



REPORT
PROJECT 100A
CARE AND CONTACT WITH CHILDREN -
ALTERNATIVE DISPUTE RESOLUTION IN
FAMILY MATTERS

13 December 2024

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**TO: MS MT KUBAYI, MP
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT**

I am honoured to submit to you in terms of section 7(1) of the South African Law Reform Commission Act 19 of 1973 (as amended), for your consideration, the Commission's Project 100A Report on Care and Contact with Children - Alternative Dispute Resolution in Family Matters.



The Honourable Mr. Justice Chris Jafta

Chairperson of the South African Law Reform Commission

Date: 13 December 2024

SOUTH AFRICAN LAW REFORM COMMISSION

The South African Law Reform Commission (the Commission) was established by the South African Law Reform Commission Act 19 of 1973.

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The name “South African Law Reform Commission” may be abbreviated as “SALRC”.

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ABBREVIATIONS AND ACRONYMS

A list of abbreviations and acronyms is provided below largely as an information tool. In so far as possible the unabbreviated name is used to facilitate context comprehension.

| | |
|-------------------|--|
| ADR | Alternative Dispute Resolution |
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| DoJ&CD | Department of Justice and Constitutional Development |
| DSD | Department of Social Development |
| FDR | Family Dispute Resolution |
| NABFAM | National Accreditation Board for Family Mediators |
| NPO | Non-profit organisation |
| SAAM | South African Association of Mediators |
| SALRC | South African Law Reform Commission |

EXECUTIVE SUMMARY

1. The object of this report is to provide an integrated approach to family dispute resolution, as one of the plinths of the overarching Alternative Dispute Resolution (ADR) framework to facilitate access to justice in the arena of family law. In turn, the report aims to foster early resolution of disputes and intervention with a view to minimising family conflict particularly in respect of the dissolution of the relationship between parents which, particularly when adversarial or combative, is to the detriment of children. This entails informing and developing policies, developing the law and processes to support such policies, and designing structures to accommodate the policies and laws. The provision of services and processes for families to collaboratively resolve disputes rather than to further sever or strain familial relationships through multi-level legal challenges ties in with governments' goal of providing an effective, timely legal solution within a democratic, accessible, affordable and respected legal system.¹

2. In recognising the deleterious effect of using an adversarial court system to resolve disputes in families, the South African Law Reform Commission (SALRC) further recognises the vast and growing body of authoritative research on the benefits of engaging in alternative, and increasingly referred to as 'appropriate', dispute resolution mechanisms to resolve family law disputes.

3. The terms of reference of this investigation as set out in issue paper 31 and discussion paper 148, which are to be considered as incorporated into this report, are as follows:

To develop recommendations for the further improvement of the family justice system that will –

- (a) be orientated to the needs of all children and families;
- (b) foster early resolution of disputes; and
- (c) minimise family conflict.

4. This report seeks to make recommendations to improve the family justice system by way of creating a pathway to foster early resolution of family law disputes through the use of ADR mechanisms. Preceding litigation with mandatory engagement in ADR mechanisms, subject to certain exceptions, is therefore aimed at minimising family conflict, empowering

¹ SALRC Discussion Paper (2019) 21.

families to resolve their conflicts in so far as possible, providing access to appropriate supportive services, and ultimately avoiding lengthy and costly litigation. The proposal is to move from a court focused solution to the court as one of the options in the solution and rarely the first option.

5. This report has six chapters. Chapter 1 provides an overview of the investigation. It includes an exposition of the problem; and explains the purpose, objective and methodology of the report. Chapter 2 considers the chapters in the draft Family Dispute Resolution Bill (draft Bill) in this report dealing with the general principles; information, education and referral; and related matters. It recognises that the draft Bill contained in this report is underpinned by 5 foundational general principles; the presence or compliance of which will trigger the use of the processes included in the draft Family Dispute Resolution Bill or ensure that the parties are redirected to the relevant court. Chapter 3 primarily focuses on mediation as one of the vehicles of ADR. This chapter seeks to consider proposals made in respect of Chapter 4 of the draft Bill in this report which provides for mandatory mediation in family law disputes. This chapter confirms the SALRC's preliminary view that mandatory mediation should be provided for, subject to exceptions to the general rule, and as such would be constitutional. It further recommends that mediated matters should be expedited through the court process and that to this end consideration should be given to issuing court directives for a special roll for settlements and expedition. The SALRC further confirms that a party who unreasonably refuses to engage in mediation may be met with a punitive costs order by a court. Chapter 4 discusses the ADR mechanism of collaborative family practice found in Chapter 5 of the draft Bill. It was referred to as collaborative dispute resolution in the discussion paper but the SALRC has subsequently concluded that the term "collaborative family practice" more accurately describes this process and has elected to substitute the terminology in favour of the term "collaborative family practice". Chapter 5 focuses on the ADR mechanism of family arbitration found in Chapter 6 of the draft Bill and Chapter 6 discusses the mechanism of parenting coordination as it relates to the proposals contained in Chapter 7 of the draft Bill.

6. In this report the SALRC traverses across the four ADR mechanisms found in the discussion paper, namely family mediation, collaborative family practice, family arbitration, and parenting coordination. These mechanisms are underpinned by the identified germane general principles and the cross-cutting need for information and education. Where relevant,

pertinent submissions received from respondents² to the discussion paper and contributions received during the subsequently held virtual workshops³ and expert engagements will form part of the report and be referred to. The report includes draft legislative recommendations contained in the draft Family dispute Resolution Bill aimed at providing a procedure to resolve conflict in family matters in a manner which, while ensuring that the best interests of particularly children are paramount,⁴ is effective, efficient and affordable. In summation, the draft Bill seeks to present the ideal of an integrated family justice system or therapeutic-justice model.

7. Following the sequence of the draft Bill the SALRC's recommendations are as follows:

Preamble

8. The SALRC recognises that every person is vested with the right found in section 34 of the Constitution to have any dispute that the application of law can resolve decided in a fair public hearing before a court or, independent and impartial tribunal or forum. With a view to:

- alignment with a therapeutic justice system;
- preserving ongoing family relations;
- providing access to justice;
- providing appropriate resolution of family law disputes;
- allowing the voices of children and parents to be heard;
- reducing legal costs; and
- expediting the resolution of family law disputes,

the draft Bill provides four mechanisms of ADR, namely mediation, collaborative family practice, family arbitration, and parenting coordination. These mechanisms are found in Chapters 4 to 7 of the draft Bill.

² Annexure A contains a comprehensive list of all respondents to the SALRC ADR in Family Matters Discussion Paper (2019). 28 substantive submissions were received.

³ Annexure B contains information relevant to some of the workshops that were held on the SALRC Discussion Paper (2019).

⁴ Section 28(2) of the Constitution and emphasized in *BMGS v MBS and others* High Court of South Africa Case No: 26675/2022 judgment delivered on 8 January 2024 (unreported) [4].

Objects of the Bill

9. Clause 2 contains the objects of the Bill, which are aimed at ensuring that parties to a family law dispute are provided with basic legal information regarding applicable legal services; are informed of processes available for them to resolve the dispute; are encouraged to resolve the dispute in the best interests of any child affected by the dispute; and to regulate ADR processes contained in the draft Bill.

General principles

10. Chapter two of the draft Bill contains five general principles which underpin the ADR processes in the draft Bill. It firstly clarifies that the professional responsibility, obligations and standards applicable to legal practitioners or other licensed professionals are not circumvented by the provisions in the draft Bill; and that the obligation of a person to report abuse, neglect, abandonment or exploitation of a child or adult under the law remains intact (see clause 3). Secondly, it clarifies that parties may approach a court, at any time during an ADR process, for an urgent order to protect the health, safety, welfare or interest of a child or other family member (see clause 4). Thirdly, it provides that parties are required to make timely, full, candid and informal disclosure of information relevant to the family law dispute (see clause 5). Fourthly, it provides that a family dispute resolution professional, which is defined in the draft Bill, must at the outset and throughout the ADR process enquire as to whether any of the parties have been involved in a coercive or abusive relationship with any other party. Where such circumstances exist, a party to a family law dispute is exempted from engaging in mandatory mediation and may approach the court directly (see clause 17). If the party should wish to engage in an ADR process, it may not be commenced with unless the party has indicated that they choose to engage in an ADR process; the party has been informed of the relief available in terms of the Domestic Violence Act 116 of 1998; any obligation to report such act of coercion or abuse has been complied with; the party has been given the opportunity of applying for a protection order or has indicated that they do not wish to; a risk assessment has been done by the family dispute resolution professional; they believe that it will be safe for the party to engage in the process; and it is believed that the party will be in a position to negotiate a fair agreement (see clause 6). Fifthly clause 7 places the child at the centre of all family law disputes. The active facilitation of what is termed the “voice of the child” through a child expert (which is defined) is required during all ADR processes.

Information and education

11. The mandatory information and education requirement for all parties to a family law dispute is triggered at the first point of access to the justice system. This is colloquially referred to as an entry or reception point (see clause 8). An “entry point” is broadly defined as ensuring that a party receives adequate information irrespective of the point they seek to access the justice system from. It provides for an open-ended list of points, which include various courts, lawyers, police stations, community advice centres, university law clinics, non-governmental organisations, schools, religious institutions, traditional leaders, and mental health care- or health practitioners. An information and education programme is provided to a party of a family law dispute at either the point of entry if the person is appointed as a programme provider, or the person at the point of entry is required to refer the person to a programme provider.

12. Clause 9 provides that the Minister of Social Development, in collaboration with the Minister of Justice and Constitutional Development, is responsible for developing minimum standards for the information and education programme. Once developed, but prior to implementation, they are required to consult with the Office of the Chief Justice. This would primarily include the effect of a family law dispute on both adults and children and how they may resolve the dispute.

13. Clause 10 provides for the content of the information and education programme. It is broadly categorised into three parts, A, B and C. Part A provides for information on mandatory mediation applicable to those parties who do not have children; and Parts B and C provide for the same information augmented to apply to parties who do have children.

14. Clause 11 provides for a variety of ways in which the programme referred to in clause 10 may be presented, including that it should be provided for in the party’s home language at prescribed locations.

15. Clause 12 provides that the MEC for social development is required to oversee the administration and implementation of the mandatory information programme at entry points other than the courts (see clause 12(1)). Entry points associated with courts must be overseen by the Office of the Chief Justice (see clause 12(2)). It is clarified that the person

presenting the programme must at the very least be qualified as prescribed, and may not have any financial or other interest in the relevant family law dispute (see clause 12(3)). Sub-clause 12(4) provides that a 'dispute resolution professional' defined as persons ranging from a government employee to 'any other person designated by the Minister' (see definition section) may act as programme providers.

16. Clause 13 regulates the applicability of the programme to parties to the family law dispute. Where the rights and interests of a child are not affected, the parties must set out the programme as set out in Part A of the programme. Where the rights and interests of the child are affected the parties must attend Part A and B of the programme.

17. Clause 14 provides that the programme provider must after completion of the programme provide each party with a certificate of attendance and a list of available certified mediators.

18. Clause 15 stipulates that there are pertinent consequences for parties choosing not to comply with the required attendance of the mandatory information and education programme. Firstly, if both parties refuse to participate no further proceedings may take place, and secondly where only one-party refuses to participate a negative inference may be drawn coupled with a costs order in the event of future court proceedings (see clause 15(1)). Where the dispute resolution professional does not inform the parties about the mandatory and non-mandatory aspects and content of the information and education programme, and the consequences of non-participation (see clause 8), a negative inference may be drawn in respect of the bona fides of the family dispute resolution professional or their intentions regarding the best interests of the child concerned; and a punitive order may be made against the person (see clause 15(3)(a) and (b)).

Family mediation

19. The SALRC explains in the discussion paper that the regulation of the mediation process itself will be primarily addressed in the envisaged overarching draft Mediation Bill being developed by the SALRC Project 94 investigation. The aforementioned draft Bill aims to provide a generic framework for the mediation of all matters, to the exclusion of provisions provided for in the proposed draft Family Dispute Resolution Bill. The draft recommendations in the attached draft Family Dispute Resolution Bill and its intersection

with the draft Mediation Bill have been developed pursuant to engagement with the advisory committee appointed to Project 94. As the Project 94 investigation is currently in the discussion paper phase, the SALRC has decided, in order to make the proposals in the draft Family Dispute Resolution Bill workable, to include the regulatory framework for mediation in this Bill as a transitional arrangement. Clauses 16 to 32 regulate the ADR mechanism of family mediation in the draft Bill. Clause 16 provides that the Chief Justice may, subject to specific criteria, recognise one or more organisations to register people as certified mediators. It further stipulates the minimum requirements necessary for certification as a mediator. As engaging in mediation is mandatory prior to litigation (see clause 17), to ensure that all parties irrespective of their financial standing have access to this process, this clause importantly provides that certification as a mediator is dependent on prescribed recurring annual community service. Clause 17 however lists six exceptions to the requirement of mandatory mediation. The exceptions to mandatory mediation are as follows:

- intention to apply for a court order based on a settlement agreement;
- a previous attempt to mediating the dispute was unsuccessful;
- the presence of domestic violence which may adversely affect the safety of the parties or to negotiate a fair agreement;
- reasonable grounds to believe that a child has been abused by one of the parties to the dispute or that a delay would result in abuse of a child;
- a signed collaborative family practice participation agreement; or
- a court determines that it is not in the best interest of the parties or the child, including urgency or potential hardship (see clause 17(4)).

20. Clause 18 delineates the jurisdiction of the court to hear family law disputes. Courts are generally precluded from hearing family law disputes if a certificate of outcome by a certified mediator is not submitted to the court (see clause 18(4)). Where a court is seized with a family law matter it may at any stage, in the best interests of any member of the concerned family, refer the matter to mediation with or without consent of the parties, or at the request of the parties (see clauses 18(1) and (2)).

21. Refusal by one or both of the parties to a family law dispute to continue engaging in mediation after attending at least one session is regulated by clause 19. Opting out of this ADR process is provided for where the dispute centres on a question of law only or there is

good cause shown, including urgency and potential hardship (see clause 19(1)). The parties are required to provide their written refusal to continue to the mediator (see clause 19(2)). However, if the parties are subsequently found to have unreasonably refused to engage in mediation, the court may impose a punitive costs order (see clause 19(3)).

22. Clause 20 provides for the termination of the services of a certified mediator for a range of reasons. This provision is coupled with the ability to appoint another certified mediator or request that another mediator be appointed.

23. A written agreement to mediate is required before the mediation commences (see clause 21). After consultation with the parties, the procedure to be followed during mediation; the role of the mediator; and the rights and responsibilities of the parties will be determined by the mediator (see clause 22(1)). The parties are required to attend the proceedings themselves accompanied with or without their legal representative or a support person. The legal representative or support person may, however, be excluded from proceedings if the mediator deems this to be in the interests of justice (see clause 22(5)). The outcome of this process is aimed at assisting the parties to reach a satisfactory resolution of the family law dispute or to suggest options for the settlement thereof (see clause 22(11)).

24. Clause 23 provides that a certified mediator is immune from liability for anything done to discharge their functions where they have not been shown to have acted in bad faith.

25. The time frame for completion of the mediation is 90 days from the date of referral. The time frame may be extended on good cause shown (see clause 24(2)). The mediation process may however be terminated by a number of actions, such as a party opting out of the process, a party initiating litigation; or a mediator withdrawing from the process (see clause 24(4)).

26. Clause 25 provides that any communication made during the mediation process is confidential unless otherwise agreed.

27. Subject to a waiver and exclusion of privilege (see clause 27) or limitation of privilege (see clause 28) a communication made during the mediation process is privileged (see clause 26)). Clause 27 provides that a privilege may be waived in writing in a record or orally

during proceedings, and clause 28 provides that there is no privilege where the communication is in the public domain, where there is a threat or statement to inflict bodily harm or commit a crime of violence; or where it is part of an agreement.

28. Clause 29 provides that a mediator is required to provide the parties with a certificate of outcome which sets out the agreement reached, or states that agreement could not be reached; or sets out why a party refused to participate in further mediation (see clause 29(1)).

29. Clause 30 provides that a written settlement agreement must be concluded once the parties have reached a mediated settlement to resolve all or part of the family law dispute. This settlement agreement is considered binding on the parties (see clause 30(3)), and may be made an order of the court (see clause 30(4)). However, any matter requiring enforcement e.g. where the interests of a child are affected or a financial commitment is agreed on, will require approval by a court (see clause 30(4)).

30. Clause 31 provides that the Chief Justice, and the Heads of Court may issue relevant practice directives, and the Rules Board for Courts of Law may make rules for family mediation.

31. Clause 32 regulates the costs of the mediation, and the extent of parties' liability for costs of the mediation.

Collaborative family practice

32. Clauses 33 to 43 encapsulate the ADR process of collaborative family practice. Parties may opt to use this process instead of engaging in mediation. Clause 33 stipulates that a written collaborative family practice participation agreement is required and that it should identify the collaborative legal practitioners and neutral professionals who will be involved in the process. It further provides that such legal practitioners are disqualified from representing the parties in other proceedings (see clause 33(1)(h)).

33. Clause 34 regulates the commencement and conclusion of a collaborative family practice process; once the parties have a certificate indicating attendance of an information and education programme and have elected to engage in a collaborative family practice

process and have signed a participation agreement the process may commence. It is concluded by way of a signed settlement agreement; the termination of the process; or as agreed (see clause 34(4)). Although a court may not order parties to engage in such a process (see clause 34(3)), court proceedings may be stayed on application for a stay in proceedings to engage in this process (see clause 35). The signed record of the conclusion of the process must be filed with the court three days after the conclusion thereof (see clause 35(2)), where after the court may confirm such settlement agreement (see clause 36). The time limit set for concluding a collaborative family practice process is 90 days from the signature of the collaborative agreement (see clause 37). Clause 38 provides that as a general rule, a collaborative law practitioner is disqualified from representing a party in matters not related to the collaborative family practice process. With the exception of presenting an agreement to the court for approval; or seeking or defending an urgent application to protect the health, safety, welfare or interests of the party or family member, an associate legal practitioner may not represent the party in court or another process either (see clause 38(3)).

34. Clause 39 provides that communications in the collaborative family practice are confidential to the extent agreed upon. Similarly, subject to the waiver of exclusion of privilege (see clause 41) and the limits of privilege (see clause 42), a collaborative family practice communication is privileged (see clause 40). Clause 42, however, clearly provides that the existence of certain circumstances such as a threat or statement of intent to inflict bodily harm or to commit a crime of violence is not protected by privilege.

35. Clause 43 provides that if any part of the procedure relevant to the collaborative family law practice process is found to be invalid, this will not affect the remaining part of Chapter 5 of the draft Bill.

Family arbitration

36. Clause 44 provides that parties to a family law dispute may after receiving a certificate of attendance of an information and education program refer the dispute to arbitration in terms of this Bill; or a court may with the consent of all of the parties to the proceedings refer the matter to arbitration in terms of clause 45.

37. The requirements for a family arbitration are contained in clause 46 in the alternative. The first option provides that the requirements will be prescribed by regulation. The second option also provides that the requirements will be prescribed by regulation but stipulates minimum requirements for legal experts and mental health experts and other bodies to act as a family arbitration tribunal. The duties of the family arbitration tribunal are contained in clause 47 and provide particularly in respect of affected children that the child's voice must be heard, the family advocates report and recommendations must be considered; and that the nature, scope and methodology of the agreement must be set out (see clause 47(4)).

38. Clause 48 provides that rules may be prescribed to facilitate the resolution of family law disputes through arbitration.

39. Clause 49 provides that prior to an application for confirmation of an arbitration award the Office of the Family Advocate must be notified thereof and requested to consider and comment thereon. Similarly, clause 50 provides that no arbitration award affecting the rights of the child may come into effect unless it has been confirmed by the High Court, the Civil Regional Court or the Children's Court. Furthermore, an application to a court must be made within 30 days of delivery of the award (see clause 50(2)). The court may confirm, partially confirm, substitute, vary or remit the award to the arbitration tribunal with appropriate directions (see clause 50(3)). A court may not confirm the award where the point is raised that the award is not in the best interests of the child. It will then proceed to hear the matter (see clause 50(4)(b)). The court is obliged to enquire as to whether the award is in the best interests of the child (see clause 50(5)).

40. The jurisdiction of the court is not limited in so far as a family law dispute does not affect the rights or interests of a child (see clause 51). Additionally, the provisions of the Arbitration Act, 1965 are applicable with the necessary changes (see clause 52).

Parenting coordinator

41. A mental health care professional, legal practitioner or other suitably qualified person may be appointed as a parenting coordinator (see clauses 53 and 54) where such person meets the minimum requirements to do so. To this end, they are appointed to act in this role only (see clauses 54(3) and (4)).

42. Clause 55 provides that a parenting coordinator may assist in resolving a family law dispute where a child is involved if an agreement is reached to do so; a court has ordered such and there is a parenting plan, settlement agreement or court order in place with respect to parenting arrangements or there is a short term, emerging and time-sensitive situation or dispute at hand (see clause 55(1)). The process is activated by the signing of a parenting coordination service agreement (see clause 56(1)). Said agreement must cover specific issues relating to procedures, fees etc (see clause 56(2)). The authority to act in terms of this agreement terminates two years after the first dispute meeting unless the agreement or court order stipulates otherwise. The agreement may be extended for a further two years at a time (see clause 56(4)) or be terminated at any time by the parties by agreement, a court order, or the parenting coordinator. Where the parenting coordinator gives notice to the parties, they must facilitate the appointment of a replacement or the parties must do so (see clause 56(5)).

43. Clause 57 provides that the court retains exclusive jurisdiction in respect of guardianship, care, contact and maintenance, and the authority to exercise management and control over the case.

44. Clause 58 stipulates the areas in which a parenting coordinator may assist parties; provides for the matters on which they may issue directives; and clarifies the matters in which they may not make directives. In issuing directives clause 59 clearly states that in matters relating to parenting arrangements or contact with the child, the best interests of the child are of utmost importance. As a determination is time sensitive and urgent, while a directive must be reduced to writing, it may be issued orally and reduced to writing not later than 24 hours after the oral directive (see clause 59 (5)). Such directives are binding on the parties and enforceable under the Bill, from the date of being issued or as determined by the parenting coordinator, and if filed with the court (see clause 59(7)).

