



Support for All: the Families and Relationships Green Paper

Response of Committees of the Family Justice Council to Consultation questions.

This response is submitted by the Alternative Dispute Resolution Committee of the Family Justice Council (Question 4) and the Children in Families and Voice of the Child Committees of the Family Justice Council. (Question 5). The Family Justice Council is a Non Departmental Public Body sponsored by the Ministry of Justice. It was established in the summer of 2004, following a public consultation. Its main remit is to promote an interdisciplinary approach to the needs of family justice and through consultation and research to monitor the effectiveness of the system and advise on reforms necessary for continuous improvement. One of its main terms of reference is the provision of advice and the making of recommendations to Government on changes to legislation, practice and procedure, which will improve the workings of the family justice system. Its members and those of its committees and working groups are drawn from the professions involved in the family justice system and include lawyers, social workers, medical professionals and government officials.

Question 4:

Do you consider that compulsory mediation assessment would improve the take-up of mediation in family law cases, and what more could be done to improve the take up of family mediation as an alternative to court action?

Response of the Alternative Dispute Resolution Committee of the FJC

The Committee supports the suggestion of compulsory mediation assessment and offers the following model:

Compulsory mediation assessment

Fundamentals

- 1 A refusal to hear about or consider mediation or unreasonably to refuse it constitutes litigation misconduct and should result in
 - a. A costs order being made; and / or
 - b. Refusal of legal aid

This is a proportionate sanction for a refusal to engage in a less costly and invasive process.

Process

- 2 All family law professionals will have a continuing professional duty to inform clients of all relevant resolution options at all relevant stages of the case – the court-based process is simply one of many and should not be treated as the default.
- 3 Family members will hear about the opportunity because
 - a. All family law professionals will have a duty to inform clients about process alternatives
 - b. Information will be provided by court staff and on court application forms that no court application will be listed (save in defined emergencies) without a mediation assessment having taken place.

Compulsory Mediation Assessment

- 4 Mediation assessment ¹ can only be provided by a recognised mediator. It will be built on the successful model now run by the LSC

¹ We use the term “mediation assessment” to reflect the language of the green paper. However, as the ADR committee of the FJC, our preference would be to use terminology such as “ADR assessment” to reflect the diversity of ADR processes now available.

- 5 The opportunity will therefore consist of joint or separate meetings for parties with mediators.
- 6 Reasons for mediation being inappropriate will include
 - a. Capacity to mediate
 - b. Safety to mediate;
 - c. Suitability of subject matter

A certificate (see suggested draft certificate attached at annex A)

- 7 The certificate must clarify whether this applicant has been assessed for mediation and has assessed the opportunity of mediation
 - a. If the applicant rejects mediation having heard about it then a certificate must issue
 - b. Only if there is such a certificate may directions issue for court process
- 8 If mediation does not result in an agreement then a certificate will issue so confirming.
- 9 Process at court
 - a. No first appointment will be listed at court without
 - i. Leave; or
 - ii. A certificate
 - b. There must be a warning on the application forms that will be used by applicants that nothing will happen to your application as to where intake meetings can advance
 - c. Intake meetings can be joint or separate

Judges will have a continuing duty to consider the appropriateness of mediation and may make directions for mediation to be considered (see FPR 2.61D (2) (d) (iv) and the Revised Private Law Programme)

- d. and contact activity directions)

- 10 A tool that will assist all professionals to identify whether a family dispute is appropriate for ADR (see Annex B)

See attached process map. (Annex C)

Question 5: How far does the need to seek leave of court act as a barrier to preventing family members applying for contact with a child? Is there a need to remove this requirement for some other family members, beyond grandparents?

Response of the Children in Families and Voice of the Child Committees of the FJC

- There is a concern that the emphasis in this proposal appears to focus on the rights of the adults rather than the interests of the child, a major departure from the usual viewpoint. The interests of the child should always be paramount.
- The leave provision provides a useful pause for thought when issues can be considered before a full application is launched. In practice few applications for leave are refused.
- If applications are limited to cases of relationship breakdown, a clear definition will be required. Will this include cases where the parents' relationship is intact but there has been a breakdown in relations with the extended family?
- If this is the case, how would allowing such applications interact with the autonomy of individual family structures?
- Fewer than 5% of applications for contact were by grandparents (Smart et al, *Residence and Contact disputes in Court* Vol 1 (2003))
- The requirement to seek leave is much less of a barrier than the costs of bringing proceedings. Many applicants will not satisfy the legal aid means test and will have to pay to instruct lawyers. Although they can, of course, act for themselves, these cases can be complex and legal advice at the start may deal with all aspects of the case, including weeding out cases where leave may not be granted.
- The requirement to seek leave does not delay cases (directions for progress of the main case can be given at the hearing when leave is granted), or add to their length, which can already be considerable.
- There is particular concern about the vulnerability of parents in some communities; for example, South Asian, where extended families issuing applications could significantly impact on them. The leave requirement is a useful filter in such cases.
- Overall, the view of the Committee is that it would be preferable for the leave requirement to be left as it is and emphasis placed on improving the current system and providing information about the reasons for the leave provision.