping' of what is available at a local and national level.
- 41 The proposed Standards/Regulatory body should develop referral pathways to encourage greater cross-referral between mediation services and SCPPs:
- referral to mediation should be embedded within SCPPs.
  - referral to SCPPs should be embedded ahead of/whilst in mediation.
  - development of approved SCPPs should be developed for delivery by mediation services.
- 42 Supporting Separated Families Alliances should:
- map SCPPs and interventions within their own area.
  - promote knowledge and access to national programmes.
  - make available information about their local mapping of SCPPs to separated parents and family professionals.

## **ANNEX 6**

### **Key Benefits of the IFLA Arbitration Scheme**

By Nadia Beckett FCIArb (Chair, Forum of Family Arbitrators)

#### **1. The Children Scheme**

The Scheme can be used for the usual private law disputes concerning children. The arbitrator's decision under the Children Scheme is called a "Determination".

#### **2. Arbitration v Court**

Court proceedings are daunting, complicated and expensive. In family cases they inevitably increase conflict and confrontation during an already distressing period. In contrast family arbitration is less formal and easier to navigate.

Whilst arbitration looks and feels like litigation it has many of the qualities of mediation. The arbitration can only take place if the parties agree to be bound by the family law arbitration rules. They must agree to arbitrate, and this sets arbitration apart from litigation. As with mediation, the parties must agree to use arbitration to resolve the dispute in question. There must be agreement on the arbitrator and agreement on the process. This makes arbitration essentially collaborative in its nature even though the parties agree to have their dispute adjudicated by a third party. Notwithstanding this, the parties have far more control over the process than they do if engaged in litigation.

#### **3. The key benefits of arbitration are:**

##### **a. Speed**

In the majority of straightforward children disputes a determination can be made within 4-8 weeks of the arbitrator's appointment.

##### **b. Choice**

The parties select the arbitrator. If they are unable to agree, the arbitrator can be selected by IFLA. This also allows the parties to choose an arbitrator who has the specialist knowledge or experience required by the issues.

##### **c. Flexibility**

The parties 'own' the procedure. They tailor the process to their own needs and decide how the arbitration is to be conducted such as on paper, by telephone, video, or face-to-face meetings. The arbitrator will assist the parties with the preparation of their cases and the parties can communicate directly with the arbitrator who is not constrained by court procedure.

##### **d. Control**

The parties 'own' the issues. They decide and control which issues the arbitrator deals with. The arbitrator does not consider or rule on the issues which have been

agreed although these can be included in the determination to ensure that the parties achieve an outcome which is binding on all issues.

e. Confidentiality

The process is private and confidential (subject to the usual exceptions in relation to safeguarding and protection from harm or where there is an over-riding obligation in law to disclose).

f. Consistency

The appointed arbitrator will deal with the dispute from start to finish. A number of obvious advantages flow from this consistency.

g. Defusing landmines

The speed and collaborative aspects of arbitration reduce conflict.

h. Cost savings

The ability to streamline the procedure will usually lead to significant cost savings. The arbitrator's fees are shared and fixed at the outset. Anecdotally the current level of fees being charged is between £1,000 and £5,000.

i. Finality

The Arbitrators decision is final and binding.

#### **4. Arbitration and the litigant in person**

Arbitration is suitable for all clients regardless of their financial position. It is particularly well suited to the litigant in person. The arbitrator can provide the parties with guidance and assistance in navigating the process including helping with the instruction of experts and drafting letters of instruction.

#### **5. Arbitration and Mediation- a match made in heaven**

Mediation often breaks down as a consequence of the parties failing to agree all issues. This is where arbitration works well with mediation. The parties can refer a single issue to arbitration, and this is a quick, efficient and cost-effective way of resolving the dispute without having to 'throw out the baby with the bathwater'. Any agreements reached in mediation can form part of the determination.

An early agreement to arbitrate unresolved issues prevents the weaponisation of mediation by the threat of litigation.

Finally, mediation can call upon arbitration to give an early, neutral evaluation to help couples move forward. This allows couples to retain the autonomy that mediation provides whilst also enjoying one of the key benefits of arbitration.



## **ANNEX 7**

### **Training Required for Mediators, Legal Professionals and Judges**

#### **A. Regulation and Training for Mediators**

- 1 The accreditation of mediators is regulated by the Family Mediation Council (FMC) through the Family Mediation Standards Board (FMSB). The competency, training, supervision and accreditation process requirements are set down in the 'FMC Manual – Professional Standards and Self-Regulatory Framework' and overseen by the FMSB and its independent sub-groups. Only mediators who attend and successfully complete an approved Mediation Foundation training course (which are subject to assessment and audit), and who demonstrate defined competencies through a demanding and extended formal accreditation process, and maintain these through meeting CPD and supervision requirements, are granted the qualification FMCA (Family Mediation Council Accredited). In addition, all accredited mediators are required to comply with the FMC 'Code of Practice for Family Mediators' and have annual ongoing professional training and supervision requirements.
- 2 It is important to recognise that the term 'mediator' is not a protected title; any person, with or without training or professional experience, operating outside of the FMC Accreditation process can choose to call themselves a mediator. Such individuals are not subject to any regulatory requirements or supervision, and present a potential risk to clients and their children. The MoJ Family Procedure Rules on the 'Conduct of MIAMs' declare that 'only an authorised family mediator may conduct a MIAM'. The FPR defines an 'authorised family mediator' as 'a person identified by the FMC as qualified to conduct a MIAM'. Accordingly, the FMC asserts that 'qualified' is represented by a mediator holding FMCA status.
- 3 The mediation standards and their development are subject to ongoing review by both FMC and FMSB, to ensure that the highest standards are maintained and that required improvements are implemented. For example, additional formally assessed training and accreditation processes have been introduced for child inclusive mediation, in recognition of its importance in providing a holistic perspective for families in mediation.
- 4 The FMSB are due to publish, hopefully later in 2020, standards for the delivery, content and conduct of the statutory MIAM and for assessment and information meetings generally, carried out by mediators prior to mediation taking place. As well as increased training for understanding domestic abuse and its impact on potential participants to mediation to ensure safe screening of domestic abuse (see below), there are likely to be other areas identified by the FMSB working group as part of their work on drafting new standards for MIAMs, that would benefit from the introduction of new mandatory training requirements for mediators.
- 5 As stated in Annex 8 (para 32) on statutory MIAMs, we trust the FMSB working group will include in the standards a requirement for accredited

mediators to understand and consider the full range of options available to resolve issues, with strong links with local providers, such as arbitrators, collaborative practitioners, family consultants and child psychologists. Although the legislation is designed to encourage parents to consider mediation, information is also given as appropriate about other processes for resolving issues.

- 6 The importance of sensitive and effective screening and assessment of individuals that have been affected by domestic abuse, has always been highlighted in mediation training and practice. However, following the shortfalls in the handling of domestic abuse issues highlighted in the recent MoJ Risk of Harm report, it is recommended that there is an enhanced focus on the quality of delivery and implementation of domestic abuse screening and assessment by mediators, specifically:
  - 6.1 Clarifying the role of mediators in identifying risk factors, assessing, signposting and supporting individuals affected by domestic abuse
  - 6.2 Developing a mandatory 'Domestic Abuse Statement of Practice' for mediators
  - 6.3 Developing a deeper understanding of domestic abuse and its impact on victims/survivors
  - 6.4 Developing a deeper understanding of the risk that coercive controlling behaviours have on victims/survivors, notwithstanding a lack of or minimum use of physical abuse
  - 6.5 Identifying additional/enhanced domestic abuse competencies and tools required by mediators
  - 6.6 Defining additional domestic abuse training/CPD requirements
  - 6.7 Ensuring that effective interfaces with relevant domestic abuse support services are in place
  - 6.8 Ensuring that the distinction between domestic abuse and 'high conflict' cases is being effectively recognised and managed
  - 6.9 Recognising the very important potential for domestic abuse issues to undermine the appropriateness of mediation and 'working together' approaches, and even to potentially cause harm. This requires mediators to go beyond screening, proactively seeking evidence that domestic abuse is not undermining the basic principles of mediation, and to ensure, where mediation is not suitable, that such cases are directed accordingly.
- 7 We recommend that mandatory training is introduced for mediators to ensure that the above areas are sufficiently understood, prior to FMCA being awarded, or for those already FMCA, to attend a mandatory updating course, prior to reaccreditation. We recommend that the FMC/FMSB consider drafting

specific competencies that would need to be covered in any mandatory training.