45. Clause 60 provides for the changing of or setting aside of directives.

46. Clause 61 provides for the parenting coordination process broadly, and clause 40 places an obligation on the parties to provide the parenting coordinator with the necessary information and authorisation to the parenting coordinator to request and receive information in respect of a child or party from a person who is not a party. It is relevant that the

communication between the parties and the parenting coordinator may not be confidential (see clause 62(2)). Clause 63 provides that a parenting coordinator may be removed by the parties by agreement or the court depending on how the parenting coordinator was appointed. Notably, a parenting coordinator may not be appointed if the court is not satisfied that the parties have the means to pay for the parenting coordinator (see clause 64(1)).

General provisions

47. Clauses 65 to 67 contain general provisions relevant to the issuing of regulations (see clause 65); the amendment of laws (see clause 66 and the attached schedule to the draft Bill); and the short title and commencement (see clause 67).

DRAFT FAMILY DISPUTE RESOLUTION BILL, 2024

REPUBLIC OF SOUTH AFRICA

FAMILY DISPUTE RESOLUTION BILL

(As introduced in the National Assembly (proposed section 75); explanatory summary of Bill published in Government Gazette No. of 2024) (The English text is the official text of the Bill)

(MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B —2024]

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments

_____ Words underlined with a solid line indicate insertions in existing enactments

BILL

A Bill to provide for meaningful access to justice by providing for appropriate resolution of family law disputes; to regulate the process of family mediation, family arbitration, collaborative family practice and parenting coordination; to introduce a standardised, compulsory information and education program and mediation process before engaging the court process; to allow the voices of children and parents to be heard; to reduce legal costs; to expedite the resolution of family law disputes; and to provide for matters connected therewith.

PREAMBLE

RECOGNISING THAT –

- everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, independent and impartial tribunal or forum as provided for in section 34 of the Constitution;

AND BEARING IN MIND THAT –

- every child has the rights set out in section 28 of the Constitution;
- every person has an inherent right to dignity and to have that dignity respected and protected as provided for in section 10 of the Constitution;
- every person has the right to privacy as provided for in section 14 of the Constitution; and
- the state must respect, protect, promote and fulfil the rights set out in the Bill of Rights as provided for in section 7 of the Constitution;

AND IN ORDER TO –

- align the family law system with a therapeutic justice system;
- preserve ongoing family relations;
- provide for access to justice;
- provide for appropriate resolution of family law disputes;
- allow the voice of the child and parents to be heard;
- reduce legal costs; and
- expedite the resolution of family law disputes.

PARLIAMENT of the Republic of South Africa enacts as follows: —

ARRANGEMENT OF SECTIONS

Sections

CHAPTER 1

DEFINITIONS AND PURPOSE

1. Definitions
2. Objects of this Act

CHAPTER 2

GENERAL PRINCIPLES

3. Standards of professional responsibility and mandatory reporting not affected
4. Urgent orders
5. Disclosure of information
6. Coercive or abusive relationship
7. Voice of the child

CHAPTER 3

INFORMATION AND EDUCATION

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CHAPTER 1

DEFINITIONS AND PURPOSE

Definitions and purpose

1.(1) In this Act, unless the context indicates otherwise—

“agreement to mediate” means an agreement by two or more persons to refer for mediation the whole or part of a family law dispute which has arisen, or which may arise between them, and may include an agreement entered into between the disputing parties and a mediator before the mediation process commences which sets out the terms according to which the mediation will be conducted;

“arbitration tribunal” means the arbitrator or arbitrators acting as such in terms of an arbitration agreement;

“certified mediator” means a person who has been certified as a mediator in terms of clause 16 of the Act;

“Chief Justice” means the Chief Justice of South Africa appointed in terms of section 174(3) of the Constitution;

“child” means a person under the age of 18 years;

“child expert” for the purpose of clause 7 means a person who has the requisite knowledge and skillset including —

- (a) child-friendly interviewing skills;
- (b) an understanding of education and schooling in terms of the educational needs of a child;
- (c) a basic awareness of common psychiatric and psychological disorders that affect children and their learning;
- (d) knowledge and awareness of parental alienation, and the indicators thereof;
- (e) thorough knowledge of child development at a cognitive, linguistic and psychosocial level;
- (f) an understanding of the various contexts and systems within which the child develops; and
- (g) current knowledge of research and development in the areas of child participation in divorce, family mediation, parenting plans, and legal aspects relevant to divorce.

“coercive or abusive relationship” includes behaviour defined as ‘domestic violence’ in section 1 of the Domestic Violence Act 116 of 1998;

“collaborative family practice participation agreement” means an agreement in writing by persons to participate in a collaborative family practice process;

“collaborative family practice process” means a procedure intended to resolve a collaborative matter, without intervention by a court, in which persons—

- (a) sign a collaborative family practice participation agreement; and

(b) are represented by collaborative law practitioners;

“collaborative law practitioner” means a legal practitioner who represents a party in a collaborative family practice process;

“collaborative matter” means a family law dispute which is described in a collaborative family practice participation agreement;

“Constitution” means the Constitution of the Republic of South Africa, 1996;

“court” means any court in the Republic as provided in section 166 of the Constitution;

“dispute resolution process” includes family mediation, family arbitration, collaborative family practice and parenting coordination;

“entry point” means the first point of access to the justice system for parties to a family law dispute, and includes—

- (a) courts, social workers, legal practitioners, the Office of the Family Advocate, police stations, Thusong Service Centres, Therisano Centres; Legal Aid South Africa, and community advice centres;
- (b) traditional courts;
- (c) community courts, university law clinics, non-governmental organisations and community-based organisations;
- (d) schools;
- (e) religious institutions;
- (f) traditional leaders;
- (g) mediators;
- (h) health practitioners;
- (i) mental health care practitioners;
- (j) social service practitioner; or
- (k) any other prescribed entry point;

“family” means a societal group that is or has been related by blood (kinship), adoption, foster care or the ties of marriage (civil, customary or religious), civil union or life partnership;

“family law dispute” means a dispute, or alleged dispute, in which one party maintains a particular point of view or claim or contention regarding the parties’ respective responsibilities, interests and rights towards, or with respect to, any member of the family to which both parties belong, and the other party maintains a contrary or different view;

“family dispute resolution professional” means any of the following:

- (a) a government employee tasked with dealing with family law disputes and includes a family advocate, family counsellor, social service practitioner, court official, maintenance officer, and an employee of Legal Aid South Africa;
- (b) a legal practitioner advising a party in relation to a family law dispute;
- (c) mental health care practitioners or social workers in private practice dealing with family law disputes;
- (d) a mediator conducting a mediation in relation to a family law dispute;
- (e) a collaborative law practitioner;
- (f) a parenting coordinator;
- (g) an arbitrator conducting an arbitration in relation to a family law dispute;
- (h) a person providing family dispute resolution services within a class of prescribed persons; or
- (i) any other person designated by the Minister;

“health practitioner” means any person, including a student, registered with the Health Professions Council of South Africa in a profession registrable in terms of section 2 of the Health Professions Act, 1974;

“information and education programme” means a programme developed in accordance with this Act for the purpose of providing relevant information and education to the parties involved in a family dispute;

“informed consent” means that the decision parties reach must be sufficiently informed by information, disclosed,

“law firm” means legal practitioners who practice law together in a partnership, professional corporation, sole proprietorship, limited liability company or association;

“legal practitioner” means an advocate or attorney admitted and enrolled as such in terms of sections 24 and 30 of the Legal Practice Act, 2014 (Act No. 28 of 2014);

“mediated settlement agreement” means an agreement, by some or all of the parties to the mediation settling the whole, or part of, the family law dispute to which the mediation relates;

“mediation” means a process in which a mediator facilitates and encourages communication and negotiation between the mediating parties and seeks to assist the mediating parties in arriving at a voluntary agreement;

“MEC for social development” means the member of the Executive Council of a province who is responsible for social development in a province;

“mental health care practitioner” means a psychiatrist, psychologist or social worker who has been trained to provide prescribed mental health care, treatment and rehabilitation services in family law disputes;

“Minister” means the Cabinet member responsible for the administration of justice or, where the context indicates another Minister, that Minister;

“non-party participant” means a person, other than a party and the party’s collaborative law practitioner, that participates in a collaborative law process, including support persons, mental-health professionals, financial neutrals and potential parties;

“parenting coordinator” means a third party who is appointed to make directives on matters incidental to the parents’ parental responsibilities and rights;

“parenting coordination” is a child-focused alternative dispute resolution process in which a mental health care professional or legal professional with mediation training and experience assists high-conflict parties in implementing parenting plans, settlement agreements or court orders and resolving pre- and post-divorce parenting disputes in an immediate non-adversarial, court-sanctioned, private forum;

“parenting coordination agreement” means an agreement in writing between the parties to use a parenting coordinator and includes such an agreement that has been included as a parenting coordination clause in a parenting plan, settlement agreement or divorce order;

“parenting coordination service agreement” means an agreement in writing between the parties and the parenting coordinator, governing their working relationship and including information regarding fee payments, billing practices and retainers;

“parenting plan” means a plan that determines parental responsibilities and rights as contemplated in Chapter 3 of the Children’s Act, 2005 (Act No. 38 of 2005);

“person” means a natural person;

“prescribed” means prescribed by regulation;

“proceedings” means any court litigation, settlement or alternative dispute resolution processes and includes the furnishing of legal advice or intervention and or investigation by the Office of the Family Advocate;

“Republic” means the Republic of South Africa;

“social service practitioner” means a ‘social service practitioner’ as contemplated in the Social Service Professions Act, 1978 (Act No. 110 of 1978);

“therapeutic justice system” means a justice system that aims to foster strong, stable, and positive family relationships through a therapeutic application of the law focusing on achieving positive outcomes for families and children involved in family law disputes;

“this Act” includes any regulation made in terms of this Act;

Objects of this Act

2.(1) The objects of this Act are to—

- (a) ensure that consistent, standardised and accurate basic legal information is provided to parties to a family law dispute in relation to all areas of applicable legal services;

- (b) ensure that parties to a family law dispute are informed of the various processes and procedures available to them to resolve the dispute;
- (c) encourage family members, parents, caregivers and guardians to resolve conflict in the best interests of the child, other than through court intervention; and
- (d) regulate alternative dispute resolution processes and procedures.

CHAPTER 2

GENERAL PRINCIPLES

Standards of professional responsibility and mandatory reporting not affected

3. This Act does not affect—
- (a) the professional responsibility, obligations and standards applicable to a legal practitioner or other licensed professional; or
 - (b) the obligation of a person to report abuse, neglect, abandonment or exploitation of a child or adult under the law of the Republic.

Urgent orders

4. During a dispute resolution process, a court may at any time issue an urgent order to protect the health, safety, welfare or interest of a child or other family member.

Disclosure of information

5.(1) Except as provided by law other than this Act, a party must, during the dispute resolution process, at the request of another party, make timely, full, candid and informal disclosure of information related to the family law matter without formal discovery.

(2) A party must promptly update previously disclosed information that has materially changed.

(3) Failure of a party to comply with subsection (1) has the effect that a negative inference may be drawn about that party's bona fides, and in the event of any subsequent court proceedings a punitive cost order may be made at the discretion of the court.

Coercive or abusive relationship

6.(1) A family dispute resolution professional consulted by a party to a family law dispute must, as a first step, make reasonable enquiries whether any of the parties has been involved in a coercive or abusive relationship with any other party.

(2) Throughout a dispute resolution process, the relevant family dispute resolution professional must reasonably and continuously assess whether any of the parties to the dispute resolution has been involved in a coercive or abusive relationship with any other party.

(3) If a family dispute resolution professional reasonably believes that any of the parties to the family dispute has been involved in a coercive or abusive relationship with any other party, the family dispute resolution professional may not begin with or continue with the dispute resolution process unless—

- (a) the relevant party has been informed of the relief available in terms of the Domestic Violence Act, 1998 (Act No.116 of 1998);
- (b) where applicable, any obligation to report domestic violence in terms of sections 2A or 2B of the Domestic Violence Act, 1998 (Act No.116 of 1998) has been complied with;
- (c) the relevant party has been given the opportunity of applying for and obtaining an interim protection order in terms of the Domestic Violence Act, 1998 (Act No.116 of 1998) or has indicated that they do not elect to do so;
- (d) the potentially vulnerable prospective party requests the commencement or continuation of the process; and
- (e) a risk assessment has been done by the family dispute resolution professional; and
- (f) the family dispute resolution professional reasonably believes that the safety of the potentially vulnerable party can be adequately protected during the process.

(4) A family dispute resolution professional's failure to protect a party in terms of this section does not allow a private cause of action against the dispute resolution professional.

(5) A family dispute resolution professional who makes a report referred to in sub-clause (3)(b) in good faith, is not liable to civil, criminal or disciplinary action on the basis of the report, despite any law, policy or code of conduct prohibiting the disclosure of personal information.

Voice of the child

7. During all dispute resolution processes, child participation in family law disputes involving children should be actively facilitated in accordance with the provisions of the Children's Act, 2005, through an independent and suitably qualified child expert.

CHAPTER 3

INFORMATION AND EDUCATION

Reception at entry point

8.(1) A person at an entry point or a family dispute resolution professional consulted by a party to a family law dispute must inform the parties about—

- (a) the mandatory and non-mandatory aspects and content of the family law information and education programme as set out in this Chapter; and
- (b) the consequences of non-participation.

(2) If the person at an entry point or the dispute resolution professional has not been appointed as a programme provider, he or she must refer the party to a programme provider appointed in terms of section 12(3) for purposes of participating in an information and education programme.

Information and education programme

9.(1) The Minister, in collaboration with the Cabinet member responsible for social development, must develop—

- (a) minimum standards for an information and education programme for the purpose of educating family members about the effect of a family dispute on adults and children, and about the manner in which such a dispute may be resolved; and
- (b) an information and education programme in accordance with the minimum standards contemplated in paragraph (a) and in accordance with this Act.

(2) The minimum standards developed in terms of subsection (1)(a) must address—

- (a) the nature of the programme;
- (b) the funding of the programme;
- (c) the effect of cultural diversity on the nature of the programme;
- (d) the importance of acknowledging the voice of the child;
- (e) arrangements for disputes in which domestic violence or child abuse may be a factor;
- (f) the qualifications of programme providers;
- (g) the means of evaluating and maintaining the programme; and
- (h) the support services available during and after the process.

(3) Once the information and education programme has been developed, but prior to implementation, it must be submitted to the Office of the Chief Justice for consultation.

Content of information and education programme

10.(1) The information and educational programme referred to in subsection 9(1)(b) must at a minimum include instruction about the following matters—

- (a) as set out in Part A of the programme:
 - (i) Ways in which family law disputes may be resolved other than by the court;

- (ii) the suitability of mediation, or of any other way of resolving disputes, such as family arbitration or collaborative family practice, as a possible way of resolving the dispute to which the matter concerned relates;
 - (iii) the nature of mandatory mediation as set out in this Act;
 - (iv) the availability of independent legal advice and representation to a party;
 - (v) the conditions for obtaining legal aid and where the parties can get appropriate legal advice;
 - (vi) referral to other non-legal service providers or agencies;
 - (vii) the legal process and procedures of divorce or separation and the responsibilities and rights of parties in all circumstances;
 - (viii) the nature of financial issues that may arise as a result of divorce or separation, and services that are available to assist the parties; and
 - (ix) protective measures available in the case of violence and all forms of abuse and how to obtain support and assistance; and
- (b) as set out in Part B of the programme:
- (i) The role of the Office of the Family Advocate;
 - (ii) the emotional, psychological, physical and other short-term and long-term effects of conflict on both children and adults;
 - (iii) the importance of recognising the welfare, wishes and feelings of a child;
 - (iv) how the parties may acquire a better understanding of the manner in which a child may be assisted to cope with the breakdown of a relationship or with any other family dispute;
 - (v) the importance of avoiding the placing of a child in the centre of conflict;
 - (vi) information for a child and their parents about separation and divorce, and their adjustment after the separation or divorce;
 - (vii) the parental responsibilities and rights of parents towards each other and towards their child and the advantages of parenting plans;
 - (viii) the suitability of parenting coordination; and
 - (ix) the role of support systems.

(2) Apart from the matters referred to in subsection (1), the information and education programme must also include instruction about the following matters set out in Part C of the programme:

- (a) The developmental and psychological needs and responses of a child;
- (b) the positive parenting behaviour skills needed to build a cooperative parallel parenting relationship; and
- (c) the importance of a parent taking care of themselves in order to be able to help their child adjust.

Format of the programme

11.(1) The format of the programme must include any of the following communication tools as prescribed:

- (a) online resources;
- (b) audio-visual materials;
- (c) in-person lectures;
- (d) literature; and
- (e) group meetings and presentations.

(2) The communication tools referred to in subsection (1) above must be provided in a party's home language at prescribed locations.

Availability, administration and implementation of programme

12.(1) The MEC for social development must oversee the administration, adoption and implementation of the programme at all entry points, other than the courts, for use by participants who are required to attend.

(2) The Office of the Chief Justice must oversee the administration, adoption and implementation of the programme in the courts, for use by participants who are required to attend.

(3) An information and education programme must be presented by a person who—

- (a) is qualified and was appointed as prescribed; and
- (b) has no financial or other interest in any aspect of the family dispute between the parties.

(4) Subject to subsection (3), nothing precludes a family dispute resolution professional from acting as a programme provider.

(5) The information and education programme must be available at the places and times prescribed.

(6) Information as prescribed must be provided to parties (other than during an information and education programme) in cases where mandatory participation in a programme does not apply.

Applicability of programme

13.(1) The parties in any family law dispute that—

- (a) does not affect the rights or interests of a child, must participate in the information and education programme contemplated in section 10(1)(a), as set out in Part A of the programme;
- (b) affects the rights or interests of a child, must—
 - (i) participate in the information and education programme contemplated in section 10(1)(a) and (b), as set out in Parts A and B of the programme; and
 - (ii) ensure that a child involved in the family law dispute receives the information contemplated in section 10(1)(b)(vi),

before any proceedings may commence, unless—

- (aa) a court determines, for reasons that may include urgency and possible harm or prejudice, that participation is not in the best interests of the parties or the child;
- (bb) a party is or will be enrolled in an education programme that the court deems to be appropriate;
- (cc) a court determines that a party has previously completed an educational programme pursuant to this section, or an appropriate programme, and the court is of the opinion that the party need not attend the programme again;
- (dd) a family dispute resolution professional is of the opinion that the safety of the parties or of their children is at risk;
- (ee) a party lives in an area where the programme is not available; or
- (ff) the court determines that participation is unnecessary in the circumstances of the case concerned.

(2) Parties in any family law dispute that affects the rights or interests of a child may participate in the information and education programme contemplated in section 10(2), as set out in Part C of the programme, before any proceedings commence.

Certificate of attendance

14. A programme provider appointed in terms of section 12(3) must furnish each party who attends with a—

- (a) certificate of attendance as prescribed; and
- (b) list of available certified mediators.

Compliance

- 15.(1)** Failure of a party to comply with section 13(1)(a) has the effect that—
- (a) when both parties refuse to participate, no further proceedings may take place; and
 - (b) when one of the parties refuses to participate, a negative inference may be drawn regarding that party's bona fides and a punitive cost order, or any other appropriate order, may be made at the discretion of the court in the event of any subsequent court proceedings.
- (2) Failure of a party to comply with section 13(1)(b) has the effect that—
- (a) when both parties refuse to participate, no further proceedings may take place; and
 - (b) when one of the parties refuses to participate—
 - (i) a negative inference may be drawn as to that party's intentions regarding the best interests of the child concerned; and
 - (ii) a punitive cost order, or any other appropriate order, may be made at the discretion of the court in the event of any subsequent court proceedings.
- (3) Failure of a dispute resolution professional to comply with section 8 will result in—
- (a) a negative inference being drawn with respect to the bona fides of the family dispute resolution professional, and when the rights or interests of a child are affected, to the professional's intentions regarding the best interests of the child concerned; and
 - (b) a punitive cost order, or any other appropriate order, may be made, where applicable, at the discretion of the court in the event of any subsequent court proceedings.

CHAPTER 4

FAMILY MEDIATION

Certification as a mediator

- 16. (1)** The Chief Justice must, after consultation with the Heads of Court, without delay and by way of notice in the Government Gazette, recognise one or more organisations to register persons as certified mediators.
- (2) The Chief Justice may from time to time recognise additional organisations, by way of notice in the Government Gazette, to register persons as certified mediators.

(3) When the Chief Justice has recognised an organisation in accordance with subsections (1) or (2), the persons certified as mediators of family law disputes by that organisation are deemed certified mediators, for purposes of this Act and any other law that requires family law mediation services to be rendered.

(4) Prior to recognising any organisation in terms of subsections (1) or (2), the Chief Justice must ascertain details of the –

- (a) qualification and certification standards used by the organisation, including any such standards that may be applicable to mediation in family law disputes;
- (b) manner in which the organisation requires persons to be assessed for certification against these standards;
- (c) codes of conduct that the organisation requires certified mediators to comply with, as well as the complaints and disciplinary procedures that apply to mediators certified by the organisation; and
- (d) manner in which the mediator standards, the codes of practice, the complaints and disciplinary procedures, and the register of mediators certified by the organisation, are published.

(5) The Chief Justice may when recognising an organisation in terms of subsection (1) or (2) stipulate that the organisation is only recognised to register persons as certified mediators for family law disputes.

(6) Subject to subsection (4), the decisions in accordance with subsections (1), (2) and (5) must be at the discretion of the Chief Justice, provided that the Chief Justice may consult with any relevant stakeholders prior to making any such decision.

(7) The Chief Justice may from time to time, after consultation with the body, at their discretion, withdraw the recognition of any organisation previously made in accordance with sections (1), (2) or (5).