- 8 We further recommend that mediators undertake regular updating domestic abuse training to ensure continued reflection and application of initial training to ongoing professional practice as well as being kept up to date.

## **B. Regulation and Training for Legal Professionals**

- 9 The definition 'legal professionals' includes
  - Solicitors
  - Barristers
  - Chartered Legal Executives
  - Paralegals
  - Judges
  - Magistrates
  - Family Arbitrators
  - Lawyer Mediators
- 10 The recommendations in this paper (written on a personal basis by a practising family solicitor, on behalf of the Family Solutions Group) focus on the solicitors' profession but the recommendations are equally relevant to all in the Legal Profession including the judiciary.

### **What are the current difficulties and why does it need to change?**

- 11 Where funds permit, solicitors are often people's first port of call when dealing with family issues. Clients are vulnerable, have complex needs at the time of relationship breakdown which they do not understand, nor do they know how their choices will impact their children. The family practitioner has a big influence over what path the clients take and whether/when the client goes to court, in financial and children issues.
- 12 A good family lawyer has emotional intelligence, understands the stages of grief in relationship breakdown and the impact of conflict on children, but also issues around mental health and addiction, including depression, personality disorders and the impact of domestic abuse. However, training on these important issues and 'softer skills' is voluntary. There is also a lack of understanding of the available child-centred research and the impact of parental conflict on children.
- 13 With many lawyers having had no or limited training on such important issues, how they practise (in particular how child-focused they are) will depend on their personal life experience or whether they have had appropriate exposure in the firm at which they have been trained or work. Currently it is down to the quality of that particular solicitor or firm whether they refer clients out to other

professionals, at an early stage before court, or whether clients are given appropriate information/resources.

- 14 Children are vulnerable to parental conflict which can be fuelled by more litigation-focused solicitors. A glance at the main legal directories illustrates the qualities in the Solicitors Profession which are still revered e.g. 'A brave and persistent fighter for his clients'. They may be focused upon litigation strategy and the overall outcome for their client, rather than the path to get there, or the longer-term impact on the family relationships. There is little awareness of the risk to children from prolonging and intensifying the period of parental conflict. While some judges (usually at a final hearing) can be critical of a litigant's (and their lawyers') approach, by that stage the damage will have already been done.
- 15 Another weakness in the current system is the lack of formal training in dispute resolution options. Lawyers are trained to provide legal advice and defend positions; there is no required training in other processes, such as the differing forms of mediation, (mediation together, separate spaces or hybrid mediation), arbitration, mediation with arbitration, collaborative practice, private FDRs. A clear working knowledge of the options and of the local practitioners available to deliver those options is needed.
- 16 Finally, there is a lack of inter-disciplinary practice. Many solicitors lack sufficient knowledge of the important role of other professionals (psychologists, psychotherapists, relationship counsellors, family therapists, child therapists) and lack understanding of local non-lawyer experts (particularly in London compared to smaller towns/areas where inter-disciplinary practice may be better).

### **Current Regulatory framework**

- 17 All Solicitors are regulated by the Solicitors Regulation Authority (SRA) and members of the Law Society. In addition, some are also members of Resolution. The SRA or Law Society have been unable to confirm the number of solicitors in England and Wales who practise family law but we are aware there is a significant number who choose not to be members of Resolution. Within Resolution most of its 6,500 members are family solicitors, and a minority are other family professionals.
- 18 In joining Resolution, members agree to abide by a Code of Practice: '... which emphasises a constructive and collaborative approach to family issues and encourages solutions that take into account the needs of the whole family, particularly in the best interests of any children.'
- 19 Resolution have a wealth of useful information on their website on the Code and in support of its approach. They also offer training for new and existing members on a wide range of subjects, to broaden the skills of its members when working with separating families. They have, for many years, been champions of dispute resolution processes so that families avoid unnecessary court applications.

- 20 The Resolution Code of Practice is endorsed and referred to within the Law Society's Family Law Protocol (first published in 2002, latest edition, 4th edition 2015). This good practice guide:
- has had to date the endorsement of all the Presidents of the Family Court;
  - applies to all family practitioners; and
  - emphasises the need to achieve resolution by non-court routes, with court proceedings being a last resort.

The Law Society's Family Law Protocol should be the standard.

- 21 In practice:
- the Law Society Protocol is not enforced;
  - it is rarely referred to by the overall legal profession, including the judiciary;
  - enforcement by Resolution to sanction members for breaching its Code of Practice is limited.
- 22 The consequence of this is a profession with unenforced regulations, who are not held accountable for the way in which they conduct their practice.

### **Accountability of the Solicitors' Profession**

- 23 In the light of clear research which evidences harm to children caused by parental conflict, the manner in which legal professionals engage with their clients is potentially an issue for child mental health.
- 24 Solicitors represent a parent but a child's need to be protected from harm is unrepresented in most private law proceedings. If the child is not independently represented and the Law Society's Family Law Protocol is not upheld, then the child may be at risk.
- 25 When representing a parent in private law children proceedings the focus is, or should be, on the child whose welfare is paramount. That is not so in money cases where the focus is on achieving a financial outcome and where any children are merely a 'first consideration' for the court. It is easy in money cases to lose sight of the impact on children of aggressive litigation.
- 26 We believe any practice, legal or other, which has the potential to harm children should be regulated, with practitioners held to account for their conduct.

- 27 There are many family solicitors whose practice adheres to the Law Society Protocol, who work hard to support their clients to resolve issues away from court, wherever possible. However, this is not uniform across the profession. There are certain firms which actively discourage Resolution membership and non-court options, and/or delegate the work to the most junior lawyers (who have the least life experience). It is a not uncommon business model to initiate a court process without first exploring other means for the clients to resolve their issues. It is those firms in particular whose practice we challenge.

### **Our Recommendations**

- 28 We invite the Law Society/SRA to introduce compulsory training and to redress this lack of accountability. In particular:

- 28.1 To create a new edition of the Law Society Protocol, in line with the new divorce legislation, which emphasises the requirement to consider non-court resolution methods, outside referrals and resources, particularly early on;
- 28.2 To expand the current check list of points to cover at a client first meeting, as the current one is very brief;
- 28.3 To enforce the Protocol for all solicitors who practise in Family Law;
- 28.4 To require completion of a training module by those who wish to work with families going through separation where there are children. The training would focus on:
- i. The harmful effects on children of parental conflict
  - ii. The importance of enabling the voice of the child to be taken into account in decisions being made which affect the child
  - iii. Screening and awareness of the high incidence of domestic abuse (including controlling and coercive behaviour)
  - iv. Mental health, personality orders, and addiction issues, which are increasingly a feature of high conflict cases
  - v. The use of Parenting Plans (e.g. Cafcass version, Resolution online version) and the benefits of Parenting Programmes (e.g. SPIP, Parenting After Parting)
  - vi. The full range of alternatives to court proceedings
  - vii. The importance of an inter-disciplinary approach, to ensure the family's wider needs are met

Resolution already deliver this type of training. We invite the Law Society to introduce this or similar training as mandatory for any practitioner, whether a member of Resolution or not, when working with any client where there is a child of the family.

- 28.5 To review the Continuing Competence Framework of self-regulation. We recommend that training in the psychological consequences of family separation, on parents and children, should be an essential CPD

target for all family lawyers, especially during the first year of qualification with regular updates to follow. In addition, we recommend all practitioners attend a shortened SPIP/Parenting/ child focused course (tailored for the legal profession) so they understand the benefits and to encourage referrals before court proceedings are issued;

- 28.6 Create accountability for these training and practice requirements by introducing a mandatory return to the SRA evidencing their CPD training as a family practitioner, their inter-disciplinary practice and their referrals to out-of-court options.
- 29 We would welcome any research or data from the Nuffield Family Justice Observatory (or others) on the role of legal professionals and the wider impact of their practice upon family relationships and, particularly, on the experience of the child.
- 30 If there is to be a new 'Separated Family Hub' we recommend a section aimed at legal professionals. Included should be good local and national resources or other professionals (be it child therapists, counsellors, parenting programmes etc). It can be overwhelming for the professional, as well as the client, to know what is available for clients. So, in line with encouraging appropriate referrals at an early stage, there needs to be a proper 'mapping' of what is available at a local and national level which is kept up to date.

### **C. Judicial Training - by HHJ Martin Dancey**

- 31 There is concern within the PrLWG and the Family Solutions Sub-Group that enforcement/encouragement of the requirement to attend a statutory MIAM is inconsistently applied by judges.
- 32 This may reflect:
- a lack of understanding by some judges of the purpose and benefits of MIAMs
  - a lack of judicial confidence in mediation (coupled with a perception that the only purpose of a MIAM is assessment for mediation)
  - poor experience of MIAMs in a particular area, especially if they are perceived to be a 10 minute telephone 'sign-off' for exemption
  - unavailability/patchy availability of mediation in some areas/regions.
- 33 What needs to be done? I suggest this is a staged process. It may be there is some justification for the perception that MIAMs are inconsistently delivered around the country. If that is so there is little point trying to train the judiciary so that they have confidence in them.
- 34 The first stage is therefore to see through the reinforcement of MIAMs themselves – to clarify their purpose and to ensure rigorous accreditation and training of all who deliver them. The short point is that those who train the

judges must first themselves have justifiable confidence in the product they are selling. To train now would be premature and only serve to reinforce doubts about the MIAM system.

- 35 The Judicial College delivers training to judges at the point that they are ticketed to do private law (section 8) work – induction training – and ongoing (continuation training) annually. It is for judges to decide what continuation training they need. Courses are typically run for about 70 judges at a time. There are some 1300 full time family judges in addition to ticketed part-time deputy district judges and recorders.
- Mediation, MIAMS and the need to consider non-court dispute resolution (NCDR) is already an integral part of the private law induction course
  - The Judicial College does not have responsibility for training magistrates because of the numbers involved. Legal adviser training leads are included in some training (e.g. private law roadshow training). The family magistrates deal with a significant proportion of private law work (in Dorset roughly 50%).
  - The Judicial College also delivers online training through its Learning Management System (LMS).
- 36 In order to deliver consistent training to all family judges, magistrates and legal advisers I suggest online training comprising a professionally made video explaining the purpose and benefits of MIAMs, how they are delivered, showing a MIAM in action (making clear that it is about exploring all forms of support as well as mediation assessment) and some parents giving their (positive) experience of MIAMs. This can be backed up with online materials.
- 37 The video could be a collaborative production by FMC/FMSB/Judicial College/Nuffield FJO.
- 38 I would also suggest that the President of the Family Division (PFD) is asked to endorse the training with an online message to all family judges and magistrates effectively asking them to treat the online training as mandatory.
- 39 The PFD could ask Designated Family Judges to arrange local training, using the video materials and local accredited mediators. This might include ‘mock’ MIAMs and include local practitioners and Cafcass.
- 40 Not directly on point, but relevant, is the separate question of the weight given by the courts to parenting agreements reached through mediation (see Annex 10, section B). We have discussed a range of possibilities:
- parenting agreements being converted into consent orders in existing proceedings (not necessarily a favoured outcome but possible in cases where it really is needed)
  - a court or central register of parenting agreements (giving perception at least of formality and seriousness)



- parenting agreements being given weight by the court unless there had been a change of circumstances or otherwise the welfare of the child required that it be departed from
- 41 The last point would, I believe, require either President's Guidance or a rule change. It may be that this could be co-ordinated with the MIAMs training (given that it will take some time to get to the point when training can be delivered).
- 42 If there is to be a requirement in a new Part 3 Protocol (Annex 10, section C) on practitioners to certify they have considered/offered NCDR, that must be backed up by the judiciary. The importance of NCDR should also be dealt with in training to ensure proper understanding of the reasons behind it and an appreciation of the importance of court sanction where the Protocol is not followed.

## ANNEX 8

### **Statutory MIAMs**

- 1 The PrLWG requested that we address a number of specific points as regards the statutory MIAMs and these are set out below. The current legislation provides for statutory MIAMs to be conducted by authorised family mediators, with a presumption that suitability for mediation (alongside consideration of other Dispute Resolution (DR) processes) will be assessed at the statutory MIAM.
- 2 The skills and competencies to undertake statutory MIAMs are laid down by the FMC Standards Framework.

#### **A. Costs**

- 3 The cheapest option for parents without legal representation is currently to issue a court application, rather than attempt to resolve issues with the help of professionals. The mediation community have been asked to engage with MoJ to address this disincentive. The Family Mediation Council has submitted a comprehensive proposal to the MoJ with the aim of significantly increasing the numbers of cases in which parents opt for mediation or other DR process rather than the court process. The FMC states in that proposal:

We believe the objective of supporting potential litigants to arrive at their own sustainable outcomes can be achieved by three fundamental steps:

A. Making Mediation Information and Assessment Meetings (MIAMs) free to all Applicants and Respondents at the point of delivery, so that the resistance on the part of Respondents to having to pay for a meeting (to deal with an issue that they might prefer not to have to face) is avoided.

B. Maintaining vigilance within the gate-keeping process and robustly enforcing the statutory requirement that Applicants attend a MIAM before making an application, unless exempt.

C. The provision of a remotely accessed Duty Family Mediator Scheme which would facilitate the immediate provision of information about family mediation or other DR options before parties become too entrenched in the litigation process.

- 4 The MoJ is considering this proposal, which we endorse.
- 5 Providing free MIAMs will not mean that mediation or any other process which follows will be free (unless eligible for legal aid). However, parents would be better informed. They would know more about the court's expectation that they resolve issues themselves; about the benefits for their child in doing so;

about the timescale of a court case; and about the way in which mediation or some other process would work. They would thus be better equipped to make an informed decision, and the prospect of paying to resolve issues out of court might then not be the deterrent that the initial requirement to pay for a MIAM now is.

6 We also considered whether MIAMs could be free to all before issuing the court application, but thereafter not free. The aim would be to create an incentive on all would-be parties to ensure they have attended one before issuing. If they have not, the Judge would be expected to direct them to attend a MIAM as an activity direction pursuant to Children Act 1989, s 11A. This is problematic, however, as there is judicial reluctance to make an activity direction which requires a parent to incur fees. The Judge in our group thought much the easiest route is to make MIAMs free across the board.

7 In addition:

7.1 We considered a reduced court fee if a MIAM has been attended. This seems to us to be fraught with complications. Those who legitimately claim a MIAM exemption should also have a reduced fee and this will create an incentive for parents to find an exemption to be eligible for the reduced fee; the reduction thus could be counter-productive. It also implies that it is possible to issue without a MIAM and with no exemption simply by paying the higher fee, whereas in the new 'working together' scheme everyone without an exemption should attend a MIAM.

7.2 As an alternative, we recommend:

7.2.1 Consideration of refunding the court fee where mediation has proceeded and an agreement has been reached (which may or may not then proceed by way of a consent order).

7.2.2 Consideration of a staged fee process, similar to the civil court, and which would take into account the attendance or otherwise of MIAMs or mediation.

7.2.3 Mirroring the practice in the small claims court, where we understand the fees are staged into 3 parts: at issue, at allocation and for the hearing. Parties receive a refund if their case settles any time up to 7 days before the hearing, thereby creating a financial incentive to agree matters out of court.

## **B. Engagement of the other parent (the Respondent)**

8 The simplest way to engage a Respondent in a consideration of options for resolving issues out of court would be for the courts to take a much more robust approach to adjourning the proceedings and directing the Respondent to attend a MIAM. This should also apply to Applicants where they have not attended a MIAM and have failed to show the court that there were good reasons not to consider mediation or another process as an alternative to court.