(8) The minimum requirements for a person to be certified as a mediator include that such person must –

- (a) provide proof of having met the following training requirements:
 - (i) training in a family mediation training course accredited by an organisation recognised in terms of subclause (1), with assessment and certification of their attendance and competence; and
 - (ii) completion of additional training, which includes training in psychology, training in family law, or training in both.
- (b) provide proof of having met the minimum practice requirement of participation in at least three supervised mediations.
- (c) be a certified member of an organisation recognised in terms of subsection (1).

(9) A minimum period of recurring annual community service as prescribed is required from certified mediators upon which continued certification as a mediator is dependent.

(10) Any additional requirements for certification as a mediator may be imposed by the Chief Justice or prescribed by regulation.

Commencement of mediation before litigation

17.(1) In order to attempt the resolution of a family law dispute, the parties to a dispute must, once they have complied with section 13, submit to mediation in terms of this Act before any other proceedings (including the issuing of summons, or a notice of motion) may commence.

(2) The mediation must be performed by a certified mediator agreed on by the parties or, if the parties are unable to agree, by a certified mediator appointed by an organisation recognised in terms of section 16(1) of the Act or by the Court.

(3) Subject to subsection (2), nothing precludes a programme provider from making their services available to the parties to facilitate the mediation as a certified mediator.

(4) The parties are not compelled to submit to mediation if—

- (a) they intend to file a settlement agreement and both parties consent to the agreement being made an order of court by incorporating it in the divorce order;
- (b) they have previously attempted to mediate the dispute concerned but that mediation was unsuccessful;
- (c) a mediator, after assessing, as prescribed, whether domestic violence as defined in section 1 of the Domestic Violence Act 116 of 1998 may be present, is of the opinion that domestic violence is present and that the domestic violence may adversely affect the safety of the party or a family member of that party or the ability of the party to negotiate a fair agreement;
- (d) a court is satisfied that there are reasonable grounds to believe that abuse of a child by one of the parties has occurred or there would be a risk of abuse of the child if there were to be a delay in applying for protection of the child;
- (e) they have signed a collaborative family practice participation agreement; or
- (f) a court determines that participation is not in the best interests of the parties or the child, including urgency or potential hardship.

Jurisdiction of court

18.(1) A court may at any stage of litigation, if it deems it in the best interests of any member of the family concerned, refer a matter to a certified mediator to facilitate mediation of the family law dispute between the parties, and may do so with or without the consent of the parties to the proceedings.

(2) A litigant may, at any stage of the litigation, apply to court for the referral of a dispute to mediation with such order as to costs as the court deems appropriate.

(3) Where a family law dispute is referred to mediation the time limits prescribed for the delivery of pleadings and notices and the filing of affidavits or the taking of any step shall be suspended for every party to the dispute from the date of signature of the agreement referred to in section 21 to the time of completion or termination of the mediation;

(4) Subject to section 17(4), a court exercising jurisdiction under this Act must not hear a family dispute unless a party files with the court a certificate of outcome furnished to that party by a certified mediator in terms of section 29.

Refusal to submit to mediation

19.(1) Notwithstanding the provisions of sections 17 and 18, a party may, within five days after attending one session with a certified mediator to determine whether mediation appears to be appropriate for the resolution of the dispute, or the parties and the circumstances, opt out of further mediation contemplated in those sections, on the following grounds:

- (a) The issue constitutes a question of law only; or
- (b) any other good cause shown, including urgency and potential harm or prejudice.

(2) Parties who refuse to participate in further mediation must provide the mediator with written reasons for their refusal.

(3) The court may impose a punitive cost order, or another appropriate order, if, during a subsequent hearing, it concludes that a party unreasonably refused to engage in mediation.

Termination of appointment of a certified mediator

20.(1) If a mediator appointed under this chapter is—

- (a) found to be non-compliant with the training or practice requirements as set out in section 16(8)(a) or (b);
- (b) found to no longer satisfy the requirement for certification as required under section 16(8)(c);
- (c) found to have financial or personal interest in the family law dispute;
- (d) found to have obtained their appointment by way of fraud or any other improper means; or
- (e) unable to serve as a mediator for the mediation,

the parties may terminate the appointment of the mediator and appoint another certified mediator for the mediation or request an organisation recognised in terms of clause 16(1) of the Act to appoint another certified mediator.

(2) Notwithstanding subsection (1), the parties may agree to terminate the appointment of a mediator, or agree to replace a mediator at any time, for any reason whatsoever.

Agreement to mediate

21.(1) Before commencement of the mediation in terms of clauses 17 or 18, a certified mediator must enter into a written agreement to mediate with both or all parties.

- (2) The agreement to mediate must set out–
- (a) the role and functions of the certified mediator and their affiliation with an organisation recognised in terms of section 16(1) of the Act;
 - (b) the rights and obligations of the parties in respect of the mediation process, including the duty to disclose all relevant documentation and information voluntarily, openly and honestly;
 - (c) the fact that the mediation occurs without prejudice of rights;
 - (d) the professional fees payable to the mediator; and
 - (e) other matters the parties and the mediator deem appropriate.

Procedure to be followed during mediation and the role of mediator

22.(1) A mediator may determine the manner in which the mediation is to be conducted after consultation with the parties, taking into account –

- (a) the circumstances of the case;
 - (b) any wishes that the parties may express; and
 - (c) the need for a speedy settlement of the dispute.
- (2) The parties to a family law dispute are required to attend mediation proceedings.
- (3) A mediation must be conducted in private unless otherwise agreed by the parties.
- (4) A party may have their legal representative or a support person attending the mediation process, but the mediation must take place between the parties to a family law dispute themselves.
- (5) The mediator may, if they deem it in the interests of justice, and subject to the application of sections 25 and 26, include or exclude any legal representative or support person from the proceedings.
- (6) Notwithstanding subsection (3) a non-party of a mediator’s choice may participate in a mediation to assist the mediator during the mediation, subject to the consent of the parties.
- (7) A mediator must act independently and impartially and seek to maintain fair treatment of the parties and, in so doing, must take into account the circumstances of the case including the best interest of any children.
- (8) Prior to accepting the appointment, the prospective mediator must ensure their availability to conduct the mediation diligently and efficiently.
- (9) At any stage of a mediation a mediator may meet or communicate with the parties together or with each of them separately.

(10) A mediator may not act as a representative or an advisor of a party in any arbitral, judicial or other dispute resolution proceedings in respect of the dispute that is related to the mediation.

(11) A mediator may assist the parties to reach a satisfactory resolution of the family law dispute and may suggest options for the settlement of the dispute.

Immunity of mediator

23. A mediator is not liable for any act or omission in respect of anything done or omitted to be done in the discharge of their functions as a mediator unless the act or omission is shown to have been in bad faith.

Commencement and completion of the mediation

24.(1) The mediation process commences when the parties and a certified mediator sign an agreement to mediate.

(2) The time limit for completion of the mediation is 90 days from the date of referral, and on expiry of this date the parties may institute legal proceedings even if the mediation has not been completed, unless the certified mediator, in writing, extends such time period for completion of the mediation process on good cause shown.

(3) The mediation process is concluded by —

- (a) the resolution of the matter as reflected in a signed mediated settlement agreement, on the date of such signature;
- (b) the resolution of a part of the matter as reflected in a signed mediated settlement agreement in which the parties agree that any remaining parts of the matter must not be included in the process; or
- (c) the termination of the process.

(4) The mediation process terminates when —

- (a) a party opts out of the mediation process or refuses further mediation in terms of clause 19;
- (b) a party initiates a proceeding in connection with the matter without the agreement of all the parties;
- (c) in pending proceedings in connection with the matter a party —
 - (i) initiates an action, motion, or application;
 - (ii) requests that the proceeding be put on the court's active roll; or
 - (iii) takes similar action that requires a notice to be delivered to the parties; or
- (d) a mediator withdraws from the process.

Confidentiality of any communication made during the mediation process

25. (1) Any communication made during the mediation process is confidential unless the parties agree otherwise, or any other law provides otherwise.

- (2) A communication made during the mediation process includes -
- (a) an invitation by a party to engage in mediation or the fact that a party was willing to participate in mediation;
 - (b) views expressed, or suggestions made by a party during the mediation in respect of a possible settlement of the family law dispute;
 - (c) statements or admissions made by a party in the course of the mediation;
 - (d) proposals made by the mediator or the parties;
 - (e) the fact that a party had indicated their willingness to accept a proposal (or parts thereof) for settlement made by the mediator or the parties; and
 - (f) a document prepared primarily for purposes of the mediation.

Privilege, admissibility and discovery

26.(1) Subject to sections 27 and 28, any communication made during the mediation process is privileged in terms of subsection (2), is not subject to discovery, and is not admissible in evidence.

- (2) In court or arbitration proceedings, the following privileges apply:
- (a) a party may refuse to disclose, and may prevent any other person from disclosing, any communication made during the mediation process; and
 - (b) a non-party participant may refuse to disclose, and may prevent any other person from disclosing, any communication made during the mediation process made by the non-party participant.
- (3) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely on account of its disclosure or use in the mediation process.

Waiver and exclusion of privilege

27. (1) A privilege in terms of section 26 may be waived in writing in a record or orally during proceedings if it is expressly waived by all parties and, in the case of the privilege of a non-party participant, if it is also expressly waived by the non-party participant.

(2) A person who makes a disclosure or representation about any mediation communication which prejudices another person in legal proceedings may not claim privilege in terms of section 26, but this limitation only applies to the extent necessary for the person prejudiced to respond to the disclosure or representation.

Limits of privilege

28.(1) There is no privilege in terms of section 26 for any communication made during the mediation process that is—

- (a) available to the public in terms of any law or made during a session of the mediation process that is open, or is required by law to be open, to the public;
 - (b) a threat or statement of intention to inflict bodily harm or commit a crime of violence;
 - (c) intentionally used to plan a crime, commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity;
 - (d) part of an agreement resulting from the mediation process, reflected in a document signed by all parties to the agreement; or
 - (e) not subject to the privilege in accordance with the terms of an agreement to mediate between the parties and the mediator.
- (2) Privileges in terms of section 26 do not apply to the extent that a communication is—
- (a) sought or presented to prove or disprove a claim or complaint of professional misconduct or malpractice arising from or relating to the mediation process; or
 - (b) sought or presented to prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult, unless the child protection services agency or adult protection services agency is a party to or otherwise participates in the process.
- (3) There is no privilege in terms of section 26 if a court, tribunal or forum finds, after a hearing *in camera*, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, the need for the evidence substantially outweighs the importance of protecting confidentiality, and the communication made during the mediation process is sought or presented in—
- (a) court proceedings involving an offence; or
 - (b) proceedings seeking rescission of a contract arising out of the mediation process or in which a defence to avoid liability under the contract is raised.
- (4) If any communication made during the mediation process is subject to an exception in terms of subsection (2) or (3), only that part of the communication necessary for the application of the exception may be disclosed or admitted.
- (5) Disclosure or admission of evidence excluded from privilege in terms of subsection (2) or (3) does not render the evidence or any other communication made during the mediation process discoverable or admissible for any other purpose.
- (6) The privileges under section 26 do not apply if the parties in a signed document agree in advance, or if a record of proceedings reflects that the parties agree, that all or part of the mediation process is not privileged.

Certificate of outcome

29.(1) A mediator must provide the parties with a certificate of outcome—

- (a) setting out the agreement reached between the parties; or
- (b) stating that an agreement between the parties could not be reached; and
- (c) if applicable, setting out the reasons why a party refused to participate in further mediation as provided for in subclauses 19(1) and (2).

(2) Except as required in subsection (1) a mediator may not make a report, evaluation, recommendation, finding, or other communication regarding a mediation to a court, arbitrator, or other authority that may make a ruling on the family law dispute that is the subject of the mediation.

(3) A communication made in violation of subsection (2) may not be considered by a court, arbitrator, or other authority.

Mediated settlement agreement and enforcement thereof

30.(1) Once the parties agree on the terms of a settlement to resolve all or part of the family law dispute, they must prepare and sign a written settlement agreement.

(2) The mediator must provide support to the parties in preparing and accurately recording the settlement agreement.

(3) A mediated settlement agreement is binding on the parties.

(4) Where a mediated settlement agreement is reached it may be made an order of court; provided that where the interests of a child is affected or a financial or any other commitment is agreed upon which would require enforcement, such agreement must be ratified by a court.

Issuing of Directives and Rules

31.(1) The Chief Justice, and the Heads of Court under the Superiors Courts Act, may issue relevant practice directives among others, on the following –

- (a) mediation under this Act;
- (b) screening guidelines for referring matters to mandatory mediation;
- (c) expedited processes for the enforcement of mediated settlement agreements.

(2) The Chief Justice and the Heads of Court must consult with the Legal Practice Council and members of organisations recognised in terms of section 16 before issuing any practice directive in terms of sub-section (1).

(3) The Rules Board for Courts of Law established under the Rules Board for Courts of Law Act, 1985 (Act No, 107 of 1985) may make rules for family mediation in the superior courts and the magistrates' courts under this Act.

Costs, funding and fees

32.(1) The parties participating in the mediation process must pay the costs of the mediation in full, except when the services of the mediator are provided free of charge or when a sliding scale, as prescribed, applies owing to the indigence of a party or the parties.

(2) Liability for the costs of the mediation must be borne proportionally between the opposing parties participating in the mediation process: Provided that the parties may agree otherwise.

(3) The phrase “costs of the mediation” includes only:

- (a) the fees of a mediator;
- (b) the travel and other expenses of a mediator;
- (c) the cost of any expert advice requested by a mediator with the agreement of the parties;
- (d) the cost of any assistance of a selecting authority for appointing a mediator provided pursuant to sections 17 and 18; and
- (e) the costs of the venue of the mediation.

CHAPTER 5

COLLABORATIVE FAMILY PRACTICE

Requirements for a collaborative family practice participation agreement

33.(1) A collaborative family practice participation agreement must—

- (a) be in writing;
- (b) be signed by the parties;
- (c) state the intention of the parties to resolve a matter through a collaborative family practice process in terms of this Act;
- (d) describe the nature and scope of the matter;
- (e) identify the collaborative law practitioner who represents each party in the process, and the role of the collaborative law practitioner in the collaborative family practice process should be explained;
- (f) identify the neutral professionals involved in the collaborative family practice process, and their role therein;
- (g) contain a statement by each collaborative law practitioner confirming the legal practitioner’s representation of a party in the process; and

- (h) include a statement that the representation of each collaborative law practitioner is limited to the collaborative family practice process and that the collaborative law practitioners are disqualified from representing any party or non-party participant in proceedings other than a collaborative family practice in connection with a collaborative matter consistent with this Chapter.
- (2) Parties may agree to include additional provisions not inconsistent with this Act in a collaborative family practice participation agreement, including, but not limited to—
- (a) an agreement concerning confidentiality of communications made during the collaborative process;
 - (b) an agreement that a part or the whole of the collaborative family practice process must not be privileged in any proceeding;
 - (c) the scope of voluntary disclosure;
 - (d) the role of non-party participants; and
 - (e) the retention and role of non-party experts.

Commencement and conclusion of a collaborative family practice process

34.(1) Parties may engage in the collaborative family practice process only once they have obtained a certificate in accordance with section 13.

(2) Participation in a collaborative family practice process is voluntary and the process commences when the parties sign a collaborative family practice participation agreement.

(3) A court may not order a party to participate in a collaborative family practice process in the face of that party’s objection to participation.

(4) A collaborative family practice process is concluded by —

- (a) the resolution of a collaborative matter as reflected in a signed settlement;
- (b) the resolution of a part of the collaborative matter as reflected in a signed settlement in which the parties agree that any remaining parts of the matter must not be included in the process;
- (c) the termination of the process; or
- (d) a method specified in the collaborative family practice participation agreement.

(5) A collaborative family practice process terminates when a party—

- (a) gives notice in writing to other parties that the process has ended;
- (b) initiates a proceeding other than a collaborative family practice process in connection with a collaborative matter without the agreement of all the parties;

- (c) in pending proceedings other than a collaborative family practice process in connection with the matter—
 - (i) initiates an action, motion, or application to show cause;
 - (ii) requests that the proceeding be put on the court’s active roll;
 - (iii) takes similar action that requires a notice to be delivered to the parties; or
 - (d) except as otherwise provided in subsection (7), discharges a collaborative law practitioner or when a collaborative law practitioner withdraws from further representation of a party.
- (6) A party’s collaborative law practitioner must give prompt notice in writing to all other parties of a discharge or withdrawal.
- (7) A party may terminate a collaborative family practice process with or without cause.
- (8) Notwithstanding the discharge or withdrawal of a collaborative law practitioner, the collaborative family practice process concerned continues if, not later than 30 days after the date on which the notice of the discharge or withdrawal in terms of subsection (6) was delivered to the parties—
- (a) the unrepresented party engages a new collaborative law practitioner; and
 - (b) in a signed notice—
 - (i) the parties consent to continue the process by reaffirming the collaborative family practice participation agreement;
 - (ii) the agreement is amended in order to identify the new collaborative law practitioner; and
 - (iii) the new collaborative law practitioner confirms their representation of the party concerned in the collaborative process.
- (9) The provisions of subsection (4) notwithstanding, a collaborative family practice process does not conclude until a party, with all the consent of the parties, requests a court to approve the resolution of the collaborative matter or any part thereof as recorded in a signed document.
- (10) A collaborative family practice participation agreement may provide additional methods of concluding a collaborative family practice process.

Proceedings pending before court

35.(1) Persons in proceedings pending before a court may enter into a collaborative family practice participation agreement seeking to resolve a collaborative matter related to the proceedings.

- (2) The parties must, within three days of the conclusion of the agreement, file a duly signed record of the agreement with the court.
- (3) Subject to subsection (6), the filing operates as an application for a stay of the proceedings.
- (4) The parties must, within three days of the conclusion of the collaborative family practice process, file a duly signed record of the conclusion with the court, which filing will have the effect of lifting the stay of the proceedings in terms of subsection (3).
- (5) The notice may not specify any reason for termination of the process.
- (6) A court in which proceedings have been stayed in terms of subsection (3) may require the parties and collaborative law practitioners to furnish a status report on the collaborative family practice process and the proceedings, which—
 - (a) may include only information on whether the process is ongoing or concluded; and
 - (b) may not include a report, assessment, evaluation, recommendation, finding, or other communication regarding a collaborative family practice process or collaborative family practice matter.

Confirmation of agreement by court

36. A court may confirm a settlement agreement resulting from a collaborative family practice process.

Time limit for completion of collaborative family practice process

37. The time limit for completion of the collaborative family practice process, after the collaborative agreement has been signed, is 90 days, and on expiry of that date the parties may institute legal proceedings, even if the collaborative family practice process has not been completed, unless the collaborative law practitioner provides the parties with a reasonable explanation, in writing, for the delay.

Disqualification of collaborative law practitioner and legal practitioners in associated law firm

38.(1) Except as otherwise provided in subsection (3), a collaborative law practitioner is disqualified from appearing before a court or in arbitration proceedings to represent a party in a matter relating to the collaborative matter.

(2) Except as otherwise provided in subsection (3), a legal practitioner in a law firm with which the collaborative law practitioner is associated is disqualified from appearing before a court to represent a party in proceedings relating to the collaborative matter if the collaborative law practitioner is disqualified from doing so in terms of subsection (1).

(3) A collaborative law practitioner or a legal practitioner in a law firm with which the collaborative law practitioner is associated may represent a party—

- (a) to request a court to approve an agreement resulting from the collaborative

family practice process; or

- (b) to seek or defend an urgent application to protect the health, safety, welfare or interests of a party, or family member of a party, if a new legal practitioner is not immediately available to represent that person.

(4) If subsection (3)(b) applies, a collaborative law practitioner, or a legal practitioner in a law firm with which the collaborative law practitioner is associated, may represent a party or a family member of a party only until the person is represented by a new legal practitioner or reasonable measures are taken to protect the health, safety, welfare, or interests of the person.

Confidentiality of collaborative family practice communication

39. A collaborative family practice communication is confidential to the extent agreed on by the parties in a signed document or as provided by law of the Republic other than this Act.

Privilege, admissibility and discovery

40.(1) Subject to sections 41 and 42, a collaborative family practice communication is privileged in terms of subsection (2), is not subject to discovery, and is not admissible in evidence.

(2) In court or arbitration proceedings, the following privileges apply:

- (a) A party may refuse to disclose, and may prevent any other person from disclosing, a collaborative family practice communication; and
- (b) a non-party participant may refuse to disclose, and may prevent any other person from disclosing, a collaborative family practice communication made by the non-party participant.

(3) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely on account of its disclosure or use in a collaborative family practice process.

Waiver and exclusion of privilege

41.(1) A privilege in terms of section 40 may be waived in writing in a record or orally during proceedings if it is expressly waived by all parties and, in the case of the privilege of a non-party participant, if it is also expressly waived by the non-party participant.

(2) A person who makes a disclosure or representation about a collaborative family practice communication which prejudices another person in legal proceedings may not claim privilege in terms of section 40, but this limitation only applies to the extent that it is necessary for the person prejudiced to respond to the disclosure or representation.