- 9 It will be essential that solicitors, court staff, and judges all understand the expectation that both parents attend a MIAM. We refer to Annex 7 section C which sets out the training recommendations for the judiciary, provided by HHJ Dancey.
- 10 We would welcome guidance being issued by the President of the Family Division that there is an expectation that both Applicants and Respondents will attend MIAMs and that this will be actively encouraged by all the judiciary. If one parent has failed to attend without good reason, the Judge should adjourn and direct attendance, to include the potential for costs sanctions.
- 11 As for a separate C200 form, the consensus was that it would be confusing for a separate C200 to be completed by Respondents for a number of reasons. The different legal terminology between Applicant and Respondent is not helpful; in practice they are both parents and neither has higher or lesser status.
- 12 Instead, the legal, mediator and judicial members of the group all agreed that the MIAM pages of the C100 be removed and a free-standing MIAM form should be used, for all MIAMs, by Applicants and Respondents in both children and finance cases. The duty to consider alternative means of resolving the dispute applies equally to children and finance cases; a conflicted finance case can cause irreparable damage to a parenting relationship, and therefore any child of the family. The use of one separate statutory MIAM form for all family cases, regardless of whether the person completing the form is the parent applying or responding, would be simplest. A draft has been prepared and approved by the FMC (see Annex 9).
- 13 A point arose about data and the KPI indicators which local FJBs monitor. We understand these are geared to the time taken for a case to be completed which, perversely, raises a disincentive to adjourn a case to be resolved away from court. The pressure to satisfy KPI targets will diminish the emphasis on resolving issues out of court, if the case has to be paused while other means of resolving it are attempted. We recommend a review of the KPI factors to ensure they promote DR processes being attempted where appropriate.

**C. A failure by many courts to enforce the MIAM requirements as set out in statute and in the FPR**

- 14 An inconsistent application of the MIAM requirements by Court staff and the judiciary, at various stages of the court process, has undermined the efficacy of the MIAM system. Our proposals for redressing this are to provide training to judges of all levels, as set out in Annex 7 Section C.

## **D. Standards**

- 15 The Family Mediation Council has asked the Family Mediation Standards Board to conduct a thorough review of the practice and procedure for statutory MIAMs and to produce a set of standards. This work is underway and it is hoped that it will be completed by the end of 2020. If early Information and Assessment Meetings are introduced, the FMSB will need to consider how, if at all, the mediation standards for their conduct differ from those for the statutory MIAM.

## **E. Capacity**

- 16 The Official Solicitor raised a specific concern about those who lack capacity and suggested that they should be exempted from attending a statutory MIAM. The difficulty of creating a MIAM exemption for capacity is that it raises the question of who assesses the capacity and at what point. A MIAM is distinct from mediation, and any mediator would include an assessment of capacity as part of the MIAM assessment which takes place. The FMSB will introduce standards in relation to statutory MIAMs, so the importance of assessing the capacity of a participant to take part in mediation would be made clear. This would go towards safeguarding vulnerable potential participants. Capacity is clearly a very complex assessment and overlaps with all the other screening that the mediator must do.
- 17 Those who lack capacity would not be offered mediation on their own but would need some other process in which they are supported, be that legal representation, collaborative law (if funds permit), or a combination of legal representation and some other process such as mediation in a hybrid model, or arbitration. These options would be discussed with the client (and any person attending in support) at the MIAM. The assessment of suitability for mediation would take place at the MIAM, but if signposted to another process, then the follow-on professional would need to make their own assessment as to capacity in relation to their process.

## **F. Numbers of Mediators available to conduct MIAMs**

- 18 We believe that there is sufficient capacity in the system at present. Since COVID19, many accredited mediators have adapted their practices by delivering online assessment meetings and mediations. A search facility for those offering online mediation is now available on the FMC website, so anyone in any part of the country will be able to take part in an online MIAM.
- 19 Furthermore:
  - 19.1 a number of mediators do not work full time and may well wish to take on more work;
  - 19.2 a number of mediators working towards accreditation are delayed in the process of accreditation by a lack of work;

- 19.3 a number of accredited mediators find it difficult to re-accredit due to lack of work;
- 19.4 for trained and qualified mediators who do not currently practice, update training can be provided
- 20 The LAA has previously worked hard to ensure that sufficient contracts were in place throughout the country to ensure that everyone had access to a mediator.

#### **G. Should the C100 section about MIAMs be re-written?**

- 21 We considered whether the mediator pages in the C100 should be re-written. Different views were shared: on the one hand stressing the need to ensure that the mediator pages cannot be used to weaponise the other person as a result of information submitted on the form, and on the other hand stressing the view that the form is currently inadequate in dealing with the range of different scenarios that are encountered in mediation. (The wording of the current form often means that mediators have to tick a box on the form when they sign it which is clearly wrong, as the situation does not fit any of the standard options.) A view was expressed that any form that invites mediators to tick something which is incorrect is clearly wrong and therefore needs to be re-written. (An example of this is where the applicant wishes to get the court time table moving but still wishes to mediate and hopefully resolve things through mediation. The applicant might ask the mediator to sign the form and the mediator would need to tick the box that says “Mediation is not proceeding” when in fact it is going to proceed.)
- 22 There was a general consensus that it would be simpler for everyone if the MIAM paperwork were disconnected from any court application (in both children and finance cases) and instead presented as a single standard form for everyone to use to consider their out of court options.<sup>177</sup>
- 23 We have made a first attempt to create a stand-alone form (attached at Annex 9) for use in both children’s applications and financial applications; the aim was to simplify the forms currently in use. This includes a revised version of the ‘Information for parents and other parties’ appended to the first PrLWG report (PrLWG report Annex 7), plus a re-written page for the mediator to sign.
- 24 In addition, we suggest replacing the term ‘exemptions’ with the words ‘specific circumstances’, with the aim (a) of emphasising that there are specific circumstances in which a statutory MIAM is not required, and (b) of moving away from a concept of trying to find an exemption to avoid a negative activity. We have reviewed the list, mindful of the many criticisms of its length and complexity.
- 25 With increasing moves towards digitisation, we are aware that the MoJ will need to create their own version which fits within any online process. We

<sup>177</sup> FMC had suggested this should be a free-standing form in its response to the PrLWG consultation last summer.

hope the version provided here can form a working draft for them and we, or an FMC working group, are of course willing to be involved in any further discussions about how an online MIAM system might best serve the needs of clients, mediators and the court.

- 26 When the new form is made available online, the systems must ensure strong gate-keeping for MIAMs to be conducted only by those accredited to do so. The current system is open to abuse as parents can look up a mediator's URN number and insert the details on the form, without any MIAM having taken place. Online systems will need to be piloted and consulted on to ensure they work as intended.
- 27 We considered whether domestic abuse should continue to exempt a person from participating in a MIAM. While people thought that a MIAM might be very useful for a victim of domestic abuse (in screening, understanding other pathways and signposting to appropriate support) the name MIAM will give a confused message that mediation is expected. Our general consensus was that domestic abuse should remain an exemption (or rather, specific circumstance) for a MIAM. If our recommendations for an early Information and Assessment meeting are adopted, then these may be helpful meetings to identify domestic abuse and signpost appropriately at an early stage.

#### **H. Interaction with the Court**

- 28 Most courts have little understanding or awareness of mediation. Any increased interaction with the court is to be encouraged to promote awareness amongst the court staff, Cafcass and judiciary, as to what mediation is and when it might be suitable.
- 29 A funded online duty mediator scheme can deal with MIAMs and also enable mediators to be 'virtually' present and liaise with other professionals, HMCTS staff, the judiciary and others as necessary about the suitability of mediation and how mediation can assist those within the court system. This general interaction is distinct from any interaction about client cases which shall remain fully confidential.

#### **I. Changes to the MIAM provider?**

- 30 Our group has been tasked with making recommendations which can be implemented in the short-term, to improve services for separating families and reduce the numbers turning unnecessarily to court, pending the longer-term changes which are to come. The current legislation provides for MIAMs to be conducted by FMC accredited mediators, with a presumption that suitability for mediation will be assessed at the MIAM. Any change to the MIAM provider from being an authorised family mediator will require a legislative change, so this is outside of our remit and a matter to be considered by the Family Justice Reform Implementation Group.

- 31 Beyond that, we have considered the AIM (Advice and Information Meeting) suggestion by Resolution, which we understand is still in its early days and the detail is not yet formulated. The AIM scheme suggests that they could be conducted by all family professionals - mediators, solicitors and arbitrators - with some alternative form of training, standards and accreditation to the current FMC accredited providers.
- 32 We acknowledge the concerns of the legal sector that mediators may not sufficiently promote processes for resolving issues other than mediation. We trust the FMSB working group, who are tasked with setting standards for the conduct of MIAMs, will include in the standards a requirement for accredited mediators to understand and consider the full range of options available to resolve issues, with strong links with local providers, such as arbitrators, collaborative practitioners, family consultants and child psychologists. Although the legislation is designed to encourage parents to consider mediation, information is also given as appropriate about other processes for resolving issues.
- 33 However, the MIAM is an opportunity to address a range of issues which are not about resolving a legal dispute:
- Screening for domestic abuse must take place.
  - Introducing a child-focus is an essential element, such as options for hearing the voice of the child, the long-term benefits for children of cooperative parenting and the risk of harm to children caused by parental conflict. Parenting options will be discussed and the issue in question will be reframed away from parent positions and into the interests of the child, now and for the rest of childhood and beyond.
  - The emotional impact of the relationship breakdown is discussed, and what support the parent may have to cope through the emotional turmoil; whether they may be ready to engage in mediation or some other process and/or what other support or process might be helpful.
  - Are there other vulnerabilities which need to be taken into account, such as capacity issues, or mental health issues, or physical vulnerabilities?
  - Where appropriate, the concept of 'working together' is gently introduced, while recognising that this may inevitably take time, and that professional support may be needed.

This meeting is a broad discussion of options that might help the family, as well as an assessment for mediation.

- 34 We acknowledge the vitally important role lawyers have in guiding their clients through options for settlement, in ways that will minimise the necessity to make an application to court. We have referred in our section on Family Professionals to the importance of family professionals working alongside each other better, there being potential for lawyers and MIAM providers to learn from each other. It should not be that MIAM providers create a seamless bridge into mediation, just as lawyers should not take their clients through the options that are only on hand to them directly. Thus, the mindset for all



professionals working in the pre-issue space is to look at all times for the most appropriate ways, with diligence and creativity, to consider options for settlement and pathways to assist separated families achieve the best outcome for their children.

- 35 We have the following further comments about a proposal to change the MIAM provider:
- 35.1 The history to the MIAM is relevant here. Everyone knows about access to solicitors in family cases, whereas access to a mediator was not so well understood. The MIAM protocol first came into being to promote awareness by would-be litigants of their out-of-court options; it was not necessary to promote awareness of the role of solicitors as that was already known.
  - 35.2 Lawyers, as opposed to MIAM providers, have stronger and longer curating, steering and triage roles with their clients. Within that role, they will take their client through the various lawyer-led methods of settlement, such as arbitration or collaborative law.
  - 35.3 If a client is already engaging a lawyer, the options for resolving issues should have already been discussed, so an AIM would not progress matters further. The solicitor's existing Protocol is already in place, which obliges them to consider all forms of DR with their clients already.
  - 35.4 A clear concern with the AIM concept, is the idea that this is an **Advice** and information meeting. Giving advice is a formal provision of legal services which precludes the solicitor from engaging with the other client. It therefore sets up a disconnected process where the clients are advised separately by different solicitors. We welcome a system in which the clients see the same family professional for legal information rather than legal advice. This would enable a balanced overview of the issue(s) to be resolved, rather than partisan positions being taken between the two parents.
  - 35.5 If it were permitted for both clients to see a lawyer for an 'Advice and Information Meeting', without either having engaged the lawyer, the lawyer could not then take on a retainer for either of them thereafter. The lawyer's role would be to hold the advice and information meetings as a one-off piece of work and their role would end there. This may raise a potential disconnect between the lawyer's limited role and the clients' expectations. In paying to attend a meeting with a lawyer, a client is not unnaturally going to think that they will be able to receive ongoing legal advice, and may be frustrated when that is not the case.
  - 35.6 If the lawyer contacts the second parent after the first AIM to tell them what has taken place and recommend that the second party sources their own AIM provider, the link between the original AIM and the

likelihood of engaging together in a process to resolve the issue becomes more tenuous.

- 36 As with the rigorous competencies required within the FMC Standards Framework, there would need to be a new standards framework to ensure clients' interests are protected from the risk of the role of an AIM provider blurring professional boundaries and creating conflicts of interest.
- 37 For those lawyers who also practice as mediators, the AIM proposal will have little impact as they are already able to conduct MIAMs in their capacity as a mediator.
- 38 Lawyers who are not also mediators would not be trained to screen for domestic abuse and assess the nuances of the parental relationship to see if their case is suitable for mediation. If mediation were to be recommended, then the client would need to engage with a mediator for a pre-mediation assessment meeting. It's one thing to be able to provide information about mediation, but another to assess whether mediation is suitable in that particular case. If the AIM develops into a consideration of mediation, the person conducting the AIM should have the necessary skill to assess whether it is suitable.
- 39 The statutory MIAM provides a key opportunity to understand and choose non-court options for resolving issues between parents. It enables families to make informed decisions about the most suitable and helpful pathway, and sets the scene for the important work which follows. Families need the best from the differing professional skills available – solicitors, mediators, counsellors and other family professionals – complementing each other in supporting the family in an integrated way, tailored to their specific range of needs.

## ANNEX 9

### Proposed new MIAM Information Sheet and Form

## **Information about Mediation Information and Assessment Meetings (MIAMs)**

A MIAM gives you an opportunity to agree matters with your partner without using a court, and to understand what is suitable for your case. It can save you time and money and reduce possible conflict between the two of you.

### **Financial Arrangements**

When couples separate, there are often financial issues to resolve. With good support and advice from family professionals, many cases can be agreed without the need for disputes in front of a judge. You can reach a financial agreement yourselves, with or without help from family professionals, and together ask the court to make your agreement legally binding. This is called a 'consent order'. No court appearances are usually needed and it's a simple paper exercise.

Court proceedings are expensive, stressful and take a long time. They increase conflict between the two of you. A MIAM will help you consider alternatives to court, so that you can both select the right process for you as early as possible.

### **Child Arrangements**

Some cases concerning children, for example where there are risks to a child's safety or welfare, may have to be dealt with by the court. This includes cases where spending time with a parent would put a child at risk of suffering harm.

**A court is not usually the best place for parents to sort out disputes about arrangements for their children. The court process increases conflict and that in itself is harmful for children, and makes resolving disagreements more difficult. If there is no risk of harm, it is better for children that their parents try and sort out arrangements without going to court.**

### **What is a MIAM?**

A MIAM is an individual meeting with a mediator, qualified to assist you in these difficult times. It can be face-to-face or online. The mediator will provide you with information in relation to:

- the different ways of solving the problem without going to court, including mediation
- family professionals who can help you, including how solicitors and mediators can support you to arrive at an agreement without difficult court appearances
- financial matters
- how best to meet the needs of any children
- details of other support services such as help with housing or debt, co-parenting or therapeutic support
- the court process and timetable

During the MIAM, the mediator will discuss with you whether mediation or some other way of resolving the dispute is suitable. Mediation will only go ahead if both partners/parents and the mediator believe that it can take place safely and that discussions can be free of any fear of harm or undue pressure.

The MIAM is fully confidential and will not be disclosed to the other person. Each person attends separately, and you do not have to meet each other. It will usually last for about an hour.

### **Why should I attend a MIAM?**

Knowing how to resolve disagreements out of court can help to reduce conflict and support co-operation between separating partners. It may also save you time and money.

Anybody applying to the court must attend a MIAM unless there are very specific circumstances (there is a list of the specific circumstances at the end of this leaflet). If somebody applies to the court without going to a MIAM and without any specific circumstances, the court is likely to order you to attend one anyway.

Your partner should also attend a MIAM unless there are specific circumstances. If they don't attend, the court will ask them why they haven't and may require them to attend.

**How much will it cost me?** *Dependent on MoJ response to FMC proposal*

If you, or the other person, are eligible for legal aid, the MIAM is free. You can find out if you are eligible for legal aid at <https://www.gov.uk/legal-aid> before you go to a MIAM, and at the MIAM the mediator will confirm whether you qualify for this.

If neither of you is eligible for legal aid, the mediator will tell you how much they charge before you book a MIAM appointment.

### **How do I organise a MIAM?**

Contact a family mediator in your area to book an appointment for a MIAM. You can find local mediation services on the Family Mediation Council's website: <https://www.familymediationcouncil.org.uk/find-local-mediator/>.

### **What if I'm not interested in mediation?**

Going to a MIAM doesn't mean you have to mediate. The MIAM will:

- include an assessment of whether mediation is suitable for you and your ex-partner
- provide you with general information about resolving disagreements without going to court
- provide details about mediation or about other helpful out of court processes that you may not know about, and which might be more suitable for your case
- give you the opportunity to raise any concerns about mediation

## Resolving your matter out of court

You are required to consider your options for resolving your matter out of court unless specific circumstances apply (see over).