Limits of privilege

42.(1) There is no privilege in terms of section 40 for a collaborative family practice communication that is—

- (a) available to the public in terms of any law or made during a session of a collaborative family practice process that is open to, or is required by law to be open, to the public;
 - (b) a threat or statement of intention to inflict bodily harm or commit a crime of violence;
 - (c) intentionally used to plan a crime, commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity;
 - (d) part of an agreement resulting from the collaborative family practice process, reflected in a document signed by all parties to the agreement; or
 - (e) not subject to the privilege in accordance with the terms of a collaborative family practice participation agreement between the parties.
- (2) Privileges in terms of section 40 do not apply to the extent that a communication is—
- (a) sought or presented to prove or disprove a claim or complaint of professional misconduct or malpractice arising from or relating to a collaborative family practice process; or
 - (b) sought or presented to prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult, unless the child protection services agency or adult protection services agency is a party to or otherwise participates in the process.
- (3) There is no privilege in terms of section 40 if a tribunal finds, after a hearing *in camera*, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, the need for the evidence substantially outweighs the importance of protecting confidentiality, and the collaborative family practice communication is sought or presented in—
- (a) court proceedings involving an offence; or
 - (b) proceedings seeking rescission of a contract arising out of the collaborative family practice process or in which a defence to avoid liability under the contract is raised.
- (4) If a collaborative family practice communication is subject to an exception in terms of subsection (2) or (3), only that part of the communication necessary for the application of the exception may be disclosed or admitted.
- (5) Disclosure or admission of evidence excluded from privilege in terms of subsection (2) or (3) does not render the evidence or any other collaborative family practice communication discoverable or admissible for any other purpose.
- (6) The privileges under section 40 do not apply if the parties in a signed document agree in advance, or if a record of proceedings reflects that the parties agree, that all or part of a collaborative family practice process is not privileged.

Severability

43. If any provision of this Chapter or its application to any person or circumstance is held to be invalid, the invalidity does not affect other provisions or applications of this Act, which can be given effect to without the invalid provision or application, and to this extent the provisions of this Act are severable.

CHAPTER 6

FAMILY ARBITRATION

Parties may refer family law disputes to arbitration

44. The parties to a family law dispute may, subject to sections 13 and 17 above, agree, as prescribed, to refer the dispute to an arbitration tribunal to be resolved through arbitration in terms of this Act.

Court may refer matter

45.(1) A court presiding over a family law dispute may, with the consent of all the parties to the proceedings, make an order referring the proceedings, or any part thereof, or any matter arising therefrom, to an arbitration tribunal for arbitration in terms of this Act.

(2) If the court makes an order in terms of subsection (1), it may, if necessary, adjourn the proceedings and may make any additional order as it deems appropriate to facilitate the effective conduct of the arbitration.

Requirements for a family arbitration tribunal

46. An arbitration tribunal which conducts a family arbitration in terms of this Chapter must comply with the prescribed requirements.

Alternatively:

46.(1) The requirements for appointment as an arbitration tribunal in terms of this Chapter must be prescribed by regulation.

(2) An arbitration tribunal which conducts a family arbitration in terms of this Chapter must comply with the following minimum requirements:

- (a) If the arbitration tribunal consists of a legal expert, such expert must have experience in dealing with family law disputes of at least 10 years and undergo ongoing training as prescribed;

- (b) If the arbitration tribunal consists of a mental health expert, such expert must have experience in dealing with family law disputes of at least 10 years and undergo ongoing training as prescribed;

If the arbitration tribunal consists of a religious body, such body must be one that is formally recognised by its observant followers and undergo ongoing training as prescribed.

Additional duties of a family arbitration tribunal

47.(1) The arbitration tribunal presiding over a family law dispute must ensure—

- (a) compliance with sections 13 and 17 of this Act;
- (b) that the consent of the parties to have the dispute resolved through arbitration constitutes informed consent;
- (c) the principles of good faith and therapeutic justice are followed in the arbitration proceedings;
- (d) that any other parties who may have an interest in the outcome of the arbitration are notified of that outcome; and
- (e) that an arbitration agreement setting out amongst others the nature, scope and procedure must be followed.

(2) In addition, the arbitration tribunal presiding over a family law dispute affecting the rights or interests of a child must ensure that —

- (a) the child's voice is heard, and that legal representation is available if required; and
- (b) the report and recommendations contemplated in section 4(1) of the Mediation in Certain Divorce Matters Act, 1987, is considered, where an enquiry has been instituted by the family advocate.

(3) The arbitration tribunal is precluded from making their services available to the parties in terms of subsection (1)(a) to facilitate the mediation as a certified mediator.

Rules applicable to a family arbitration

48. Rules may be prescribed by regulation to facilitate the resolution of family law disputes through arbitration.

Notification of the Office of the Family Advocate

49. Prior to an application being made in terms of section 50 for confirmation by the High Court, the Civil Regional Court or the Children's Court of any arbitration award that affects the rights and interests of a child, a completed form, duly sworn or affirmed, corresponding substantially with Annexure A of the regulations published in terms of the Mediation in Certain Divorce Matters Act, 1987, must be filed with the Office of the Family Advocate for consideration and comment.

Confirmation of the family arbitration award that affects the rights and interests of a child

50.(1) No arbitration award affecting the rights or interests of a child may come into effect unless it has been confirmed by the High Court, the Civil Regional Court or the Children's Court on application to that court and on notice to all parties who have an interest in the outcome of the arbitration.

(2) An application to the relevant court in terms of this section must be made within 30 days after delivery of the award to the applicant, or such further period as the Court may allow on good cause shown.

(3) A court may—

- (a) confirm the award;
- (b) declare the whole or any part of the award to be void;
- (c) substitute another award the court deems appropriate for the award;
- (d) vary the award on appropriate terms; or
- (e) remit the matter to the arbitration tribunal with appropriate directions.

(4) In considering an application contemplated in sub-section (1) for the confirmation of an arbitration award, the court must be satisfied that the award is in the best interests of all children concerned and to this end the court —

- (a) may refer the matter for an enquiry;
- (b) may, in such circumstances as prescribed in terms of the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), cause an enquiry as contemplated in that Act to be instituted by a family advocate in whose area of jurisdiction that court is with regard to the welfare of any minor or dependent child affected by the proceedings in question, whereupon the provisions of that Act, with the amendments required by the context will apply;
- (c) must, if an enquiry is instituted by the family advocate in terms of section 4 of the Mediation in Certain Divorce Matters Act, 1987, consider the report and recommendations contemplated in section 4(1) of that Act;
- (d) must, if a report or recommendations by a family advocate, a social worker or other suitably qualified person have been ordered in terms of section 29(5) of the Children's Act, 2005, consider the report and recommendations.

(5) The court must, on application by a party, confirm the award unless—

(a) the application is opposed on one or more of the grounds set out in section 33(1) of the Arbitration Act, 1965 (Act No. 42 of 1965); or

- (b) the court is not satisfied that the award is not in the best interests of all children concerned, in which case the court must proceed to hear and determine all relevant issues.

Setting aside of family arbitration award that does not affect the rights and interests of a child

51. Nothing in section 50 must be construed as limiting the court's jurisdiction in terms of any law to review an arbitration award in so far as it relates to a family law dispute that does not affect the rights or interests of a child.

Application of Arbitration Act to special laws

52. The provisions of the Arbitration Act, 1965, with the amendments required by the context, must apply to an arbitration conducted in terms of this Chapter in accordance with section 39 of that Act.

CHAPTER 7

PARENTING COORDINATION

Parenting coordinator

53. A person meeting the requirements set out in section 54 who assists parents in resolving family law disputes pursuant to section 55 may act as a parenting coordinator.

Requirements

54.(1) The requirements for appointment as a parenting coordinator must be prescribed by regulation.

(2) The minimum requirements for a person to be appointed as a parenting coordinator include that such person must —

- (a) be a mental health care professional or legal practitioner or suitably qualified person as determined by the regulations from time to time;
- (b) who has a minimum of five years' experience in working with children and families in the context of disputed residence and contact; and
- (c) has training and experience in family mediation and be a certified mediator; and
- (d) has completed a parenting coordination training course.

(3) The parenting coordinator is not appointed as a psychotherapist, counsellor or attorney for a child or the parents. No psychotherapist- patient, or attorney- client - relationship is created by this appointment or otherwise exists between the parenting coordinator and any of the parents, nor will the parenting coordinator be considered to be

engaging in the unauthorised practice of law.

(4) A person serving as a parenting coordinator with respect to a family dispute in terms of this Act may not create a professional conflict by serving in sequential or multiple roles with respect to the same parties.

When parenting coordinators may assist

55.(1) A parenting coordinator may assist parties in resolving a family dispute where a child is involved

- (a) in accordance with a parenting coordination agreement based on informed consent and where it is in the best interests of the child; or
- (b) in terms of a court order on a finding that there is conflict between the parties and that the appointment of a parenting coordinator is in the best interests of the child; and
- (c) if there is a parenting plan, a settlement agreement or court order in place with respect to parenting arrangements, contact with a child or other prescribed matters for the purpose of implementing the parenting plan, settlement agreement or the court order; or
- (d) if a short-term, emerging and time-sensitive situation or dispute arises or there is a need to phase in contact and care.

(2) A parenting coordination agreement may be entered into in anticipation of, or as a result of, the need to appoint a parenting coordinator.

(3) If a parenting coordinator is appointed upon agreement between the parties, and the parties cannot agree on a specific parenting coordinator, an organisation recognised in terms of section 16(1) or the Office of the Family Advocate will be empowered to appoint a parenting coordinator for the parties.

(4) If a parenting coordinator is appointed in terms of a court order, a specific parenting coordinator must be nominated by the court and provisions for the replacement or change of the said parenting coordinator and their powers must be made part of the court order.

Parenting coordination service agreement

56.(1) The parenting coordinator can only assume their duties once a parenting coordination service agreement has been signed.

(2) The parenting coordination service agreement must detail specific issues not contained in the agreement between the parties to appoint a parenting coordinator or the court order making provision for the appointment of a parenting coordinator, including

- (a) the procedures to be followed;
- (b) the fees of the parenting coordinator;
- (c) billing practices to be followed;

- (d) services to be provided; and
 - (e) that professional peer consultation by the parenting coordinator will be permitted.
- (3) A parenting coordinator's authority to act terminates two years after the first dispute meeting, unless the parenting coordination service agreement or a court order specifies that the parenting coordinator's authority must terminate at an earlier or later date or on the occurrence of a specified earlier event.
- (4) Despite subsection (3), a parenting coordination service agreement may be extended for a further two years at a time by a further parenting coordination service agreement provided the parties and the parenting coordinator agree, or by a court order.
- (5) Despite subsection (3), a parenting coordination service agreement may be terminated at any time by —
- (a) agreement between the parties or by a court order made on application by either of the parties;
 - (b) the parenting coordinator, on giving notice to the parties and, if the parenting coordinator has been appointed in terms of an order, to the court; provided that the parenting coordinator facilitated the appointment of a replacement parenting coordinator or the parties themselves have appointed a new parenting coordinator in compliance with the relevant requirements.

Exclusive jurisdiction of the court

57. The appointment of a parenting coordinator does not divest the court of its exclusive jurisdiction to determine fundamental issues of guardianship, care, contact and maintenance, and the authority to exercise management and control of the case.

Assistance from parenting coordinators

58.(1) A parenting coordinator may assist the parties by—

- (a) reducing harmful conflict and in promoting the best interests of the children;
- (b) educating the parties by giving information about
 - (i) child development;
 - (ii) separation or divorce research;
 - (iii) the effects of conflict and impact of parties' behaviour on the children;
 - (iv) parenting skills, communication, and conflict resolution skills;
- (c) providing information about resources available to the parties for purposes of improving communication or parenting skills;
- (d) assisting the parties to resolve conflict;
- (e) clarifying disputed issues;

(f) by issuing directives in accordance with subsection (2) with respect to —

- (i) parenting arrangements;
- (ii) contact with a child.

(2) For the purposes of subsection (1)(f), a parenting coordinator, in order to implement the terms of a parenting plan, settlement agreement or court order—

(a) may issue directives in respect of—

- (i) The implementation of a child's schedule in respect of parenting time and contact with the child;
- (ii) the education of a child, including in relation to the child's special needs;
- (iii) the participation of a child in extracurricular activities and special events;
- (iv) the temporary care of a child by a person other than -
 - (aa) the child's guardian; or
 - (bb) a person who has contact with the child in terms of an agreement or order of court;
- (v) the provision of routine medical, dental, mental health or other health care to a child;
- (vi) the discipline of a child;
- (vii) the transport and exchange of a child for purposes of exercising parenting time or contact with the child;
- (viii) parenting time or contact with a child during holidays and on special occasions; and
- (ix) any other matters, other than matters referred to in paragraph (b), that are agreed on by the parties with the parenting coordinator or directed by the parenting coordinator; and

(b) may not make directives in respect of—

- (i) a change to the guardianship of a child;
- (ii) a change to the allocation of parental responsibilities and rights;
- (iii) the giving of parenting time or contact with a child to a person who is not entitled to parenting time or contact with the child, unless-

- (aa) a rights and responsibilities agreement have been made an order of the court in respect of the person or was registered with the Office of the Family Advocate;
 - (bb) or a person have been specifically excluded in the parenting plan or rights and responsibilities agreement from having contact with the child;
 - (cc) or an allegation is made that the proposed person may pose a danger to the child;
 - (iv) a substantial change to the parenting time or contact with a child;
 - (v) the relocation of a child;
 - (vi) the need for supervised visitation by either parent; or
 - (vii) the need for psychological or psychiatric treatment for either parent.
- (c) A parenting coordinator may make non-binding recommendations or proposals in respect of any issue referred to in (b)(i)-(vii) as well as:
- (i) minor financial disputes;
 - (ii) variations in care and contact;
 - (iii) supervised contact and level of supervision;
 - (iv) any issue which would be deemed to be in the best interests of the child.

Directives by parenting coordinators

59.(1) A parenting coordinator—

- (a) may issue directives with respect to matters referred to in section 58 only, subject to any limitation or conditions set out in the regulations;
- (b) may not issue a directive in respect of any matter excluded by the parenting coordination agreement or court order, even if the matter is included in section 58;
- (c) may not issue a directive that would affect the division or possession of property, or the apportionment of debts;
- (d) must consider the child's views as ascertained by an independent and suitably qualified child expert if the child has reached such an age and level of maturity and development as to be able to participate in terms of section 10 of the Children's Act; and
- (e) may not modify the parenting plan or court order other than minor, temporary or interim departures from the parenting plan or court order.

- (2) In issuing a directive with respect to parenting arrangements or contact with a child, a parenting coordinator must consider the best interests of the child only, as set out in section 7 of the Children's Act.
- (3) A parenting coordinator may issue a directive at any time.
- (4) A parenting coordinator must provide reasons in writing for the directive.
- (5) A parenting coordinator may issue an oral directive, but must reduce the directive to writing and sign it as soon as practicable, but not later than 24 hours, after the oral directive was issued.
- (6) A parenting coordinator must make a directive available to both parties simultaneously.
- (7) Subject to section 60, a directive issued in accordance with the provisions of this Chapter—
 - (a) is binding on the parties, effective from the date the directive is issued or from such later date as may be specified by the parenting coordinator, and
 - (b) if filed with the court as prescribed, is enforceable under this Act as if it were an order of the court.

Changing or setting aside directives

- 60.(1)** Any party to a directive issued by a parenting coordinator may, within 10 days after the parenting coordinator issued the directive or within such other period of time as the court may direct, file with the court, and serve on the parenting coordinator and all other parties, an objection to the parenting coordinator's directive and subject to the court rules and practise directives launch an application for condonation for late submission.
- (2) Responses to the objections must be filed with the court and served on the parenting coordinator and all other parties within 10 days after the objection was served.
 - (3) The court must review any objections to the directive and any responses submitted to the objections to the directive and, after so reviewing the objections and responses, may amend or set aside the directive, if it is satisfied that the parenting coordinator—
 - (a) acted outside the ambit of their powers, or
 - (b) committed an error of law or of an error of both law and fact; or
 - (c) on any other reasonable grounds for review.
 - (4) The directive of the parenting coordinator must remain in effect until the court gives an order.
 - (5) If the court sets aside a directive, it may make any order to resolve a dispute between the parties in relation to the subject matter of the directive.

- (6) If the court confirms a directive, it may issue any order to enforce compliance with the directive.

Parenting coordination process and procedure

61. The prescribed parenting co-ordination process and procedures, must include the following:

- (a) An impartial parenting coordinator;
- (b) meetings between the parenting coordinator and the parties, which need not follow any specific procedure and may be informal;
- (c) an opportunity for each party to state their case;
- (d) an opportunity for the parenting coordinator to challenge or question a party's statements or views and ask for proof or supporting information; and
- (e) a transparent process and
- (f) the opportunity for the parenting coordinator to obtain information from collateral sources and third parties.

Information sharing in parenting coordination

62.(1) A party must, for purposes of facilitating parenting coordination, provide the parenting coordinator with—

- (a) such relevant information as the parenting coordinator may request in accordance with section 5, and
- (b) authorisation to request and receive information in respect of a child or a party from a person who is not a party.

(2) Communication between the parties and the parenting coordinator may not be confidential. No information may be taken into consideration by the parenting coordinator unless made available to both parties.

Removal of parenting coordinator

63.(1) Where the appointment of the parenting coordinator was made in accordance with an agreement to appoint a parenting coordinator which has not been made an order of court, the parties may agree to remove the parenting coordinator.

(2) Where the appointment of the parenting coordinator was made by the court with or without the consent of the parties, the court may remove the parenting coordinator on application by either of the parties and on good cause.

Fees

64.(1) No parenting coordinator may be appointed unless the court is satisfied that the parties have the means to pay the fees of the parenting coordinator.

(2) The state is barred from assuming any financial responsibility for payment of fees to the parenting coordinator, except that, in cases of hardship, the court may appoint, if it is feasible, a parenting coordinator to serve on a voluntary or a reduced fee basis.

(3) The fees of the parenting coordinator must be shared between the parties proportionally in accordance with their means, provided that the court may allocate the fees between the parties differently.

(4) The fees of the parenting coordinator may also be allocated in a different proportion in accordance with the provisions of the parenting coordination service agreement.

CHAPTER 8

GENERAL PROVISIONS

Regulations

65.(1) The Minister may make any regulations necessary for the proper implementation and administration of this Act.

(2) Before making any regulations, the Minister must consult such organisations recognised in terms of section 16 and any other persons deemed appropriate.

Amendment of laws

66. The laws referred to in the first and second columns of the Schedule to this Act are amended to the extent indicated in the third column of the Schedule.

Short title and commencement

67. This Act is called the Family Dispute Resolution Act, 20xx, and comes into operation on a date fixed by the President by proclamation in the Gazette.

SCHEDULE

LAWS AMENDED BY SECTION 66

| No. and year | Short title | Extent of repeal or amendment |
|----------------|-----------------|---|
| Act 42 of 1965 | Arbitration Act | <p>The following section is hereby substituted for section 2 of the Act:</p> <p><u>Matters not subject to arbitration</u></p> <p><u>2. (1) Arbitration is not permissible in terms of this Act in respect of any family law dispute, or any matter incidental to any such dispute.</u></p> <p><u>(2) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement and which relates to a matter the parties are entitled to dispose of by agreement may be determined by arbitration unless—</u></p> <p style="padding-left: 40px;"><u>(a) such a dispute is not capable of determination by arbitration under any other law of the Republic; or</u></p> <p style="padding-left: 40px;"><u>(b) the arbitration agreement is contrary to public policy of the Republic.</u></p> <p><u>(3) Arbitration may not be excluded solely on the ground that an enactment confers jurisdiction on a court or other tribunal to determine a matter falling within the terms of an arbitration agreement.</u></p> <p><u>(4) For the purposes of this section—</u></p> <p><u>“family law dispute”</u> means a dispute, or alleged dispute, in which one party maintains a particular point of view or claim or contention regarding the parties’ respective responsibilities, interests and rights towards, or with respect to, any member of the family to which both parties belong, and the other party maintains a contrary</p> |

| | | |
|-----------------------|---|---|
| | | <u>or different view.</u> |
| <u>Act 24 of 1987</u> | <u>Mediation in Certain Divorce Matters</u> | <p>The following new subsection (c) must be inserted in section 4(1) and 4(2):</p> <p>(c) after the referral of a family law dispute, which deals with the care or guardianship of, or contact with, a child, to arbitration in terms of relevant legislation;</p> <p>Note: the intention is to make section 4(1) and (2) of the Mediation in Certain Divorce Matter Act applicable to a family law arbitration which deals with the care or guardianship of, or contact with, a child.</p> |
| Act 68 of 1969 | Prescription Act | <p>The following heading is hereby substituted for section 13 of the Act</p> <p>13. <u>Suspension of prescription in certain circumstances</u></p> <p>The following sub-section is hereby substituted for section 13(1) of the Act</p> <p>(1) [If] <u>The period of prescription shall be suspended if—</u></p> <p>(a) the creditor is a minor or is [insane] <u>a person with a mental or intellectual disability, disorder or incapacity</u> or is a person under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15(1); or</p> |

| | | |
|--|--|--|
| | | <p>(b) the debtor is outside the Republic; or</p> <p>(c) the creditor and debtor are married to each other; or</p> <p>(d) the creditor and debtor are partners and the debt is a debt which arose out of the partnership relationship; or</p> <p>(e) the creditor is a juristic person and the debtor is a member of the governing body of such juristic person; or</p> <p><u>(f) the debt is the object of a dispute [subjected] referred to an Ombud with jurisdiction or arbitration or mediation or other process providing for the alternative resolution of a dispute other than negotiation; or</u></p> |
|--|--|--|

CHAPTER 1: OVERVIEW OF THE INVESTIGATION

A Introduction

1.1 This report seeks to make recommendations to improve the family justice system by way of creating a pathway to foster early resolution of family law disputes through the use of alternative dispute resolution (hereafter referred to as ADR) mechanisms. Preceding litigation with mandatory engagement in ADR mechanisms is aimed at minimising family conflict, empowering families to resolve their conflicts in so far as is possible, providing access to appropriate supportive services and ultimately avoiding lengthy and costly litigation. The proposal is to move from a court focused solution to the court as one of the options as a solution and rarely the first option. In this chapter, the purpose and objective of the investigation is presented as seeking to ensure access to justice for the most vulnerable in society, namely the children.