### Specific Circumstances

If any of the following specific circumstances apply to you, you may attend a MIAM if you wish but you are not required to do so before completing a court application:

1. There is evidence of domestic violence. If this applies to you, please complete Section A below.
2. The local authority is investigating the child's circumstances or there is a child protection plan in place. If this applies to you, please complete Section B below.
3. The application is urgent because delay would cause a risk of harm to the applicant or a child (including unlawful removal from the UK), or unreasonable hardship to the applicant (including loss of evidence or threatened court proceedings in another country). If this applies to you, please complete Section C below.
4. There are other reasons why a MIAM may not be required:
  - there has already been a MIAM or a formal attempt to resolve the issue away from court within the last 4 months
  - the application is part of existing proceedings in court and the applicant previously attended a MIAM or had one of these specific circumstances before those proceedings
  - the prospective applicant may be bankrupt
  - the applicant doesn't have sufficient contact details for the respondent to enable the mediation service to contact them to invite them to attend a MIAM
  - the application is being made without notice
  - one of the individuals to the dispute can't attend a MIAM either in person or online because of a disability
  - one of the individuals to the dispute can't attend a MIAM because they are in prison or detained in another institution, or are subject to bail or licence conditions that prohibit them having contact with the other person to the dispute
  - one of the persons to the dispute doesn't live in England or Wales

If any of these apply to you, please complete Section D below.

**Unless there is a proper reason for not doing so, every person to a dispute should go to a MIAM before court proceedings start. The MIAM is an opportunity to get help to sort things out without going to court.**

**Mediator confirms MIAM attendance**

(To be completed and signed by the authorised family mediator – complete all three sections)

**1 MIAM attendance**

The person named ..... has attended a MIAM.

or

The persons named ..... and ..... have each attended a separate MIAM.

**2 MIAM content**

The mediator confirms that the mandatory and applicable requirements as prescribed by the FMC have been covered during the MIAM.

**3 Mediation attendance**

Mediation is not proceeding because:

- the person named ..... has so far not attended a MIAM; or
- either one or both determined that mediation is unsuitable; or
- the mediator has determined that mediation is unsuitable; or
- another form of non-court dispute resolution is proceeding.

or

Mediation is due to start or has started, but:

- mediation did not, or will not deal with some or all of the issues; or
- one person wishes to make an application to court to establish a timeframe in parallel to the mediation process (with any hearing to be vacated if matters settle through mediation); or
- mediation has broken down.

Date

Signed

Name of Authorised Family Mediator

FMC Unique Registration No. (URN)

Family Mediation Service Name

Address

## **Specific Circumstances – Section A – Domestic Violence**

**(To be completed by the person intending to make a court application or their solicitor)**

**The applicant confirms that there is evidence of domestic violence, as specified below:**

evidence that a prospective party has been arrested for a relevant domestic violence offence;

evidence of a relevant police caution for a domestic violence offence;

evidence of relevant criminal proceedings for a domestic violence offence which have not concluded;

evidence of a relevant conviction for a domestic violence offence;

a court order binding a prospective party over in connection with a domestic violence offence;

a domestic violence protection notice issued under section 24 of the Crime and Security Act 2010 against a prospective party;

a relevant protective injunction;

an undertaking given in England and Wales under section 46 or 63E of the Family Law Act 1996 (or given in Scotland or Northern Ireland in place of a protective injunction) by a prospective party, provided that a cross-undertaking relating to domestic violence was not given by another prospective party;

a copy of a finding of fact, made in proceedings in the United Kingdom, that there has been domestic violence by a prospective party;

an expert report produced as evidence in proceedings in the United Kingdom for the benefit of a court or tribunal confirming that a person with whom a prospective party is or was in a family relationship, was assessed as being, or at risk of being, a victim of domestic violence by that prospective party;

a letter or report from an appropriate health professional confirming that-

(i) that professional, or another appropriate health professional, has examined a prospective party in person; and

(ii) in the reasonable professional judgment of the author or the examining appropriate health professional, that prospective party has, or has had, injuries or a condition consistent with being a victim of domestic violence;

a letter or report from-

(i) the appropriate health professional who made the referral described below;

(ii) an appropriate health professional who has access to the medical records of the prospective party referred to below; or

(iii) the person to whom the referral described below was made;

confirming that there was a referral by an appropriate health professional of a prospective party to a person who provides specialist support or assistance for victims of, or those at risk of, domestic violence;

a letter from any person who is a member of a multi-agency risk assessment conference (or other suitable local safeguarding forum) confirming that a prospective party, or a person with whom that prospective party is in a family relationship, is or has been at risk of harm from domestic violence by another prospective party;

a letter from an independent domestic violence advisor confirming that they are providing support to a prospective party;

a letter from an independent sexual violence advisor confirming that they are providing support to a prospective party relating to sexual violence by another prospective party;

a letter from an officer employed by a local authority or housing association (or their equivalent in Scotland or Northern Ireland) for the purpose of supporting tenants containing-

(i) a statement to the effect that, in their reasonable professional judgment, a person with whom a prospective party is or has been in a family relationship is, or is at risk of being, a victim of domestic violence by that prospective party;

(ii) a description of the specific matters relied upon to support that judgment; and

(iii) a description of the support they provided to the victim of domestic violence or the person at risk of domestic violence by that prospective party;

a letter which-

(i) is from an organisation providing domestic violence support services, or a registered charity, which letter confirms that it-

(a) is situated in England and Wales,

(b) has been operating for an uninterrupted period of six months or more; and

(c) provided a prospective party with support in relation to that person's needs as a victim, or a person at risk, of domestic violence; and

(ii) contains-

(a) a statement to the effect that, in the reasonable professional judgment of the author of the letter, the prospective party is, or is at risk of being, a victim of domestic violence;

(b) a description of the specific matters relied upon to support that judgment;

(c) a description of the support provided to the prospective party; and

(d) a statement of the reasons why the prospective party needed that support;

a letter or report from an organisation providing domestic violence support services in the United Kingdom confirming-

(i) that a person with whom a prospective party is or was in a family relationship was refused admission to a refuge;

(ii) the date on which they were refused admission to the refuge; and

(iii) they sought admission to the refuge because of allegations of domestic violence by the prospective party referred to in paragraph (i);



a letter from a public authority confirming that a person with whom a prospective party is or was in a family relationship, was assessed as being, or at risk of being, a victim of domestic violence by that prospective party (or a copy of that assessment);

a letter from the Secretary of State for the Home Department confirming that a prospective party has been granted leave to remain in the United Kingdom under paragraph 289B of the Rules made by the Home Secretary under section 3(2) of the Immigration Act 1971, which can be found at

<https://www.gov.uk/guidance/immigration-rules/immigration-rules-index>;

- (i) evidence which demonstrates that a prospective party has been, or is at risk of being, the victim of domestic violence by another prospective party in the form of abuse which relates to financial matters.

### **Specific Circumstances – Section B – Child Protection**

**The applicant confirms that a child would be the subject of the application and that child or another child of the family who is living with that child is currently—**

the subject of enquiries by a local authority under section 47 of the Children Act 1989 Act; or

the subject of a child protection plan put in place by a local authority.

### **Specific Circumstances – Section C – Urgency**

**The applicant confirms that the application must be made urgently because:**

there is risk to the life, liberty or physical safety of the prospective applicant or his or her family or his or her home; or

any delay caused by attending a MIAM would cause—

- a risk of harm to a child; or
- a risk of unlawful removal of a child from the United Kingdom, or a risk of unlawful retention of a child who is currently outside England and Wales; or
- a significant risk of a miscarriage of justice; or
- unreasonable hardship to the prospective applicant; or
- irretrievable problems in dealing with the dispute (including the irretrievable loss of significant evidence); or
- there is a significant risk that in the period necessary to schedule and attend a MIAM, proceedings relating to the dispute will be brought in another state in which a valid claim to jurisdiction may exist, such that a court in that other State would be seized of the dispute before a court in England and Wales.

## **Specific Circumstances – Section D – Other reasons**

### **The applicant confirms that one of the following applies:**

- in the 4 months prior to making the application, the person attended a MIAM or participated in another form of non-court dispute resolution relating to the same or substantially the same dispute; or
- 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; or
- in the 4 months prior to making the application, the person filed a relevant family application confirming that a MIAM exemption applied and that application related to the same or substantially the same dispute; or
- the application would be made in existing proceedings which are continuing and the prospective applicant attended a MIAM before initiating those proceedings; or
- the application would be made in existing proceedings which are continuing and a MIAM exemption applied to the application for those proceedings.

### **The applicant confirms that one of the following other specific circumstances applies:**

evidence that the prospective applicant is bankrupt exists in one of the following forms:

- application by the prospective applicant for a bankruptcy order;
- petition by a creditor of the prospective applicant for a bankruptcy order; or
- a bankruptcy order in respect of the prospective applicant.
- the prospective applicant does not have sufficient contact details for any of the prospective respondents to enable a family mediator to contact any of the prospective respondents for the purpose of scheduling the MIAM.
- the application would be made without notice (Paragraph 5.1 of Practice Direction 18A sets out the circumstances in which applications may be made without notice.)
- the prospective applicant is or all of 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 her 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.
- 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 in relation to the other person.

- the prospective applicant or all of the prospective respondents are not habitually resident in England and Wales.
- a child is one of the prospective parties by virtue of Rule 12.3(1).

## ANNEX 10

### **At Court Mediation, Parenting Agreements, Part 3 FPR Protocol**

#### **A. At Court MIAMs and/or Mediation – Challenges and Key learning points**

- 1 There have been many at-court mediation schemes over the last twenty years, with varying models of mediation being offered. As yet, no reliable model has been found. Here we explain the challenges and summarise what we regard as the key learning points.

#### **The challenges**

- 2 These can be summarised as follows:
  - 2.1 Clients are not in the best mindset for mediation: they arrive at court prepared for the battlefield, without mental or personal preparation for collaboration with their ex-partner.
  - 2.2 Clients have already paid for court, solicitors and/or counsel: they do not welcome being asked to pay for mediation on top.
  - 2.3 There is little training of or understanding by Judges, Cafcass, HMCTS staff about mediation: when it is suitable, how it works or what the professional boundaries are.
  - 2.4 As a result of this last point, misplaced expectations can arise about the role of a mediator. Judges have at times asked the mediator to work with the parties and report back to the court. When professional boundaries are not clearly understood by the legal professionals, it is all the more confusing for the client.
  - 2.5 The mediator's time at court is unpaid. Unlike every other person in the court service, the mediator is invited to attend for free.
  - 2.6 Perhaps for the above reasons, the service offered by the mediator is not seen as an integral part of the court provision for families.
  - 2.7 The number of cases referred to the mediator is dependent on good judicial and Cafcass support, and this varies considerably from court to court.
  - 2.8 The work is unpredictable; there are days when no clients are seen.
  - 2.9 Court represents a challenging work environment for the mediator: the clients are stressed and anxious, time is pressured and the mediator is making hasty assessments, away from their usual working environment.

- 2.10 Lack of access to a confidential space in the court building can be an obstacle, especially if the service is not seen as integral to the overall court provision.
- 3 Many of the above challenges could be overcome with clear training, structured collaboration and better awareness; nevertheless, lack of funding, and the overriding concern that mediation is being offered in the wrong place and at the wrong time, would still remain significant obstacles.

### Key learning points:

- 4 These can be summarised as follows:
- 4.1 A close working partnership with the judges/Cafcass/HMCTS staff is vital. The schemes which have survived are based on successful co-working between the mediator and all levels of court staff.<sup>178</sup> For example, it works well to include the mediator in the case reviews which Cafcass manage at the start of the day.
- 4.2 Judicial and Cafcass encouragement to the parties is also vital, if they are to consider it seriously.<sup>179</sup> If a court has judiciary and/or Cafcass who do not support the diversion to mediation, then any scheme will fail.
- 4.3 The invitation to consider mediation is better received by litigants in person than those who are legally represented.
- 4.4 Once a person has paid for legal advice, then any invitation to consider mediation will be heavily dependent upon the guidance of the paid legal advisor, be that counsel or a solicitor or a paid Mackenzie friend. This varies enormously, but there is a financial disincentive to refer to mediation.
- 4.5 Most schemes are based upon assessment meetings (statutory MIAMs) being offered at court rather than mediation itself. Although some mediators report successful outcomes from mediations within the court building, the majority of mediators say it is not a suitable environment for mediation, but that it can work well for MIAMs, enabling the parties to stand back from the dispute and consider the range of non-court dispute resolution processes (NCDR), including mediation.
- 4.6 Assessment meetings conducted at court are good opportunities to reframe the dispute away from a purely legal context, and signpost clients to different types of support which might be locally available (e.g. SSFA provision).

<sup>178</sup> In Southampton, for the last 10 years, Theresa Le Bas has been providing free at-court MIAMs one day a week on a voluntary basis, with good judicial support and working partnerships with Cafcass and HMCTS staff.

<sup>179</sup> One mediator commented that older and more experienced Cafcass officers tend to be pro-mediation, but younger Cafcass staff seem reticent to suggest mediation.

- 4.7 For those few schemes where the mediation itself takes place at court, when a successful outcome is reached the clients appreciate being able to obtain an immediate consent order.
- 5 Note: From the perspective of the current crisis, the proposal of an online engagement from court with a mediator for the purposes of assessment is attractive. The above is offered as a reminder that it cannot however be a panacea on its own.

## B. Making Parenting Agreements Legally Binding

- 6 We are aware of work done by several bodies over the years on this issue, and would like to pull this expertise together, rather than 'reinvent the wheel'.
- 7 All agreed that clients will be more likely to engage in mediation if they knew that any agreement arrived at could be enforced.<sup>180</sup> People want that sense of certainty, especially if they incur costs in mediation fees. However, this is not a question exclusive to mediators. **We believe parenting agreements can and should be made open, if the parents so choose, and this is not limited to those parents with an obvious dispute or who agree arrangements in mediation.** We understand that some mediators may offer this choice to parents, however, there is much confusion and inconsistency concerning this as an option for parents.
- 8 How formal should a parenting agreement be: court ordered, court registered, or just with a (possibly standardised) form of words making clear it is open?
- 9 Obtaining a 'quickie consent order' was not thought to be the best route for all. It offends the no-order principle, but importantly it would give the wrong message to parents that their family issues need to involve the court.
- 10 Instead, the agreement needs to be treated as an open document so it can be enforced if one parent reneges on the terms agreed. It will need to be given weight by the court in the absence of any change in the family circumstances.
- 11 The following points are recommended:
- 11.1 **FMC should provide a standard wording** to be included on the parenting agreement recorded by the mediator, and to be signed by the clients. It will be important for this wording to be applied universally by all mediators, and so become known by solicitors, Cafcass and courts.
- 11.2 HHJ Dancey, judicial member of the group, suggested that it would be helpful to **invite the President's guidance** on this point or an amendment to the rules, to the effect that a parenting agreement reached in mediation will be upheld unless there has been a change of

<sup>180</sup> Barlow et al, n 3 above.

circumstances, or the welfare of the child requires different arrangements to those agreed.

- 11.3 While objectively not necessary, it was thought that it would make a difference, subjectively, for **parents to register their agreement**. Registering it gives it an official validity and this may affect the parents' perception of their obligation to adhere to what is agreed. **A register similar to that of Parental Responsibility agreements is suggested. We invite MoJ to consider whether this is feasible.** There would need to be publicity that such an option is available. That may include a level of education to parents of the benefits of having something semi-formalised, clear and comprehensive which is likely to avoid conflicts in the future.
- 11.4 For those parents who are already engaged in court proceedings and who reach an agreement in mediation, there should be the option of obtaining a court order by consent, without the application of the no order principle.
- 12 Before parenting agreements become legally binding, the following points need careful consideration:
- 12.1 Should there be a standard national template to work from for the parenting agreement itself? Would this set out just the core critical points (such as we already have for standard Children Act orders template) or could it be very detailed? There are already some standard formats, for example the Cafcass parenting plan, but this is not necessarily the right format for everyone. It might help to have one standard national template, which is guidance rather than compulsory, but creating this would be a larger piece of work, almost certainly for the medium/long term, rather than the short term.
- 12.2 What safeguards need to be in place to ensure that the plans are not reached by coercion etc (with the greater financial gain from being the Child Benefit recipient and/or maintenance given/denied if there is/not a 'primary parent'). If more formal in status, there may be more motive for a parent to manipulated/coerce the terms for their ulterior motives. What further safeguards may be needed if parents register an agreement without any third party assistance or guidance? Safeguards should cover the way that professionals work with parents, as well as the standardised sign off wording (to show, for example, that it is freely entered into as the work of both parents and the contents and the formalities of registration are fully understood.)
- 12.3 Should there be some form of guidelines as to parenting patterns at various ages and stages (we discussed how controversial this is, but may help against coercion or the blanket 'only 50:50 is fair' mantra). This has been a 'too hot to handle issue' and likely to remain so.
- 13 **We recommend a small multi-disciplinary working party is set up to consider these points and move this forward soon** (comprising a Cafcass

representative, a solicitor, a mediator, an MOJ official, a judge and a parenting expert).