1.2 The South African Law Reform Commission (SALRC) recognises the deleterious effect of using an adversarial court system to resolve disputes in families. It further recognises the vast and growing body of authoritative research on the benefits of engaging in alternative and increasingly referred to as “appropriate”, dispute resolution mechanisms to resolve family law disputes. This rising awareness partly provided the SALRC with the impetus to integrate the family mediation sub-project, previously part of Project 94 Alternative Dispute Resolution, and component of Project 100A (then categorised as Project 100D) Care of and Contact with Children into a sub-project under the auspices of Project 100A dealing with ADR in family matters.⁵ The further impetus was derived from a recommendation contained in the report of the SALRC’s Project 110 Review of the Child Care Act⁶

⁵ South African Law Reform Commission *Alternative Dispute Resolution in Family Matters* Project 100D Discussion Paper 148 (2019) 1.

⁶ South African Law Reform Commission *Review of the Child Care Act* Project 110 Report (2002).

1.3 The discussion paper, which precedes this report, presents the preliminary views of the SALRC in the text of the discussion paper and the format of a draft Bill, namely the draft Family Dispute Resolution Bill. The discussion paper is segmented into six parts and ten chapters which are to a great extent mirrored in the draft Bill. Following publication, workshops were conducted on the draft Bill in Cape Town (18 February 2020), Port Elizabeth (20 February 2020), Nkandla (25 February 2020) and Durban (26 February 2020); Polokwane/Ga-Molepo (5 March 2020) and Phokeng/Rustenburg (6 March 2020). However, the workshop process was interrupted by the outbreak of COVID-19 and the implementation of the ensuing lockdown measures. Two national virtual workshops were held on 1 and 8 June 2022 to provide a final platform for engagement and to make submissions on the draft Bill and the proposals contained in the discussion paper. The date for submissions was extended to 30 September 2022. Due to capacity constraints, the SALRC relegated this sub-project. It received renewed attention from November 2023.

1.4 The discussion paper presented the ideal of an integrated family justice system or therapeutic-justice model aimed at providing a range of cost effective and efficient dispute resolution options integrated with litigation where necessary and ultimately resolved formally.⁷

1.5 After considering various international developments, the SALRC identified a number of common themes and proposed a basic service delivery model for the family justice system to support the resolution of family law disputes.⁸ The components of the proposed service delivery model are:

- Entry points to the family justice system
- Information
- Triage
- Dispute resolution
- Improved court processes
- Post-resolution support.⁹

⁷ SALRC Discussion Paper (2019) 39.

⁸ SALRC Discussion Paper (2019) 27.

⁹ SALRC Discussion Paper (2019) 27.

1.6 The SALRC explains that the proposed service delivery model should be underpinned by the following common guiding principles, which deserve to be repeated in this report:

- (a) The best interests of the child is paramount.
- (b) The value of family relationships should be recognised, nurtured and supported.
- (c) Families should, as far as possible, be supported (or empowered) to resolve their own disputes.
- (d) Conflict should be minimised.
- (e) The family justice system should accommodate the diversity of families.
- (f) The response to families' experiencing family restructuring should be integrated and multidisciplinary.
- (g) The safety of family members from violence should be assured.¹⁰

1.7 In this report, the SALRC traverses the four themes found in the discussion paper, namely family mediation, collaborative family practice, family arbitration and parenting coordination. These themes are underpinned by the identified germane general principles and the cross-cutting need for information and education. Where relevant, pertinent submissions received from respondents¹¹ to the discussion paper and contributions received during the subsequently held virtual workshops¹² will form part of the report and be referred to. The report includes draft legislative recommendations contained in the draft Bill aimed at providing a procedure to resolve conflict in family matters in a manner which, while ensuring that the best interests of particularly children are paramount,¹³ is effective, efficient and affordable.¹⁴

¹⁰ SALRC Discussion Paper (2019) 27 – 28.

¹¹ Annexure A contains a comprehensive list of all respondents to the SALRC ADR in Family Matters Discussion Paper (2019). 28 substantive submissions were received.

¹² Annexure B contains information relevant to some of the workshops that were held on the SALRC Discussion Paper (2019).

¹³ Section 28(2) of the Constitution and emphasized in *BMGS v MBS and others* High Court of South Africa Case No: 26675/2022 judgment delivered on 8 January 2024 (unreported) [4].

¹⁴ A litany of recent cases extols the benefit of mediation in family disputes, for e.g. *Denver Wesley Damons v Ivana Laurielle Lee and Herschel Girls School* heard in the High Court of South Africa, Western Cape Division, Cape Town on 20 August 2024 (Case No:16939/2024) [18] Parker J expressed the view that “. . .if correctly managed by a mediator with experience, decisions could be made quicker. Furthermore, “[I]t will cost far less than a High Court urgent application and appropriate experts could be engaged as and when needed.” Mandatory mediation has also gained traction in the United Kingdom with the then Lord Chancellor Dominic Raab MP quoted as saying that “Our plans will divert thousands of time-consuming family disputes away from the courts – to protect children and ensure the most urgent cases involving domestic abuse survivors are heard by a court as quickly as possible.” See Rose N Compulsory family mediation “will reduce demand for law firms” Legal Futures 23 March 2023 available at <https://www.legalfutures.co.uk/latest-news/compulsory-family-mediation-will-reduce-demand-for-law-firms> accessed on 27

B Purpose and objective of this report

1.8 In brief, the terms of reference of this project as set out in Issue Paper 31 are as follows:

To develop recommendations for the further improvement of the family justice system that will –

- (a) be orientated to the needs of all children and families;
- (b) foster early resolution of disputes; and
- (c) minimise family conflict.¹⁵

1.9 The discussion paper and in turn this report seeks to address one of the areas identified in Issue Paper 31, namely the procedural aspects of family dispute resolution, and, more specifically, ADR. It is therefore the first discussion paper in a series of discussion papers.¹⁶

1.10 The parameters of an overarching ADR framework are furthermore being considered under the auspices of the Commission's Project 94. The primary aim of Project 94 is to consider the development of legislation to promote the optimal use of ADR, including mediation, to provide another avenue of access to justice.¹⁷ Against this backdrop, the crux of this report is to provide an integrated approach to family dispute resolution, as one of the plinths of the overarching ADR framework to facilitate access to justice in the arena of family law. This entails informing and developing policies; developing the law and processes to support such policies, and designing structures to accommodate the policies and law. The task is to foster early resolution of disputes and intervention with a view to minimising family conflict particularly in respect of the dissolution of the relationship between parents which, particularly when adversarial or combative, has a deleterious effect on children.¹⁸

March 2023.

¹⁵ SALRC South African Law Reform Commission *Family Dispute Resolution: Care of and contact with Children* Project 100D Issue Paper 31 (2015) 5; SALRC Discussion Paper (2019) 8.

¹⁶ SALRC Discussion Paper (2019) 9.

¹⁷ SALRC (2019) 7.

¹⁸ The matter of *SDL v SJ* before the High Court of South Africa Gauteng Division, Johannesburg dated 2 August 2024 6 is a case in point. The matter has been bitterly contested for 12 years – in effect exposing the child in this matter from the age of 5 until 17 to the stress and tension of their parent's ongoing animosity. In the matter of *Denver Wesley Damons v Ivana Laurielle Lee and Herschel Girls School* [2] heard in the High Court of South Africa, Western Cape Division, Cape Town on 20 August 2024 (Case No:16939/2024) the bitter dispute between the parents of a young child is sketched in the judgment.

1.11 The draft Bill which accompanies this report makes proposals pertinent to ADR mechanisms, more precisely, family mediation, family arbitration, collaborative family practice and parenting coordination – not only mediation itself.

C Exposition of the problem

1.12 The discussion paper provided an overview of the governing legal framework applicable to family law and the nature and status of families in South Africa. This information is considered incorporated by reference and will only be updated where there has been a change in policy, law or structure of family law services.¹⁹ While, due to the passage of time, the exact numbers might differ it is safe to say that the concept of ‘family’ in South African society covers a broad range of relationships. The average family unit, as a microcosm of greater society, unfortunately, continues to be plagued by endemic poverty and a high incidence of domestic violence. Children are most susceptible to violence in the home, irrespective of whether it is verbal or physical, or whether they are the targets or witnesses thereof. With more than half of all children in the country born to unmarried mothers, or living in single-headed households and a great number of children affected by separation and divorce, there is a particular need to find the least traumatising, most efficient and cost-effective way to resolve disputes that arise around the care of and contact with these children. The primary aim of this part of the project is to provide services and processes for families to collaboratively resolve disputes rather than to further sever or strain familial relationships through multi-level legal challenges. This aim ties in with government’s goal of providing an effective, timely legal solution within a democratic, accessible, affordable and respected legal system.²⁰

D Methodology and purpose of the Report

1.13 This report represents the SALRC’s current thinking and opinions on how the law should be developed to provide for ADR in family law matters.

1.14 The SALRC has considered the public response to the discussion paper and the draft legislation contained therein. It has tested public opinion against the solutions

¹⁹ SALRC Discussion Paper 148 11 – 14.

²⁰ SALRC Discussion Paper (2019) 21.

identified by the SALRC by way of two public calls for written submissions and through the holding of workshops for the general public and identified stakeholders. While this report contains the SALRC's final recommendations with respect to ADR mechanisms for family law disputes, these recommendations and the interim framework may be further augmented by the overarching ADR framework to be provided for in terms of the SALRC's Project 94. The report, which contains a draft Bill, will be submitted to the Minister of Justice and Constitutional Development for her consideration. It however remains the prerogative of the Minister to promote and implement the Commission's recommendations.

E Outline of the Report

1.15 The following chapter (Chapter 2) considers the general principles, information, education and referral, and related matters found in Chapter two of the draft Bill. It recognises that the draft Bill contained in this report is underpinned by five foundational general principles - the presence or compliance of which will trigger the use of the processes included in the draft Family Dispute Resolution Bill or ensure that the parties are redirected to the relevant court. This chapter includes submissions received from respondents to the discussion paper on questions pertinent to this chapter; provides and concludes with an evaluation and recommendations pertinent to the five general principles underpinning Chapter 2 of the draft Bill, and the information and education programme contained in Chapter 3 of the draft Bill which is to be made available to all parties seeking guidance on family law disputes at various entry points.

1.16 Chapter 3 primarily focuses on mediation as one of the vehicles of ADR. This chapter seeks to consider proposals made in respect of Chapter 4 of the draft Bill in this report which provides for mandatory mediation in family law disputes. It commences with an overview of the proposals contained in the discussion paper and thereafter considers comments received on this chapter of the draft Bill. An update on the regulatory framework is provided as to place developments after the publication of the draft discussion paper in context. This chapter confirms the SALRC's preliminary view that mandatory mediation should be provided for, subject to exceptions to the general rule, and as such would be constitutional. It further recommends that mediated matters should be expedited through the court process and that to this end consideration should be given to issuing court directives for a special roll for settlements and expedition. The SALRC further confirms that a party who unreasonably refuses to engage in mediation

may be met with a punitive costs order by a court. However, it is not in support of requiring a mediator to make a value judgment of the motives of the parties in this regard.

1.17 Chapter 4 discusses the ADR mechanism of collaborative practice. It was referred to as a collaborative dispute resolution in the discussion paper but the SALRC explains that it has subsequently concluded that the term “collaborative family practice” more accurately describes this process and has elected to substitute the terminology in favour of the term “collaborative family practice”. This chapter provides an overview of the proposals contained in the discussion paper; considers the submissions received on this topic and concludes with an evaluation thereof and the final proposals in this regard. For the most part the SALRC has confirmed the recommendations contained in the discussion paper providing for a collaborative approach guided by a team of experts seeking to resolve the family law dispute as amicably as possible.

1.18 Chapter 5 focuses on the ADR mechanism of family arbitration. This chapter seeks to provide an overview of the proposals contained in the discussion paper; to consider the submissions received on these proposals; and to provide the SALRC’s recommendations in this regard. The conclusion is drawn that for the purposes of arbitration of family law disputes where children are involved, the Family Dispute Resolution legislation should apply; and where there are no children the Arbitration Act should apply.

1.19 Chapter 6 discusses the mechanism of parenting coordination as it relates to the proposals contained in Chapter 7 of the draft Bill in this report. This chapter seeks to document the proposals on parenting coordination contained in the discussion paper; present a summary of the recommendations received on this aspect; and reflect the final recommendations as found in the report. Among other recommendations, this chapter confirms that a parenting coordinator issues a binding directive in the capacity of an expert and not as an arbitrator. Therefore, the directive is not final and may be overturned by a court. It also includes reference to Chapter 8 of the draft Bill which contains general legislative provisions. As no comment or change has been made to the general provisions these provisions have not been amended other than to reflect the revised numbering.

F Acknowledgement

1.20 The SALRC wishes to acknowledge and express its appreciation to Ms Ananda Louw who developed, published, and prior to the Covid-19 lockdown, workshopped the discussion paper and draft Bill preceding this report.

CHAPTER 2: GENERAL PRINCIPLES, INFORMATION, EDUCATION AND REFERRAL, AND RELATED MATTERS

A Introduction

2.1 In the discussion paper the SALRC provides a situational analysis of the structural and informational barriers faced by prospective litigants in family law disputes regarding their rights, responsibilities and processes. Access to information and education on rights and responsibilities are key to accessing justice and resolving family conflict.²¹

2.2 Highlighting the continuous nature of family relationships, both the issue paper and the discussion paper pertinently endorse the view that

providing parents with information is important to defuse family disputes between parties, both during and after divorce and separation.²²

2.3 Furthermore, failure to provide information and education places children at risk during litigation and cyclically as they become parents.²³ Although the need for information and education programmes seems to be an ongoing necessity at various points along the continuum, the discussion paper provides a clear rationale, to achieve a sustainable outcome, for the provision of information and education programmes at multiple entry points to the judicial process.

2.4 At the outset of this chapter, it is appropriate to recognise that the draft Bill contained in this report is underpinned by five foundational general principles. The presence or compliance of which will trigger the use of the processes included in the draft Family Dispute Resolution Bill or ensure that the parties are redirected to the relevant court.

²¹ Chapter 3 Discussion paper (2019) 43.

²² Issue Paper (2015) 31 and Discussion Paper (2019) 46.

²³ Discussion Paper (2019) 45, Issue Paper (2015) 31.

2.5 This chapter seeks to evaluate the proposals made by the Commission in respect of the five general principles underpinning Chapter 2 of the draft Bill, and the information and education programme contained in Chapter 3 of the draft Bill which is to be made available to all parties seeking guidance on family law disputes at various entry points.

2.6 By way of summary this chapter proposes that the Preamble to the draft Bill should, in line with sections 6(4)(a) and 70 of the Children's Act, clearly align the purpose of the draft Bill with the use of therapeutic outcomes in respect of family law disputes and the preservation of ongoing family relations. To this end, the term "therapeutic justice" is defined. It further proposes the extension of "entry points" for information and education to include, among others, religious and traditional leaders, mediators, health practitioners, mental health care professionals and social service practitioners; together with the definition of these terms. It is further proposed that as an interim arrangement a definition of "certified mediator" be included in the draft Bill until the SALRC Project 94 draft Mediation Bill has been finalised and submitted to the Cabinet member responsible for justice for consideration. Furthermore, a certification mechanism is required to ensure that relevant family dispute resolution professionals are adequately qualified and certified through organisations recognised by the Chief Justice. This is dealt with in Chapter 3 below. The SALRC has amended the objects of the draft Bill to extend the draft Bill wider than the nuclear family thereby recognising a wider understanding of what constitutes a family. A definition of 'coercive and abusive relationship' has been inserted in the definitions section to align with the amendments to the Domestic Violence Act 116 of 1998, and to provide for an informed decision to commence or terminate a dispute resolution process following a risk assessment where any party has been subjected to coercive or abusive behaviour. The reporting obligations provided for in this Act have also been incorporated in this clause and in accordance with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) General Recommendation No.35 on gender-based violence against women, it is proposed that the process must be strictly regulated and only allowed subject to a risk evaluation by a specialised team to ensure free and informed participation by the affected party. The SALRC confirms that mediation should be available under these circumstances but not mandatory as in all other family law disputes. It is further proposed that compliance with mandator reporting will not lead to liability on the part of the mediator. The SALRC further confirms its stance that the voice of the child should be heard in all matters relevant to the child, subject to their maturity and other relevant factors. However, it recognises that to safeguard children, this may not translate to every family law dispute where children

are involved. This chapter further considers comments received on the information and education process and confirms the provisions contained in Chapter 3 of the draft Bill.

B Summary of proposals contained in the discussion paper relevant to Chapter 1 and 2 of the draft Bill

2.7 From the outset the draft Bill on FDR reflects in Chapter 1 that the objects of the Bill are to –

- (a) ensure that consistent, standardised and accurate basic legal information is provided to parties to a family law dispute in relation to all areas of applicable legal services;
- (b) ensure that parties to a family law dispute are informed of the various processes available to them to resolve the dispute;
- (c) encourage family members, parents, caregivers and guardians to resolve conflict in the best interests of the child, other than through court intervention; and
- (d) regulate alternative dispute resolution processes.²⁴

2.8 The objects of the draft Bill are followed by five general principles which inform the reading of the draft Bill. The first general principle contained in clause 3 of the draft Bill provides that the standards of professional responsibility of legal practitioners or other licensed professionals are not affected by this draft Bill. Furthermore, that any obligation to report abuse, neglect, abandonment or exploitation of a child or adult is similarly not affected. The second general principle is confirmatory in nature and states that a court may at any time issue an urgent order to protect the health, safety, welfare or interest of a child or other family member.²⁵ The third general principle provides for timely, full, candid and informal disclosure of information during the dispute resolution process. Failure to do so may lead to a negative inference being drawn by the court coupled with possible punitive measures.²⁶ The fourth general principle provides for an initial and continuous assessment of whether parties to a dispute are involved in a coercive or abusive relationship and the steps to be followed before a dispute resolution process

²⁴ Clause 2 of the draft Bill.

²⁵ Clause 4 of the draft Bill as confirmed in *BMGS v MSB and others* High Court of South Africa, Gauteng Division, Pretoria Case No:26675/2022, judgment delivered on 8 January 2024 (unreported) [5].

²⁶ Clause 5 of the draft Bill.

may be embarked on.²⁷ The fifth and final general principle provides for the facilitation of child participation in all dispute resolution processes in accordance with the provisions of the Children’s Act, 2005.²⁸

2.9 With the above as context, the SALRC has recognised the concept of multiple entry points for the resolution of family law disputes. This initial entry point could be one of a number of people or service points, e.g. a lawyer, law clinic, faith-based centre, traditional leader, church or Imam. The SALRC proposed that standardised information should be provided at every entry point. The party or parties seeking guidance at an entry point would be channelled to a reception point where they will be provided with a mandatory standardised information and education program. The parties would then move on to the next point categorised as triage or diversion, where the parties after receiving the information and education will decide how the dispute should be dealt with. There are one of three outcomes. Firstly, if it is an urgent matter it will be channelled directly to a court with court mandated parenting coordination. Secondly, the parties may be referred for support services and other services such as psychological support or counselling. Thirdly, the parties may be channelled to mandatory mediation or a collaborative family practice process where they will choose and consent on the way forward. The next point on the dispute resolution continuum is determined by whether the dispute is resolved or not. If the mediation process or parenting coordination process is engaged in, and the dispute is resolved, the parties will submit their agreement and parenting plan to the court. If the dispute or parts thereof are not resolved the parties may choose to engage in a family arbitration process or to proceed directly to court.

C Submissions, evaluation and recommendations

2.10 A number of respondents welcome the innovation of the family law space brought about by the draft Bill.²⁹ Legal Aid SA notes that ADR provides an alternative to long, confrontational, and non-conciliatory court processes. It submits that mediation is “particularly suitable” in resolving family law disputes. However, some of the respondents

²⁷ Clause 6 of the draft Bill.

²⁸ Clause 7 of the draft Bill.

²⁹ Dr Razia Nordien-Lagardien, lecturer at Nelson Mandela University; La Poppie Mediations; Wimpie Bartheil on behalf of the Father’s Rights Movement SA; Journé Le Roux, family mediator; Legal Aid SA; Dr Razia Nordien-Lagardien (Lecturer at Nelson Mandela University); Legal Practice Council, Kwa-Zulu Natal.

point towards systemic abuse of processes by court officials.³⁰ La Poppie Mediations suggests that policy and regulatory provisions should be captured in the Bill as they otherwise have no enforcement value in respect of court officials. Wimpie Bartheil³¹ submits that corruption and bribery are a significant issue when it comes to family law and that the family law industry has placed itself above the law or at best outside of its view. He refers broadly to abuse by lawyers, attorneys, advocates, social workers, psychologists or therapists who are aware that most parents would spare no cost to protect their relationship with their children. In his view, a lack of knowledge of the system exacerbates the vulnerability of parents. In certain instances, resulting in suicide.

2.11 Wimpie Bartheil endorses the view of Justice van Zyl that High Court judges mostly come from criminal law backgrounds and therefore do not have the necessary experience in children of family law disputes. Furthermore, the traditional adversarial approaches used by the court for civil litigation does not work for family law.³² Courts are not equipped to deal with high-conflict cases that deal with parental alienation (PA) or Hostile-Aggressive Parenting (HAP). Consequently, this may cause “severe damage to the relationship between targeted parents and children” and may permanently impact a child’s trust and sense of safety with the targeted parent where they need a relationship with both parents. Furthermore, it is submitted that the courts are ill-equipped to deal with allegations of child abuse and molestation, which are commonplace in high-conflict divorces. The view is further held that protective mechanisms such as obtaining a domestic violence protection order may be manipulated through false and unsubstantiated claims to obtain full physical and legal custody of a child.³³ To substantiate this argument Wimpie Bartheil³⁴ uses the vast difference between the number of applications for protection orders juxtaposed against the number of withdrawals and non-confirmation of final orders; or the number of unsuccessful prosecutions in respect of registered acts of domestic violence offences. He highlights the irreparable harm to children who are unnecessarily subjected to medical and psychological examinations for sexual abuse and may witness a parent being arrested due to a false allegation of breach of a protection order. It is averred that the Office of

³⁰ La Poppie Mediations; Wimpie Bartheil on behalf of the Father’s Rights Movement SA.

³¹ Father’s Rights Movement SA.

³² This view is shared by Legal Aid SA.

³³ Wimpie Bartheil on behalf of the Father’s Rights Movement SA.

³⁴ Wimpie Bartheil on behalf of the Father’s Rights Movement SA.

the Family Advocate may engage in “confirmation bias”, whereby it does not embrace new judgments or evidence, and the courts may embrace judgment by comparison, whereby a court judges a matter by comparing the matter to others instead of judging the matter in isolation.

2.12 Wimpie Bartheil³⁵ with reference to Galatzer-Levy and Kraus notes that the high divorce rate has translated into a lucrative business for family lawyers. He states that high-conflict families find endless opportunities for confrontation and further conflict, assisted by legal representatives, through pleadings, subpoenas, depositions and court appearances. He is of the view that in some cases, litigation and the legal system may polarize parents and may unwittingly reinforce some of their problems. Wimpie Bartheil³⁶ further argues that forensic and private social workers compile reports which explain the situation in terms of a particular spouse’s psychopathology, which invariably places blame on the other party to the marriage. The reports impose stereotyped labels on the parties which in turn cause relationships to become rigid and may contribute to an escalation in the conflict and parental alienation. He cites various authors on parental alienation to substantiate his view that in high-conflict divorce cases, parents are so invested in their arguments that ADR is mostly unsuccessful. He further reports that parental alienation has become so prevalent that the World Health Organisation has included aspects thereof under the description of “caregiver-child relationship problem” in its eleventh International Classification of Diseases (ICD). In summary, he paints a picture of a judicial landscape in which the rights of parents (particularly fathers) and children to maintain their relationship are thwarted by “dirty tricks” of industry players and a lack of knowledge on the bench. Dr Razia Nordien-Lagardien³⁷ makes various suggestions that relate to policy in her submission with a view to enhancing the practice of mediation to enhance the parental involvement of unmarried fathers. These include allocating adequate resources to the Office of the Family Advocate for providing integrated mediation services to families after separation; that the Department of Social Development provide services and ensure support for vulnerable families after separation; that policies are developed that facilitate integrated, holistic services aimed to strengthen families with the aim of preventing non-compliance.

³⁵ Wimpie Bartheil on behalf of the Father’s Rights Movement SA.

³⁶ Wimpie Bartheil on behalf of the Father’s Rights Movement SA.

³⁷ Dr Razia Nordien-Lagardien (Lecturer at Nelson Mandela University) PhD completed in 2019. Topic: Descriptive guidelines for mediation to enhance the parental involvement of unmarried fathers.

Preamble

2.13 The SALRC considered and endorses the submission by Dr Martalas that ascribing to the use of therapeutic outcomes in respect of family law disputes aligns well with sections 6(4)(a) and 70 of the Children's Act and that it should be reflected as such in the draft Bill.³⁸ The SALRC recommends that the Preamble to the draft Bill should be amended to incorporate this alignment and that the preservation of ongoing family relations should be incorporated as well. Furthermore, "therapeutic justice" should be defined. Although the Sunni Ulama Council Gauteng proposed the inclusion of the phrase that 'every person has the freedom of choice as set out in the Bill of Rights (including the freedom of religious beliefs and practice)' the SALRC is of the view that the procedure set out in the draft Bill may limit but does not remove the choice of parties on how to resolve a family law dispute, and therefore is not in support of this inclusion. Any envisaged limitation brought about by gatekeeping direct access to a court would arguably be in the best interest of children and in keeping with section 33 of the Children's Act 38 of 2005, which provides that before seeking court intervention parties must seek to agree through mediation.

³⁸ Endorsed by Dr Razia Nordien-Lagardien, lecturer at Nelson Mandela University.

2.14 The revised Preamble and recommended definition are provided for as follows:

| PREAMBLE |
|---|
| <p>RECOGNISING THAT –</p> <ul style="list-style-type: none"> - everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, independent and impartial tribunal or forum as provided for in section 34 of the Constitution; <p>AND BEARING IN MIND THAT –</p> <ul style="list-style-type: none"> - every child has the rights set out in section 28 of the Constitution; - every person has an inherent right to dignity and to have that dignity respected and protected as provided for in section 10 of the Constitution; - every person has the right to privacy as provided for in section 14 of the Constitution; and - the state must respect, protect, promote and fulfil the rights set out in the Bill of Rights as provided for in section 7 of the Constitution; <p>AND IN ORDER TO –</p> <ul style="list-style-type: none"> - align with a therapeutic justice system; - preserve ongoing family relations; - provide for access to justice; - provide for appropriate resolution of family law disputes; - allow the voice of the child and parents to be heard; - reduce legal costs; and - expedite the resolution of family law disputes. <p>And</p> <p>“therapeutic justice system” means a justice system that aims to foster strong, stable, and positive family relationships through a therapeutic application of the law focussing on achieving positive outcomes for families and children involved in family law disputes;</p> |

Definitions

2.15 Lesley Blake Attorneys proposes that the words “including maintenance courts” should be included after the word “courts”. It is reasoned that as a maintenance court is defined in the Maintenance Act, it might be held by those courts that the Act does not apply to them. The Islamic Forum Azaadville while supporting the definition of “entry point” suggested that the following entry points should be included, i.e. ‘religious and traditional Leaders’ as (e) under this definition. This aligns with the comment received from Dr George Fordham Wara³⁹ calling for the recognition of traditional leaders, chiefs

³⁹ Dr. George Fordham Wara, Post-doctoral fellow, University of the Free State, Free State Centre for Human Rights.

and elders and traditional dispute resolution mechanisms. The SALRC is of the view that the word “courts” is sufficiently broad to include all courts and for this reason “maintenance courts” do not have to be included by name. It further supports this inclusion proposed by the Islamic Forum Azaadville. It recommends that the definition should not only include the more inclusive reference to religious institutions and traditional leaders but should also expressly include a mediator, religious leader, health practitioner, mental health care professional, and social service practitioner in addition to social workers as provided for in the Social Service Professions Act. This would include, for example, people providing services at a clinic. Consequently, the terms “health practitioner”; “mental health care professional”; and “social service practitioner” have been defined. The SALRC further agrees to retain the catch all provision ‘any other prescribed entry point.’ The SALRC does not recommend defining “traditional leader” as suggested by the Sunni Ulama Council Gauteng as it is of the view that given the broad range of persons who might be recognised as traditional leaders, defining the term may be restrictive.

2.16 The recommended amended definition of “entry point”, and inserted definitions of health care practitioner; “mental health care professional”; and “social service practitioner” read as follows:

“entry point” means the first point of access to the justice system for parties to a family law dispute, and includes—

- (a) courts, social workers, legal practitioners, the Office of the Family Advocate, police stations, Thusong Service Centres, Therisano Centres; Legal Aid South Africa, and community advice centres;
- (b) traditional courts;
- (c) community courts, university law clinics, non-governmental organisations and community-based organisations;
- (d) schools;
- (e) religious institutions;
- (f) traditional leaders;
- (g) mediators;
- (h) health practitioners;
- (i) mental health care practitioners;
- (j) social service practitioner; or
- (k) any other prescribed entry point;

“health practitioner” means any person, including a student, registered with the Health Professions Council of South Africa in a profession registrable in terms of section 2 of the Health Professions Act, 1974;

“mental health care practitioner” means a psychiatrist, psychologist or social worker who has been trained to provide prescribed mental health care, treatment and rehabilitation services in family law disputes; and

“social service practitioner” means a ‘social service practitioner’ as contemplated in the Social Service Professions Act, 1978 (Act No. 110 of 1978);

2.17 The South African Association of Mediators (SAAM), while welcoming the processes contained in the draft Bill, is of the view that as the proposed Bill is solely aimed at providing for family dispute resolution, the proposed definitions should be amended slightly to provide for more specific definitions of individuals concerned with family dispute resolution as opposed to “mediation” in general or dispute resolution relating to matters that do not form part of the family law context. It suggests that provision should be made in the definition of “family dispute resolution professional” for any additional training or qualification, which may prove to be to the detriment of the quality of family dispute resolution professional practitioners and family dispute resolution practice of South Africa, as additional skill, training and experience ought to be required to assist families. It notes that this is needed to develop and sustain quality family dispute resolution professionals and develop the field of practice. To this end, it submits that family dispute resolution professionals should be regulated by the Act as envisaged and that the conduct of family dispute resolution professionals should be overseen by family dispute resolution professional service providers, such as SAAM. It further recommended that amendments should be made to the definitions of “certified mediator” and “family dispute resolution professional”, and that a new definition of “program provider” should be inserted in the draft Bill.

2.18 The SALRC considered the proposals made by SAAM and it agrees that the mediator needs to be certified and opts to amend the definition of ‘certified mediator’ and to remove the definition of “mediator”. The aim of the draft Bill is to regulate what is needed for family mediators and for that, they need to be certified mediators. The SALRC is of the view that the term “certified” is useful to indicate that a person needs to be qualified and cannot be mediated by just any person. The suggestion to refer to a “certified mediator” throughout the Bill is supported. The SALRC recommends that as an interim arrangement (until the Project 94 Mediation Act is promulgated) the definition of “certified mediator” should be amended to align with that of the draft Mediation Bill and clause 5 of the draft Bill contained in the Project 94 Discussion Paper. The word “person” should be changed to “mediator” to incorporate the referred definition. The SALRC is of the view that reference should be made to a body recognised to certify mediators and not an organisation by name. Using generic wording would be advisable so that a recognised body could be identified without being pre-emptive. To this end the certification of mediators has been incorporated into clause 16 of the draft Bill which

deals with the recognition of organisations who provide certification. While broad guidelines will be set for training minimum requirements and associated prerequisites the exact modalities would be left to the recognised organisations. It is further recommended that the definitions of “agreement to mediate” and “mediated settlement agreement” as found in the draft Mediation Bill should also be included. The use of the term “dispute” should be augmented throughout the chapter to read “family law dispute” to align with the definition in the draft Family Dispute Resolution Bill. The proposed definition of ‘program provider’ was considered and not accepted.

2.19 The SALRC has taken the definition of “family dispute resolution professional” under review. It welcomes the endorsement by Ms Ruiters of La Poppie Mediations of the inclusion of ‘a mediator conducting mediation in relation to a family law dispute’. While the SALRC understands the reason for SAAM’s proposal to add additional criteria for certification, training and registration it is of the view that these matters are better regulated by the organisations which will be recognised by the Chief Justice to certify mediators. This will allow these criteria to be augmented as required without the need for lengthy legislative amendments. Although it agrees with Lesley Blake attorneys that a police official should be removed from the definition and that a maintenance officer should be included, it is of the view that court officials should be retained as it would exclude mandated court officials if the reference was removed. It further agrees with Dr Roux that ‘mental health professionals’ should be included as a family dispute resolution professional, but that this should be restricted to the category of professionals dealing with family law disputes. While the SALRC supports the inclusion of ‘family counsellor’ as proposed by the Chief Family Advocate, it has opted to remove the reference to social workers who would fall under the generic reference to government employees, while at the same time including social workers in private practice dealing with family law disputes.

2.20 The SALRC agrees with the Islamic Forum Azaadville that reference to clause 42 in the definition is misplaced and is of the view that the definition does not sufficiently define the term. It presents two definitions in the alternative for consideration. However, the SALRC does not support the deletion of the definition of ‘parenting coordination service agreement’ as proposed by the Sunni Ulama Council Gauteng as courts appoint parenting coordinators daily and these agreements need to be provided for. Finally, the SALRC agrees with the Chief Family Advocate that the intervention and or investigation

by the Office of the Family Advocate should be included in the definition of “proceedings”.⁴⁰

2.21 The recommended and amended definitions are provided as follows:

“agreement to mediate” means an agreement by two or more persons to refer for mediation the whole or part of a family law dispute which has arisen, or which may arise between them, and may include an agreement entered into between the disputing parties and a mediator before the mediation process commences which sets out the terms according to which the mediation will be conducted;

“certified mediator” means a person who has been certified as a mediator in terms of clause 16 of the Act;

“family dispute resolution professional” means any of the following:

- (a) a government employee tasked with dealing with family law disputes and includes a family advocate, family counsellor, social service practitioner, court official, maintenance officer, and an employee of Legal Aid South Africa;
- (b) a legal practitioner advising a party in relation to a family law dispute;
- (c) mental health care practitioners or social workers in private practice dealing with family law disputes;
- (d) a mediator conducting a mediation in relation to a family law dispute;
- (e) a collaborative law practitioner;
- (f) a parenting coordinator;
- (g) an arbitrator conducting an arbitration in relation to a family law dispute;
- (h) a person providing family dispute resolution services within a class of prescribed persons; or
- (i) any other person designated by the Minister;

“mediated settlement agreement” means an agreement, by some or all of the parties to the mediation settling the whole, or part of, the family law dispute to which the mediation relates;

“mediation” means a process in which a mediator facilitates and encourages communication and negotiation between the mediating parties and seeks to assist the mediating parties in arriving at a voluntary agreement;

“parenting coordinator” means a third party who is appointed to make directives on matters incidental to the parents’ parental responsibilities and rights;

“parenting coordination” is a child-focused alternative dispute resolution process in which a mental health care professional or legal professional with mediation training and experience assists high-conflict parties in implementing parenting plans, settlement agreements or court orders and resolving pre- and post-divorce parenting disputes in an immediate non-adversarial, court-sanctioned, private forum;

⁴⁰ Submissions by Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; and the Office of the Family Advocate Western Cape

“proceedings” means any court litigation, settlement or alternative dispute resolution processes and includes the provision of legal advice or intervention and or investigation by the Office of the Family Advocate;

Objects of the Act

2.22 Sandra Ferreira of the University of South Africa (UNISA) submits that clause 2(c) of the draft Bill states that an object of the Act is to "encourage parents and guardians to resolve conflict in the best interests of the child, other than through court intervention". As the Act reaches wider than the nuclear family she suggests that this clause should be amended to encourage family members to resolve conflict in the best interests of the child, other than through court intervention. The SALRC endorses this submission and proposes that sub-clause 2(c) should be extended to include family members and caregivers. The extended sub-clause would therefore include siblings and child-headed households.

2.23 The recommended objects clause reads as follows:

2.(1) The objects of this Act are to—

- (a) ensure that consistent, standardised and accurate basic legal information is provided to parties to a family law dispute in relation to all areas of applicable legal services;
- (b) ensure that parties to a family law dispute are informed of the various processes available to them to resolve the dispute;
- (c) encourage family members, parents, caregivers and guardians, to resolve conflict in the best interests of the child, other than through court intervention; and
- (d) regulate alternative dispute resolution processes.

General Principles

Standards of professional responsibility and mandatory reporting not affected

2.24 The SALRC has taken note of Pat Mkhize of the Mandulo Foundation’s comment on clause 3 of the draft Bill, that model rules of practice or model standards of conduct for mediators should be incorporated in the draft Bill instead of recognising the responsibility, obligations and standards applicable to legal or licensed professionals. However, the SALRC is of the view that while important, these standards would be better

placed in a code of ethics for certified mediators as provided for in clause 16 of the draft Bill.

2.25 Natalie Ruiters of La Poppie Mediations submits in respect of clause 3(b) that the mandatory reporting obligations contained in section 54 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and section 110 of the Children's Act 38 of 2005 to report abuse of children be mentioned in the main body of the proposed Act instead of referring to "the obligation of a person to report abuse, neglect, abandonment or exploitation of a child or adult under the law of the Republic.". She is of the view that not all professionals have specific training in sexual offences, child abuse, human trafficking or illegal labour practices and should have a clear definition of where they have a statutory duty to report since there are criminal sanctions in sections 54 of the Sexual Offences Act and section 110 of the Children's Act where there are non-reporting of sexual abuse or abuse of children. In the alternative La Poppie Mediations recommends that the "information and education programmes" should be defined as "a programme developed in accordance with this Act for the purpose of providing relevant information and education to the parties involved in a family dispute – that these programmes include specifics of the statutory legislation that place a compulsory duty to report on professionals." A third recommended option is that the proposed Act's regulations should list the statutory legislative frameworks that professionals have to abide by so that no professional can claim not knowing of a statutory obligation to report. Having considered this submission, the SALRC is of the view that with respect to the first and second options proposed by La Poppie Mediations that a broad reference to reporting obligations provides for an open-ended list of obligations rather than restricting it to what is provided for in the abovementioned two laws. As such it is of the view that the clause is sufficient. The proposed alternative will, however, be considered under the comment received in Chapter 3 of the draft Bill below.

Urgent orders

2.26 La Poppie Mediations argues that as urgent orders are provided for in the Domestic Violence Act and the Maintenance Act but not complied with clause 4 of the draft Bill, which provides for urgent orders needs to be augmented. La Poppie Mediations is of the view that all family matters should appear before a magistrate after application forms are completed by a justice official or clerk to determine urgency and enquire about interim relief sought and not be left to the discretion of justice official clerks or

maintenance officers to decide on interim maintenance orders. In its experience the Maintenance Act 99 of 1998 has not been very successful in securing Interim Maintenance orders envisaged in terms of section 10(6) of the Maintenance Act. It is recommended that provision be made for clause 4 to be brought to the attention of presiding officers to act in the best interest of children and the welfare of children. It is further submitted that the success of interim “emergency monetary relief” in the Domestic Violence Act 14 of 2021 still needs to be seen and it is foreseen that where any applicant should use the provision of section 4 urgent order a presiding officer might find that there is already provision in section 10(6) of the Maintenance Act 99 of 1998 or in the Domestic Violence Amendment Act 14 of 2021. The view is held that where complainants need urgent relief in interim domestic violence orders based on their injuries, such domestic violence applications should be tabled before a magistrate immediately and not wait for all documentation to be gathered including a J88 medical report or identification documentation before the application is processed. The SALRC is of the view that while the concerns expressed are valid, this speaks to implementation challenges, which may in the case of the Domestic Violence Act, be ameliorated by way of the recent amendments to the Act. It does not believe that there is sufficient reason to amend clause 4. The SALRC further believes that it stands to be noted that not all cases involving children are automatically urgent.⁴¹

Disclosure of information

2.27 Pat Mkhize of the Mundulo Foundation suggests that at the end of clause 5(1) which provides for timely, full, candid and informal disclosure, the following should be added:

“[T]his is in line with the fundamental principles of self-determination and informed consent”.

2.28 Furthermore, that ‘self-determination’ should be defined to mean “that parties voluntarily choose the process of dispute resolution in which they directly discuss what concerns them, and, how they reach the agreement”, and that ‘informed consent’ should be defined to mean “that the decision parties reach must be sufficiently informed by information, disclosed”.

⁴¹ *Denver Wesley Damons v Ivana Laurielle Lee and Herschel Girls School* heard in the High Court of South Africa, Western Cape Division, Cape Town on 20 August 2024 (Case No:16939/2024) [25]. In the present case Judge Parker found that the urgency was self-created and not urgent *per se*.

2.29 The Chief Family Advocate in turn enquires whether in respect of clause 5(1) parties would be in a position to be advised on what information is privileged as would be the case with discovery. It furthermore questions whether there should be qualified privilege if there are risks to the protection of children.⁴² The Sunni Ulama Council Gauteng comments that during the mediation process, such information will be regarded as non-prejudicial. It comments that this is an international norm to encourage the disputants to reach an agreement without fear of intimidation. The SALRC is of the view that the comment on being 'non-prejudicial' is general and should be addressed under the Project 94 Mediation Bill, failing which it will be considered as a submission under Chapter 4 below.

2.30 La Poppie Mediations expresses its concern that the punitive costs orders provided for in clause 5(3) are at the discretion of judicial officers. It explains that unless magistrates understand the psyche and emotional trauma women go through in a delay in reporting updated information, women might be exposed to cost orders due to a delay in reporting a change in circumstances. Where a woman has suffered domestic abuse, she may due to economic circumstances not be in a position to report and update changes in information as required in clause 5(2). La Poppie Mediations proposes a toll-free number or the creation of an electronic portal similar to the Domestic Violence Amendment Act that will have easy toll-free access for family members to update their information to avoid costly orders. The Chief Family Advocate shares a similar concern and questions what the effect would be if discovery is not made due to a valid excuse or exception. She is of the view that provision should be made for exceptions such as privilege.⁴³

2.31 With respect to the comment by the Mundulo Foundation the SALRC is of the view that self-determination and informed consent are procedural matters and therefore not best placed in the draft Bill. After consideration of the comment on the requirement for full disclosure, the SALRC finds that full disclosure is needed to avert unnecessary litigation. All matters are dealt with in mediation, financial, parenting plans etc. In

⁴² Submissions by Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; and the Office of the Family Advocate Western Cape

⁴³ Submissions by Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; and the Office of the Family Advocate Western Cape

Australia, there has to be a “genuine effort” and an open, honest and full disclosure is required. There is nothing that should be privileged. It is of the view that a cost order should be provided for where one party does not disclose everything or opts out without reasons. The SALRC is unclear on what would constitute a valid excuse or exception. It is of the view that if there are any risks the parties should go straight to court and that the dispute should then not be dealt with through the ADR mechanism. Additionally, if any risk to the child presents during mediation, the mediation process should be stopped. The provisions contained in the Children’s Act would then apply and the matter would be dealt with through the courts.

2.32 The viability of an electronic repository was considered by the SALRC but it is of the view that this will be a matter that will need to be considered in the course of time through subsequent amendments. Until the domestic violence electronic repository has been given effect to, the clause is to be left as is.

Coercive or abusive relationship

2.33 In respect of the fourth general principle Lesley Blake Attorneys suggests the inclusion of an additional sub-paragraph defining a coercive or violent relationship (as previously referred to) with reference to economic abuse; emotional, verbal and psychological abuse; harassment; intimidation and physical abuse as found in the Domestic Violence Act 116 of 1998. The Chief Family Advocate further submits that provision should be made for obtaining a domestic violence protection order and that the professional should be mindful that breaches of orders should not be allowed and that the parties should be warned of this.⁴⁴ Zenobia du Toit submits that family law disputes that involve domestic violence should only be mediated by mediators who are trained to deal with issues of domestic violence for it to be dealt with sensitively and to ensure that specific protective procedures are implemented during mediation, for example, the use of shuttle mediation.