- 14 The 'Separated Families Hub' and other local touchpoints could be provided with a list of all professionals locally available who facilitate parenting plans, so as to signpost parents to the right help.

### C. Part 3 Family Procedure Rules and a new proposed Part 3 Protocol

- 15 Part 3 of the Family Procedure Rules sets out the court's duty and powers to encourage and facilitate the use of non-court dispute resolution. Rule 3.3(1) states:

*'The court must consider, at every stage in proceedings, whether non-court dispute resolution is appropriate.'*

- 16 **It would be helpful to gather data on the extent to which these duties and powers are applied.** Are there universal standards across the country or are differing courts adopting differing approaches? Concern has been expressed within our discussions and the wider PrLWG that the courts are not actively case managing in accordance with Part 3 of the FPR, and opportunities to resolve cases out of court are thus lost.

- 17 To facilitate the court's duty to consider whether NCDR options are appropriate, a new initiative for a Part 3 Protocol is being trialled in Surrey, referred to as a 'The Surrey Initiative'.<sup>4</sup> This new protocol is gathering momentum, with considerable interest now being shown from other areas.

- 18 In civil litigation there are the Civil Procedure Rules and the Civil Practice Direction – Pre-Action Conduct and Protocols. In short parties who litigate without any consideration of NCDR do so at their own risk. The courts have shown a remarkable willingness to impose cost sanctions on parties who, in the view of the judge, have unreasonably refused to mediate.

- 19 In family, we have:

- Part 3 Family Procedure Rules
- The Family Procedure (Amendment) Rules 2020, which came into force on 6 April 2020 (save for rules 10 to 14 – the costs rules - which came into force on 6 July 2020)
- A range of sophisticated out-of-court process options

- 20 In family cases, the parties often issue an application to obtain a court timetable. This action may be more suitable for financial rather than children

<sup>181</sup> This initiative is the idea of Karen Barham at Moore Barlow, mediator and former co-director of the Family Mediation Council and Resolution. The protocol is currently being trialled in Surrey.

<https://www.moorebarlow.com/the-surrey-initiative/>



applications, but, if the court is being used to 'chivvy up' the other party, can we not find some robust prodding stick that does not take up so much of the court's time and resources as at present? The proposed Part 3 Protocol is a streamlined quasi-judicial / administrative process for robust case-management / timetabling with increased (continuing) use of online/virtual hearings.

21. The proposed Part 3 Protocol must be robust, have 'teeth', be consistently applied and with a range of unattractive sanctions / consequences including:
  - the court's refusal to hear the matter i.e. stay/adjourn the proceedings
  - vocal judicial displeasure/'rollicking', leading to costs orders against both the parties and/or their legal advisers
  - negligence and/or disciplinary actions against non-compliant legal advisers
  
22. A proposed draft Protocol is included below. While possibly more appropriate for finance cases rather than children cases, it will be interesting to hear from Surrey how this new initiative works in practice, and whether it leads to greater use of out-of-court pathways to resolve issues for both finance and children cases.

## **SUGGESTED DRAFT PROTOCOL**

1. In accordance with 3.3 (1) at all hearings the court/judge must undertake the Part 3 Review [define] and certify that they have done so by recording on the court file [contents of record/certificate].
2. [The parties if self-presenting or their] legal advisers must [consider/apply] Part 3 at all times including pre and post issue of court proceedings and evidence [by way of contemporaneous file notes/records] that they have done so.
3. At each hearing or when called upon by the court to do so it shall be the duty of the legal advisers [parties if self-representing] to provide to the court a copy set of the correspondence and attendance notes emanating from [4 & 5] below.
4. The [parties if self-presenting or their] legal advisers must issue an open invitation to the other party to engage in a non-court dispute resolution process detailing [how, what, where, when & funding proposal etc] alternatively they must explain why they are not inviting.
5. Upon receipt of an invitation as at [4 above] the recipient must within 14 days reply in open terms setting out their acceptance / refusal / proposed alternative non-court dispute resolution process.
6. Legal advisers must certify in the prescribed form that they have contemporaneously forwarded a copy of the correspondence / attendance notes at 4 & 5 above to their client and that they have appraised them of the range of non-court dispute resolution processes available – to include providing a copy of [the stairway of options or some other resource?].
7. If the court considers that a non-court dispute resolution process is appropriate and / or that it has been unreasonably refused, or there has been a breach of this Protocol it may
  - (a) adjourn the proceedings
  - (b) order compliance of the Part 3 Protocol
  - (c) make wasted costs orders against a party and / or their legal advisers
  - (d) [disciplinary proceedings against legal advisers]

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1. In accordance with 3.3(1) [or a new Family Procedure Rule] in all case management reviews [define] and at all hearings the court/judge must undertake the Part 3 Review [define] and certify that they have done so by recording on the court file [contents of record/certificate].
  2. [At First Appointment the court must
    - (a) direct the matter to a non-court dispute resolution process to include the date by which it must be conducted which date can be moved/delayed only by further order of the court or
    - (b) certify why it has not so directed]
  3. [The parties if self-presenting or their] legal advisers must [consider/apply] Part 3 at all times including pre and post issue of court proceedings and

evidence [by way of contemporaneous file notes/records] that they have done so.

4. At each hearing or when called upon by the court to do so it shall be the duty of the legal advisers [parties if self-representing] to provide to the court a copy set of the correspondence and attendance notes emanating from 5 & 6 below.
  5. [The parties if self-presenting or] legal advisers must issue an open invitation to the other party to engage in a non-court dispute resolution process detailing [how, what, where, when & funding proposal etc] alternatively they must explain why they are not inviting.
  6. Upon receipt of an invitation as at 5 above the recipient must within 14 days reply in open terms setting out their acceptance / refusal / alternative non-court dispute resolution process [ask for a further 14 days to respond if required].
  7. Legal advisers must certify in the prescribed form that they have contemporaneously forwarded a copy of the correspondence / attendance notes at 5 & 6 above to their client and that they have appraised them of the range of non-court dispute resolution processes available – to include providing a copy of [the stairway of options or some other resource?].
  8. If the court considers that a non-court dispute resolution process is appropriate and / or that it has been unreasonably refused, or there has been a breach of this Protocol it may
    - (a) adjourn the proceedings for up to [ ] months [Ungley orders]
    - (b) order compliance of the Part 3 Protocol
    - (c) Order a private FDR or ENE
    - (d) make a wasted costs order against a party and / or their legal advisers
    - (e) [disciplinary proceedings against legal advisers/report for breach of Code etc]
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**B SUGGESTED DRAFT CORRESPONDENCE**

This could be by letter or could also be by telephone call with the other lawyer with a note taken of the discussions.

Dear [solicitor]

Jack and Jill Smith

This open letter is written in accordance with the new Part 3 FPR Protocol which is set out below. My client understands that it shall be the duty of the court to consider all Part 3 Protocol correspondence / communication between us including this letter and your reply.

Our clients have an obligation not to unreasonably refuse to engage in an out-of-court process. The attached sets out the range of available processes. You and I have professional obligations generally and in relation to the information and advice we provide to our clients.

Accordingly we invite your client to engage in the following process/es;

*Detail.....*

In accordance with the Protocol we await your considered response within 14 days. When responding kindly certify that you have provided your client with a full copy of this letter and attachment and a full copy of your response.

Yours [       ]

**Part 3 FPR Protocol [recite.....]**

<p>I hereby certify that I have provided a copy of this letter and attachment to my client</p>          <p>..... signed &amp; dated</p>
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This letter will include an attachment of information setting out the range of options available to resolve issues.