2.34 A number of concerns were raised relating to the need for protection for dispute resolution professionals. Dr Karen Spurrier⁴⁵ highlighted a concern regarding physical safety and proposed that a dispute resolution process, where coercion or violence is

⁴⁴ Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; endorsed by the Office of the Family Advocate Western Cape.

⁴⁵ Dr Karen Spurrier Counselling & Mediation Practice.

present, should preferably be done at a police station or that there should be a visible police or security presence at the office where the session is being held. Based on a similar concern, La Poppie Mediations recommends that online mediations or a provision similar to that provided for in section 158 or section 170A of the Criminal Procedure Act 51 of 1977 be explored to provide that a party may have a support person present or for children under the age of 18 participating in the process to use an intermediary in the mediation process. While La Poppie Mediations further welcomes the protective measures recommended in terms of clause 6(4) of the draft Bill which provided that a private cause of action may not be brought against professionals who fails to protect a party, it suggests that a similar provision protecting professionals against civil liability as provided for in section 54(2)(c) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and section 110 of the Children's Act 38 of 2005 be used to protect family dispute resolution professionals who report in good faith.⁴⁶

2.35 The SALRC agrees that for the sake of clarity, the term 'coercive or abusive relationship' should be defined. After the publication of the discussion paper in this investigation the Domestic Violence Amendment Act 14 of 2021 introduced an expanded definition of 'domestic violence' into the Domestic Violence Act. This definition among others includes coercive behaviour; controlling behaviour; intimidation; economic abuse; emotional, verbal and psychological abuse; harassment, physical abuse and sexual abuse. All of the aforementioned could arguably be employed to coercively control a party in a domestic relationship or to constitute a violent relationship. In support of this interpretation Singo with reference to the court in *S v Engelbrecht*⁴⁷ for example, notes that:

Understanding domestic violence as coercive control points to the instrumentality of emotional, verbal and psychological abuse.⁴⁸

⁴⁶ Section 54 (2)(c) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides that "(c) A person who in good faith reports such reasonable belief or suspicion shall not be liable to any civil or criminal proceedings by reason of making such report". Section 110 (3) (b) of the Children's Act 38 of 2005 provides that any person (b) who makes a report in good faith is not liable to civil action on the basis of the report.

⁴⁷ *S v Engelbrecht* 2005 (2) SACR 41 (W) 146 – 147.

⁴⁸ Singo D Coercive and controlling behaviour in the Domestic Violence Act (2023) 140 SALJ 763 at 776.

While the definition of ‘domestic violence’ or specific definitions such as ‘coercive behaviour’ or ‘controlling behaviour’ in the Domestic Violence Act could be cross-referred to in this Bill, Singo questions how these concepts have been defined and argues that the concepts of coercive and controlling behaviour, both independently defined in the Domestic Violence Act, are inseparable concepts aimed at coercive control and depriving the affected person of their autonomy.⁴⁹ Singo additionally argues that the definitions of “intimidation” and “coercive behaviour” are similarly conflated as they address “two admittedly related but ultimately distinct forms of abusive behaviour”.⁵⁰ However, Singo concludes that although the definitions may be vague and possibly ambiguous they would be considered constitutional, and while understanding that judicial interpretation may lend further clarity, the definitions may benefit from a refinement in wording, such as combining the concepts of coercive and controlling behaviour into one definition and renaming it ‘coercive control’.⁵¹ The SALRC is mindful that there might be better ways of defining concepts and that these definitions may develop or be changed over time.⁵² However, the SALRC is of the view that to determine whether a party, by virtue of engaging in a dispute resolution process, is or will be put at risk and whether they will be able to negotiate a fair agreement, the concepts as worded in the Domestic Violence Act seem to serve the purpose at hand. It is to be noted that, with reference to the proposed definition of ‘family’, the Bill is potentially applicable to a wider range of persons than that defined in the Domestic Violence Act and the determination of risk is broader than determining the presence of coercion or violence between the two parties engaging in the mediation. The assessment would include the proclivity of the party to such behaviour towards “any other party”. This would arguably include children, relatives, and former or new partners. For these reasons, the SALRC recommends that the definition of ‘domestic violence’ in that Act should be used to interpret what constitutes a coercive or violent relationship. For stylistic and interpretational purposes the SALRC propose that the word “violence” should be substituted for “abuse”. The Domestic Violence Act separately defines “economic abuse”, “emotional, verbal and psychological abuse”;

⁴⁹ Singo D Coercive and controlling behaviour in the Domestic Violence Act (2023) 140 SALJ 763 at 773.

⁵⁰ Singo D Coercive and controlling behaviour in the Domestic Violence Act (2023) 140 SALJ 763 at 785.

⁵¹ Singo D Coercive and controlling behaviour in the Domestic Violence Act (2023) 140 SALJ 763 at 792.

⁵² Internationally the concept of “coercive control” has an overarching concept has gained traction. See Brandt S The impact of domestic violence and coercive control on children: applying evidence-based assessments of children to ‘the grave risk exception’ Hague Domestic Violence Forum Expert Paper #3 undated.

“physical abuse” and “sexual abuse”.⁵³ The view is held that the presence of any of these forms of abuse as opposed to violence, which could be interpreted as physical violence, would equally impact the risk of the affected party and the ability to negotiate a fair agreement. As the definition would be best placed in the section housing definitions it does not support the inclusion of an additional sub-paragraph in this clause to define a coercive or abusive relationship.

2.36 The SALRC is mindful that the use of mediation in disputes where gender-based violence, including domestic violence, is or has been present is a topic which requires particular attention. The SALRC has taken note of the Circular published by the Department of Justice and Constitutional Development (DoJ&CD) in which it directs its court administration to desist from utilising mediation services in domestic violence cases in the implementation of the Domestic Violence Act,⁵⁴ and the debate this has given rise to recently. Greyvenstein in his presentation to the Annual SAAM Conference on 29 August 2024⁵⁵ acknowledges that while mediation may recognise the particular circumstances, and need for the safety and well-being of victims through a less adversarial process, it may not keep victims safe, address the power imbalances at play, nor hold the abusive parties accountable.⁵⁶ Presumably with reference to domestic violence behaviour which constitutes a crime, he concludes that “mediation is not a viable solution for such severe issues”.⁵⁷ He suggests that restorative justice, i.e. a process aimed at behaviour change whereby the abuser takes full responsibility for their actions may be the only viable approach in certain cases.⁵⁸ This approach would flow from engaging the criminal justice system.⁵⁹ Greyvenstein, however, does not preclude all family law disputes where there is an element of domestic violence present from

⁵³ Section 1 of the Domestic Violence Act.

⁵⁴ Department of Justice and Constitutional Development Circular 3 of 2024 Directive to Court Administration to desist from utilising mediation services in domestic violence cases in the implementation of the Domestic Violence Act, 1998 (Act 116 of 1998) 22 January 2024.

⁵⁵ Greyvenstein L Chairperson of Social Justice Association of ADR Practitioners (SJA) ‘Mediation of Domestic Violence Matters’ Annual SAAM Conference 29 August 2024.

⁵⁶ This caution is similarly expressed by Olson KB Post-Grillo: New Family Mediation Protection and Revised Dangers Discussions in Dispute Resolution edited by Hinshaw A, Schneider AK, Cole SR Oxford University Press, 2021 169

⁵⁷ Page 12 of Greyvenstein’s presentation.

⁵⁸ Page 12 of Greyvenstein’s presentation.

⁵⁹ Greyvenstein L Femicide and GBV crimes are unsuitable for mediation: What about other family disputes with detected GBV Servamus August 2024 73.

mediation. He supports specialised training and rigorous screening processes including the need for the National Accreditation Board for Family Mediators (NABFAM) to establish an ethical code, clear guidelines, and minimum standards to ensure that mediation is conducted professionally and with care.⁶⁰ Sheena St Clair Jonker of the ADR Network further expresses the view that ADR processes to address domestic violence may be considered subject to practical protective measures, reparative measures and accountability for perpetrators by agreement being engaged.⁶¹ The aim is to bring about therapeutic justice. Practical measures suggested include not having the parties in the same room and the use of shuttle mediation. While considering the above, the SALRC has also been cognisant of the CEDAW General recommendation No.35 on gender-based violence against women,⁶² which provides as follows:

Ensure that gender-based violence against women is not mandatorily referred to alternative dispute resolution procedures, including mediation and conciliation.⁶³

The CEDAW General Recommendation provides that ADR should only be engaged where the process is strictly regulated and only allowed subject to a risk evaluation by a specialised team who are of the view that the victim or survivor is engaging in the process freely and with informed consent and that there are no indicators of further risks to the victim or survivor or their family members. It is expected that these processes will be conducted by specially trained professionals who are equipped to ensure adequate protection of the rights of women and children. The considered view of the SALRC is that while there may be an overlap, a distinction should be made between the mediation of matters of domestic violence where a victim is denied access to civil or criminal remedies including being prevented from applying for a protection order in terms of the Domestic Violence Act, and family law disputes which may include a context of non-criminalised behaviour resorting under the definition of “domestic violence” as broadly defined in the Domestic Violence Act.⁶⁴ In light of the object of the draft Bill included in this report,

⁶⁰ This approach is supported by Olson KB Post-Grillo: *New Family Mediation Protection and Revised Dangers Discussions in Dispute Resolution* edited by Hinshaw A, Schneider AK, Cole SR Oxford University Press, 2021 169

⁶¹ St Clair Jonker S Mediation in Domestic Violence Matters Linked In available at https://www.linkedin.com/posts/felicity-guest-786673165_mediation-in-domestic-violence-matters-activiey-7158113171805798401-OwCx.

⁶² United Nations Convention on the Elimination of All Forms of Violence Against Women General Recommendation No.35 (July 2017) para 32(b).

⁶³ Paragraph 32(b) of CEDAW General Recommendation No.35.

⁶⁴ Section 1 of the Domestic Violence Act.

namely to provide for ADR in family law matters, the SALRC endorses the CEDAW Committee's view that prescribed ADR processes should not be a barrier to women accessing justice. For this reason, the SALRC confirms the stance it took in the discussion paper that mediation should be available but not mandatory under these circumstances. The autonomy of parties who may have been subjected to domestic violence to engage in mediation of family law disputes should be recognised. The primary aim is not the mediation of domestic violence, which is clearly not provided for in the Domestic Violence Act. The view is held that after a risk assessment in a family law dispute, some matters may be suitable for mediation and others might not be. A case-by-case approach would need to be followed and obtaining a protection order is to be preferred.⁶⁵ The application of therapeutic justice through the use of mediation may result in an understanding of the deleterious impact of conflict in families on the parties and their children and may spotlight the benefit of applying conflict resolution tools. This outcome is rarely possible when parties are forced to engage in protracted litigation without the option of using ADR mechanisms.⁶⁶ The SALRC has considered the duty of the police to ensure safety during mediation. It is of the view that in these circumstances there should be no mediation. Even though there is a school of thought that believes that mediation may take place, the SALRC recommends that a cautious approach should be taken. The SALRC is mindful that the definition of 'domestic violence' is very broad, traversing behaviour not considered criminal to behaviour which is severe and capable of being prosecuted criminally. In certain matters, the conflict or dispute could be mediated if the exception provided for in clause 6(3) is applied. It is further of the view that in domestic violence matters there should already be a protection order in place and if not, the parties should be provided with an opportunity to obtain a protection order

⁶⁵ This approach is endorsed by Olson KB Post-Grillo: *New Family Mediation Protection and Revised Dangers Discussions in Dispute Resolution* edited by Hinshaw A, Schneider AK, Cole SR Oxford University Press, 2021 169. However the matter of *K.J.G v J.T.G* (A85.2024)[2024] ZAGPPHC 913 6 September 2024 illustrates the need for a case by case risk assessment. While the complication of reciprocal allegations of domestic violence has given rise to a trend in Johannesburg and Randburg courts to refer family disputes with alleged domestic violence straight to trial, balancing the circumstances of each matter remains important. See Courtenay M "The Great Case Law Update" Clarks Attorneys 11th Annual Johannesburg Family Law Conference 31 October 2024.

⁶⁶ Matters illustrating the benefit of mediation are *SDL v SJ* before the High Court of South Africa Gauteng Division, Johannesburg dated 2 August 2024 77; and the introductory remarks in *Denver Wesley Damons v Ivana Laurielle Lee and Herschel Girls School* heard in the High Court of South Africa, Western Cape Division, Cape Town on 20 August 2024 (Case No:16939/2024) which quote Prof Weston that mediation may achieve "a more satisfying, durable, and efficient resolution of disputes" and in para [15] where the court holds that "[M]ediation is a tool, and if used effectively yields potential results". Judge Parker in holding that mediation promotes restorative justice however warned that the use of court-annexed mediation should be utilised more effectively [16].

before engaging in a dispute resolution process. The SALRC recommends that a provision for this should be added to clause 6(3).

2.37 The SALRC considers online mediation and the need for intermediaries. Although it is of the view that a dispute resolution process may not be appropriate under these circumstances, it concedes that if risks are addressed and safety measures have been put in place, it may still be engaged in. The SALRC is mindful that there may still be intimidation. It considers that an insertion after clause 17(4) may be considered if domestic violence is present and the mediator feels that the matter may continue. It is further of the view that providing for support persons may be allowed depending on the circumstances, but that these support persons are not to be allowed to be part of the discussions.

2.38 The SALRC agrees that a dispute resolution professional, who makes a report in compliance with a legislative injunction such as is contained in section 110 of the Children's Act, should not be criminally liable and that this should also be added to the clause under subclause 6(3).

Voice of the child

2.39 The Office of the Family Advocate in its broader comment expressed the view that the proposals in the draft Bill do not make provision for child focussed ADR processes and that there would seem to be a lack of harmonisation between the aim of the Children's Act contained in sections 6(5), 7, 9 and 10, section 28 of the Constitution and the draft Bill in terms of child participation, decisions impacting on the child and the children's best interests.⁶⁷ Nevertheless, the importance of including the voice of the child in family dispute resolution proceedings as a general principle was endorsed by a number of respondents, including the Office of the Family Advocate.⁶⁸ The view was expressed that child participation in these proceedings should be done in an age-

⁶⁷ Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape.

⁶⁸ Pat Mkhize –Mandulo Foundation; Commission for Gender Equality; Natalie Ruiters, La Poppie Mediations; Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape; Zenobia du Toit, Miller du Toit Cloete Inc.

appropriate manner taking into consideration the age, stage of development, maturity and culture of the child by a suitably qualified person who has such experience. Further, there should be regulations guiding and not limiting the terms of how this process should take place.⁶⁹ The view was also proffered that it should not be assumed that all attorneys, judicial officers and mental health experts have the requisite skill and experience to do child-focused mediation and ADR.⁷⁰ The suggestion is made that provision should be made in legislation or the regulations on how children should be included in any process impacting on them; the ADR practitioner's appropriate skills, years of appropriate experience in family law, more specifically children's rights and qualifications should be set out; proven insight and experience in dealing with different cultures, religions and race groups; the appropriate stage at which children can participate and how participation will take place; that the presiding officer be it in the judiciary, arbitrator or any decision maker in the ADR process should have the skills and specific experience relating to family law and children's rights.⁷¹ In a similar vein, Zenobia du Toit, of Miller du Toit Cloete Inc. is of the view that mediators should be trained to facilitate the voice of the child and that this should be dealt with in terms of the Children's Act. It comments that importantly the mediation certificate issued by the mediator should reflect that the mediator has heard the voice of the child.

2.40 The Office of the Family Advocate suggests that monitoring mechanisms to assess the best interests of the child and how this should be implemented should be included in legislation.⁷² It explains that in terms of the current position in litigation matters, the Mediation and Certain Divorce Matters Act 24 of 1987 and the Children's Act 38 of 2005 makes provision for the Office of the Family Advocate to make recommendations on the best interests of children either by way of an enquiry, through mediation, interrogation of pleadings and settlement agreements, submission of

⁶⁹ Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape.

⁷⁰ Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape.

⁷¹ Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape.

⁷² Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape.

memoranda to court, submissions of reports to court, in trials, opposed and unopposed motions, or engaging in pre-trial conferences. It submits that in this way a child's best interests are interrogated before a decision is made on the related matter.⁷³ It further explains that in non-litigation matters the Office of the Family Advocate may conclude, interrogate and or register parenting plans and parental responsibilities and rights agreements once satisfied that the agreement serves the best interest of the child involved.⁷⁴ Furthermore, in litigation matters, it may also interrogate the summons and consent papers and make comments or request that an enquiry is conducted, alternatively ratify the summons or consent paper should it be in the best interests of the minor child's best interests. The Office of the Family Advocates proposes that provision for similar safeguards be made.⁷⁵ It further proposes that the existing role that the Office of the Family Advocate should be extended to any legislation which relates to children in family law within the ADR landscape. This would require that all agreements and or directives emanating from all ADR practitioners in family law matters before they are made an order by way of court or arbitration or a binding directive should be sent to the Office of the Family Advocate for interrogation.⁷⁶ This it argues is to ensure constitutional consistency for all children in family law matters and or ADR or arbitration and that they are afforded the same benefits impacting on them as is the case for children in civil matters and in terms of the Children's Act. The Office of the Family Advocate cautions that the issue of capacitation of the Office of the Family Advocate should not be used as the sole argument militating against its involvement in matters impacting on children as the state has a duty to provide services even under difficult circumstances. It refers to *S v M* which refers to *S v Jaipal* 2005(4)SA 581 (CC); 2005(5)BCLR 423 (CC); 2005 (1) SACR 215 (CC) at paras 55-6 in which this Court states:

“. . . Furthermore, all those concerned with and involved in the administration of justice – including administrative officials, judges, magistrates, assessors and

⁷³ Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape.

⁷⁴ Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape.

⁷⁵ Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape.

⁷⁶ Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape.

prosecutors – must purposefully take all reasonable steps to ensure maximum compliance with constitutional obligations, even under difficult circumstances.”⁷⁷

2.41 The Office of the Family Advocate emphasises that its office is the only existing multi-disciplinary unit that is free to the public (legal and mental health with a child focussed lens is available and accessible to all).⁷⁸

2.42 With regard to the framing of clause 7 the Mandulo Foundation suggests that the word “actively” in respect of active facilitation of the involvement of children in the process should be deleted, as the participation of a child in the family dispute would depend on the age of a child. Lesley Blake Attorneys in turn suggests that the following words should be added to the end of the sentence: “save that no child shall be called upon to participate in the proceedings of the maintenance court, including mediation in such proceedings”.

2.43 While welcoming this general principle, La Poppie Mediations points out that in its experience the voice of the child is seldom, if ever, heard in maintenance courts and domestic violence courts. It points out that in most cases of section 33 (Children’s Act 38 of 2005) parenting plans some of the older children are never invited to participate in matters affecting them. This is in spite of the fact that children who are aged 12 or older are allowed in terms of the Children’s Act 38 of 2005 to participate in matters pertaining to care and access.⁷⁹ The view is held that if more young children are allowed to express how they feel about care and access arrangements, the more success will be attained in the mediation process. It is recommended that where children are of the maturity to participate in proceedings the presiding officer or commissioner of children’s court enquiries (magistrate) be actively encouraged to hear the voice of the child.

2.44 The Commission for Gender Equality points out that the majority of people who are unable to access justice in South Africa are marginalised. Additionally, culture and customs in rural areas (which predominately discriminate against women and children)

⁷⁷ Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape.

⁷⁸ Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape.

⁷⁹ Section 10. Child participation “Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration”.

generally dictate how disputes are resolved. The Commission for Gender Equality submits that Family Dispute Resolution Professionals must be able to observe these cultural differences to resolve conflict.⁸⁰ To this end, the Commission recommends that Family Dispute Resolution Professionals must be engendered to facilitate the inclusion of the voice of the child.

2.45 The SALRC in subscribing to section 10 of the Children's Act and recognising the value of the NABFAM Ethical and practice standards for obtaining the views and wishes of the child in ADR processes 2024⁸¹ agrees that the "voice of the child" should be heard in all matters relevant to the child, subject to their maturity and other relevant factors. Clause 7 of the draft Bill provides that children's voices need to be obtained in all ADR processes. This includes considering a child's views and wishes in mediation before divorce and in parenting coordination after divorce. The SALRC however cautions that hearing the child's voice should not be at the expense of the child. An assessment of the benefits and risks of hearing the child's actual voice will need to be made. The SALRC is mindful that section 10 of the Children's Act provides that children should participate as they are able. The child might not be able to participate and will then not be heard. The SALRC acknowledges that not every child's actual voice needs to be heard as it may be distressing, even if they are young adults. Section 28(1)(h) of the Constitution remains the measure to determine if there is substantial injustice. For some children 'being heard' is damaging to them. It is essential to build safeguards into these processes to protect children.

2.46 As a child specialist or representative may participate on behalf of a child (even a very young child), the SALRC does not support removing the word "actively". The child's participation may still be facilitated without their direct involvement in the proceedings. For this reason and as an endorsement of the comment by some respondents relating to the suitability of those supporting or acting on behalf of children in these matters, the SALRC suggests the insertion of the words "through an independent and suitably qualified child expert." This insertion seeks to clarify that not all mediators are child experts and that training is needed. The SALRC has for the sake of clarity defined a "child expert" but leaves the interpretation to the court as to who would be suitably qualified. The SALRC notes that the practice of exposing a child to multiple

⁸⁰ Endorsed by Dr Razia Nordien-Lagardien, lecturer at Nelson Mandela University.

⁸¹ NABFAM's ethical and practice standards for obtaining the views and wishes of the child in mediation and other ADR processes October 2024.

experts is often to the child's detriment. This practice is generally not in the best interest of the child; may even be to the child's detriment; and result in parties incurring significant costs. In keeping with *BMGS v MSB and others* "in every matter where the rights of a child are at stake, the interests of the child take preference over the interests of the parents".⁸² A wider definition may protect children from being exposed to multiple experts, due to challenges being brought against the suitability of a child expert. The view is additionally held that regulation 36 of the Children's Act might assist with understanding who a suitable person is.

2.47 The SALRC notes that the SALRC Project 100B, Review of the Maintenance Act 1998 in addition to recommending that mediation should be incorporated into the Maintenance Act with a view to the speedy resolution of maintenance matters, recommends for the inclusion of the voice of the child in its draft amendments to the Maintenance Amendment Act. This has been done to facilitate the participation of children in maintenance court proceedings.

2.48 The SALRC recommends that the general principles contained in Chapter two of the draft Bill, as amended, should read as follows:

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| <p>CHAPTER 2 GENERAL PRINCIPLES</p> <p>Standards of professional responsibility and mandatory reporting not affected</p> <p>3. This Act does not affect—</p> <p>(a) the professional responsibility, obligations and standards applicable to a legal practitioner or other licensed professional; or</p> <p>(b) the obligation of a person to report abuse, neglect, abandonment or exploitation of a child or adult under the law of the Republic.</p> <p>Urgent order</p> <p>4. During a dispute resolution process, a court may at any time issue an urgent order to protect the health, safety, welfare or interest of a child or other family member.</p> <p>Disclosure of information</p> <p>5.(1) Except as provided by law other than this Act, a party must, during the dispute resolution process, at the request of another party, make timely, full, candid and informal disclosure of information related to the family law matter without formal discovery.</p> <p>(2) A party must promptly update previously disclosed information that has materially changed.</p> <p>(3) Failure of a party to comply with subsection (1) has the effect that a negative inference may be drawn about that party's bona fides, and in the event of any</p> |
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⁸² *BMGS v MSB and others* [6].

subsequent court proceedings a punitive cost order may be made at the discretion of the court.

Coercive or abusive relationship

6.(1) A family dispute resolution professional consulted by a party to a family law dispute must, as a first step, make reasonable enquiries whether any of parties has been involved in a coercive or abusive relationship with any other party.

(2) Throughout a dispute resolution process, the relevant family dispute resolution professional must reasonably and continuously assess whether any of the parties to the dispute resolution has been involved in a coercive or abusive relationship with any other party.

(3) If a family dispute resolution professional reasonably believes that any of the parties to the family dispute has been involved in a coercive or abusive relationship with any other party, the family dispute resolution professional may not begin with or continue with the dispute resolution process unless—

- (a) the relevant party has been informed of the relief available in terms of the Domestic Violence Act, 1998 (Act No.116 of 1998);
- (b) where applicable, any obligation to report domestic violence in terms of sections 2A or 2B of the Domestic Violence Act, 1998 (Act No.116 of 1998) has been complied with;
- (c) the relevant party has been given the opportunity of applying for and obtaining an interim protection order in terms of the Domestic Violence Act, 1998 (Act No.116 of 1998) or has indicated that they do not elect to do so;
- (d) the potentially vulnerable prospective party requests the commencement or continuation of the process; and
- (e) a risk assessment has been done by the family dispute resolution professional; and
- (f) the family dispute resolution professional reasonably believes that the safety of the potentially vulnerable party can be adequately protected during the process.

(4) A family dispute resolution professional's failure to protect a party in terms of this section does not allow a private cause of action against the dispute resolution professional.

(5) A family dispute resolution professional who makes a report referred to in sub-clause (3)(b) in good faith, is not liable to civil, criminal or disciplinary action on the basis of the report, despite any law, policy or code of conduct prohibiting the disclosure of personal information.

Voice of the child

7. During all dispute resolution processes, child participation in family law disputes involving children should be actively facilitated in accordance with the provisions of the Children's Act, 2005, through an independent and suitably qualified child expert.

The relevant definition of "child expert" is included in clause 1 as follows:

"child expert" for the purpose of clause 7 means a person who has the requisite knowledge and skillset including —

- (a) child-friendly interviewing skills;
- (b) an understanding of education and schooling in terms of the educational needs of a child;
- (c) a basic awareness of common psychiatric and psychological disorders that affect children and their learning;

- (d) knowledge and awareness of parental alienation, and the indicators thereof;
- (e) thorough knowledge of child development at a cognitive, linguistic and psychosocial level;
- (f) an understanding of the various contexts and systems within which the child develops; and
- (g) current knowledge of research and development in the areas of child participation in divorce, family mediation, parenting plans, and legal aspects relevant to divorce.

In respect of comment received on clause 6 the following definition is added to the clause 1:

“coercive or abusive relationship” includes behaviour defined as ‘domestic violence’ in section 1 of the Domestic Violence Act 116 of 1998;

D Summary of proposals contained in the discussion paper relevant to Chapter 3 of the draft Bill on Information and Education

2.49 The discussion paper posed a number of questions to determine the need for and extent of information and education programmes prior to engaging in litigation to resolve family disputes. A summary of the questions posed will be discussed below followed by relevant submissions received.

Should attendance of information and education programmes prior to engaging in mediation or litigation be compulsory for all parties seeking to resolve family law disputes?

2.50 In the discussion paper the Commission questions whether attendance of information and education programmes prior to engaging in mediation or litigation should be compulsory for all parties seeking to resolve family law disputes.⁸³ The preliminary conclusion is drawn that mandatory information programmes are justified in light of the evidence which shows that early intervention is “sufficiently effective in reducing conflict and expediting resolution”.⁸⁴

⁸³ SALRC Discussion Paper (2019) 48.

⁸⁴ SALRC Discussion Paper (2019) 52.

2.51 Respondents are in support of mandatory information programmes.⁸⁵ The Sunni Ulama Council Gauteng is, however, of the view that information and education should take place at a needs level.⁸⁶ Where a solution is found at the mediation phase there would be no need for further information or education on arbitration or court process. It states that religious and traditional leaders who are normally the first port of call when families are engaged in disputes, have a key role to play. Furthermore, the weight of the process should be focussed at the therapeutic stage i.e. where elders, parents, or religious leaders are engaged to resolve the dispute informally. In its view, to acknowledge diversity, education and training should be given to and facilitated by religious or traditional leaders. Dr Astrid Martalas submits that finding therapeutic outcomes to family law disputes aligns well with sections 4(a) and 69(b) of the Children's Act and therefore it might be appropriate to refer to this in the draft Bill

2.52 The Sunni Ulama Council, Gauteng suggests that information should be shared at various points in the process. It identifies the following five steps in the process, namely entry-level, where the disputant refers the matter for mediation; administration level, where certain basic documentation takes place; the pre-mediation level; the mediation level; and the outcome phase. The Islamic Forum Azaadville, proposes a different flow within the system, namely (a) registration of all disputes at a court and a register which shows which process will be followed, e.g. therapeutic or adversarial – there will only be two options, either mediation or litigation; (b) where successful the outcome of the mediation process will be sent for entry into the court register; (c) where mediation fails the court will be advised and there will be an entry on the register indicating the option to engage in arbitration, collaborative dispute resolution or litigation; (d) the outcome of the next step will be sent to the court for entry in the register; (e) any review (limited to structure and process and not fact) will be sent for entry in the register; and (f) the family parenting coordination must be removed as a separate process and be incorporated within the other methods of FDR. The view is held that the Office of the Family Advocate will play an important role in the oversight of the “best interests of children” with possible additional powers.

2.53 The Islamic Forum Azaadville submits that the difference between information and education as opposed to counselling has not been clarified. It further submits that

⁸⁵ Sunni Ulama Council, Gauteng; Islamic Forum Azaadville; Dr Astrid Martalas; Black Lawyers Association, Limpopo Branch; Endorsed by Dr Razia Nordien-Lagardien, lecturer at Nelson Mandela University.

⁸⁶ This view is endorsed by the Islamic Forum Azaadville.

counselling assists with the resolution of disputes and in turn access to justice and that this needs to be catered for.

2.54 The Office of the Family Advocate submits that its office provides parent education in the form of information sessions, is child-focused and utilises its impartial multi-disciplinary team when necessary.⁸⁷ The Black Lawyers Association, Limpopo Branch is however of the view that requiring parties to attend a mandatory parent information or education programme at the Office of the Family Advocate will result in a bigger bottleneck at this office. It states that the current backlog of parenting plans already points to a need for the Office of the Family Advocate to be adequately capacitated.

How should information and education programmes be constituted?

2.55 In arriving at a proposal that engaging with information and education programmes should be compulsory over a plethora of platforms or in person, the Commission emphasises that these programmes would need to be adapted to recognise a client's culture and language, with particular recognition being given to the South African context and African values.⁸⁸

2.56 The Sunni Ulama Council, Gauteng, supports the SALRC's view that information, education and referral information be made available on widely used platforms.⁸⁹ The Black Lawyers Association, Limpopo Branch however emphasises that this information and these programmes should be accessible to all including the poorest of the poor, the illiterate and those living in rural areas. They should also be designed in a manner that will not frustrate access by the parties to the proceedings. It recommends that costs must be kept to a minimum.

2.57 La Poppie Mediations recommends that the "information and education programmes" means a programme developed in accordance with this Act to provide relevant information and education to the parties involved in a family dispute. It suggests that these programmes should include specifics of the statutory legislation that places a compulsory duty to report on professionals.

⁸⁷ Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape.

⁸⁸ SALRC Discussion Paper (2019) 69.

⁸⁹ Endorsed by Islamic Forum Azaadville.

2.58 On a practical note the Black Lawyers Association, Limpopo Branch submits that an inability to use technology and access to data may be a barrier to accessing this information and the associated programmes. It suggests that equipment and a person to operate said equipment could rotate from community to community in addition to dedicated equipment being placed at courts for such information and education programmes. It further emphasises that maintenance disputes must be treated as urgent in that the parties should be able to approach the courts without going through the education and mediation process. If information and education is required the domestic violence court may be approached for urgent monetary relief in terms of the Domestic Violence Act and the officials should be made aware and educated on the implementation of such.

Who should manage and coordinate the information and education programmes and where should they be conducted?

2.59 The preliminary finding in the issue paper was that information and education programmes should be implemented uniformly across the country under the auspices of the Office of Family Advocate. However, in recognition of the capacity constraints experienced by the aforementioned office, it was proposed in the discussion paper that the presentation of the programme could be outsourced to NGOs and the like.⁹⁰

2.60 The Office of the Family Advocate however submits that capacity and resource constraints should not be regarded as the sole reason for exclusion in this regard. It comments that although the same team who assesses the child at the Office of the Family Advocate may do the assessment, this impediment could be addressed through processes that do not generate costs for the beneficiaries of mediation and remain true to the participation of children.⁹¹ It suggests that policies, processes and structures to accommodate policies and processes that support families should be harnessed to enhance the Office of the Family Advocate and all other government structures and state-funded bodies in addressing ADR processes which are in turn relevant, child focussed and at no cost to its beneficiaries.

⁹⁰ SALRC Discussion Paper (2019) 70 – 71,

⁹¹ Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape.

2.61 Finally, while the Office of the Family Advocate recognises the role that private practitioners have to play, it reasons that their role needs to be evaluated against the use of this process in a manner which is “opportunistic, with poor regard to beneficiaries of the service and especially children.” It is of the view that ADR practices by private practitioners do not incorporate child-focused participation in mediation, which the Office of the Family Advocate does.⁹²

2.62 The view was submitted that using traditional leaders as a point of entry would be beneficial considering that the traditional house is the first institution approached when there are family law disputes.⁹³ However, according to the Black Lawyers Association, Limpopo Branch, the problem with traditional leaders mediating and educating is that most of them still hold the traditional belief that women are perpetual minors and consequently they are not normally afforded an opportunity to state their case. It is of the view that constant training and monitoring of tribal houses will be beneficial to the parties.⁹⁴ For this reason, it is suggested that a qualified mediator in terms of the definition needs to be placed in such institutions to ensure fair processes.⁹⁵ Furthermore, mediators should be accredited even though they might be coming from different spheres.

2.63 The Black Lawyers Association, Limpopo Branch cautions against using self-help access to information and education as this option has not yielded positive results in South Africa.

2.64 According to Lourens Grové of the University of Pretoria Law Clinic, university law clinics may be very well positioned to assist on multiple levels that go beyond simply the delivery of ADR services. He is mindful of the need to separate those conducting mediation from those engaged in subsequent litigation. He submits that trained senior students would be able to co-mediate with experienced mediators and in such a way a culture of ADR with the necessary skills, expertise and experience would be exported into the legal community and society at large. Lourens Grové further points out that with regard to the implementation of information and education programmes university-based

⁹² Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape.

⁹³ Black Lawyers Association Limpopo Branch.

⁹⁴ Endorsed by Dr Razia Nordien-Lagardien (Lecturer at Nelson Mandela University).

⁹⁵ Black Lawyers Association Limpopo Branch.

law clinics can also play an important role in training and assessment, drawing on their own practical experience with the law as well as the expert knowledge in various fields and particularly in education and assessment found in not only the clinics themselves but the universities that they are attached to. He submits that one law clinic in South Africa, for example, has a well-established and experienced research and short courses section that focuses specifically on such. The money generated through such training and assessment is in turn used to fund the legal aid activities of the clinic.

Funding of information and education programme

2.65 In the discussion paper the SALRC argues that Chapter 8 of the Children’s Act 38 of 2005 provides for early intervention and development programmes and that this provides a baseline for further development of these programmes. In light of this argument, the SALRC endorses the proposal that mandatory information and education programmes should be funded by the State, augmented by nominal fees being charged to those who do not meet the indigence test.⁹⁶

2.66 The Sunni Ulama Council Gauteng agrees that mediation and arbitration should be made accessible to the marginalised majority. It submits that if costs are not lowered, people will be denied justice.⁹⁷

Should mandatory information and education programmes be legislated?

2.67 After considering the existing legislative framework and the appropriateness of amending the Children’s Act to include information and education programmes, the SALRC opted for the inclusion of such programmes in its draft Bill. The proposed Chapter 3 of the draft Bill contains provisions which provide for the reception at an entry point (clause 8); the minimum standards for the information and education programme (clause 9); the content of the information and education programme (clause 10); the format of the programme (clause 11); the availability, administration and implementation of the programme at all entry points (clause 12); the applicability of the programme to various family configurations (clause 13); the furnishing of a certificate of attendance (clause 14); and the effect of non-compliance (clause 15). Two definitions, namely that of ‘entry point’ and ‘family dispute resolution professional’ are foundational to the dispute resolution

⁹⁶ SALRC Issue paper (2015) 31 confirmed in SALRC Discussion Paper (2015) 74 – 75.

⁹⁷ Endorsed by the Black Lawyers Association, Limpopo Branch.

process.⁹⁸ The comments received on these draft clauses, the SALRC's consideration thereof and the final draft recommendations will follow:

Reception at entry point

2.68 Providing information and education on the information and education programme at a reception or entry point is welcomed.⁹⁹ Ms Nicolle Kopping-Pavars observes that the proposed information and education process is very similar to the Mandatory Information Program (MIP program) that is used in Ontario, Canada. She explains that the MIP session is something that both applicants and respondents must attend before any further steps may be taken in their divorce application. Once a divorce application is filed, each party needs to attend the program which is set out in two sessions (Tuesday evenings for Applicants and Thursday evenings for Respondents). The first session deals with property and support issues and the second session deals with child-related issues and the emotional and psychological aspects of divorce and separation). Depending on the issues at hand a participant may only have to attend session one or both sessions. The attendance certificate is signed by the presenters at the end of the session, and it is then filed with the court and the next steps in the process may commence. Ms Kopping-Pavars is of the view that this process “should be done BEFORE proceedings are initiated in court because once the parties are in the court system, it is hard for them to go back to the options they only learn about in the program in a litigation-based setting.”¹⁰⁰

2.69 The Commission for Gender Equality recommends that there should be a Standard Operating Procedure to regulate the referral of parties to a programme provider. The Commission for Gender Equality suggests that an effective referral system would be inclusive of the initiating party, receiving party; and supervising party. It explains that for example, a referral by a Legal Aid South Africa practitioner to the Office of the Family Advocate or social worker or any Law Clinic must be acknowledged by the receiving party to the initiating party. This is to ensure that there is a proper record of monitoring of referrals and that parties in coercive relationships get the required assistance.

⁹⁸ Chapter 1 of the draft Bill.

⁹⁹ Ms Nicolle Kopping-Pavars; Natalie Ruiters, La Poppie Mediations; Commission for Gender Equality; the Black Lawyers Association of Limpopo.

¹⁰⁰ Ms Nicolle Kopping-Pavars.

2.70 La Poppie Mediations expresses its concern that government officials are not adhering to policy documentation requiring them to assist members of the public, especially domestic violence complainants and vulnerable groups, to access services. It recommends that mediators also be considered programme providers to save time and money for family members embroiled in a family dispute. It is of the view that requiring a mediator to refer parties to a programme provider would waste valuable time. It notes that a mediator would be able to determine the information needed, obtain such information, and make the same available to family members at no additional costs. The Islamic Forum Azaadville agrees that a determination of what information is needed should be made. Further, this determination should be made at each point of the dispute resolution process. This approach would recognise the needs of the parties and any constraints regarding capacity at the point of entry. It further comments that there should also be minimum standards which are generic enough to provide sufficient knowledge on all processes and different approaches utilised and accepted by different segments of the populace and not their effect but their implementation. In its view, the format must be able to meet the challenges faced by the populace in terms of access and capacity. In this regard, La Poppie Mediations suggests that section 11 (1) information brochures or short videos could be played in the reception rooms of mediation offices or be made available to family members. The Islamic Forum Azaadville observes that mandatory (forced) attendance would lead to resistance or disinterest and that would not serve the purpose. But if however, it becomes part of the process then it becomes effective.

2.71 Clause 8(2) of the draft Bill states that where the person consulted is not a programme provider that they must refer a party to a family dispute to a programme provider. The Black Lawyers Association of Limpopo enquires where a list of appointed providers may be found and who is responsible for the appointment of providers. The Sunni Ulama Council Gauteng comment that the dispute resolution professional may not be appointed unless they have acquired the necessary skills to be appointed a programme provider. While the council welcomes the “no door is the wrong door” approach at entry points, it cautions against the same approach with programme providers.

2.72 After considering the comment received, the SALRC is of the view that this clause should apply to both family dispute resolution professionals and persons at entry points. As the definition of ‘family dispute resolution professional’ includes mediators, the concern raised by La Poppie Mediations is addressed. The SALRC agrees that minimum standards should be applied and for this reason, provision has been made under clause

9 for the development of minimum standards. This includes the qualifications of programme providers. With regard to the questions posed by the Black Lawyers Association regarding the list of programme providers, the response is that the list of appointed programme providers would be compiled after the promulgation of the ADR in Family Matters Bill. It is of the view that this will be the task of the Department of Social Development. However, the expert advisory committee advising the SALRC cautions that although the Department of Social Development may provide training, it would not be in a position to guarantee employment and appointment of providers, unless this would form part of approved NGO's family-oriented programs. The view is held that the list may be kept on the data base of early intervention programs which is kept by the Provinces. If this were the case the Department of Social Development may provide funding through these programs.

Information and education programme

2.73 With regard to clause 9(1) the Sunni Ulama council Gauteng suggests adding the word 'consequences' after the word 'effect' so that it reads 'about the effect and consequences of a family dispute'. It further suggests that sub-paragraphs '(h) the processes available' and '(i) the support services available during and after the process' be added to clause 9(2) to be included in the minimum standards. The view was further expressed that it would be beneficial if the proposed programme were required to be sent to the interested parties, for example, legal practitioners, children's court clerks, social workers and so on, for comments and suggestions before it is sent to the Chief Justice. The Office of the Family Advocate submits that co-parenting, family cohesion and conflict resolution skills should inform this process as well.¹⁰¹

2.74 Dr George Fordham Wara¹⁰² submits that there is a lack of knowledge on the identity of leaders, chiefs, elders and other neutrals who typically handle these family law disputes, their qualifications and training, their funding, timelines and procedural rules involved, enforcement mechanisms etc. He is of the view that a lack of information may have led to a progressive omission of these practices from the integrated family justice system. He supports information sharing and the inclusion of traditional dispute resolution practices in family matters.

¹⁰¹ Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape.

¹⁰² Dr. George Fordham Wara, Post-doctoral fellow, University of the Free State, Free State Centre for Human Rights.

2.75 After consideration of the comment the SALRC is of the view that the addition of the words “and consequences” would not expand on the understanding of this sub-paragraph as it is a synonym of the word “effect”. In its opinion the reference to “the processes available” is vague. It, however, supports the inclusion of the sub-paragraph regarding the support services available. It is agreed that co-parenting, family cohesion and conflict resolution skills should inform this process, but finds that it is unnecessary to list these skills in this clause as it relates to the programme and not the skills of the provider. It further supports developing the programme through broad consultation but is of the view that it may lead to unintended consequences to be prescriptive in this regard. It finally suggests the insertion of the word “Office of the” before the words “Chief Justice” in clause 9(3).

Content of information and education programme

2.76 Lesley Blake Attorneys submits that sub-clause 10(1)(b)(iii) which provides for the inclusion of instruction on

“the importance of recognising the welfare, wishes and feelings of children;”

in the information and education programme, should be replaced by the words:

“the needs; and psychological and physical requirements of care of children at the age of the minor children in the dispute”.

Furthermore, that the following item should be added:

(x) how maintenance of minor children is calculated in law and the minimum costs to be expected to be taken into account in calculating the maintenance of minor children.¹⁰³

2.77 The Black Lawyers Association, Limpopo expresses its concern that requiring parents to attend parent information and education programmes at the Office of the Family Advocate will increase the workload and result in further delays. It suggests that this office be capacitated to deal with attendance of this programme prior to the granting of a court order.

2.78 With regard to sub-clause 10(1) (a)(v) to (vii) which provides for:

“(v) the conditions for obtaining legal aid and where the parties can get appropriate legal advice;
 (vi) referral to other non-legal service providers or agencies;

¹⁰³ Lesley Blake Attorneys.

(vii) the legal process of divorce or separation and the responsibilities and rights of parties in all circumstances;”

the Black Lawyers Association, Limpopo suggests that Legal Aid South Africa should be consulted when considering the conditions for obtaining legal aid to ensure understanding. It reasons that non-legal service providers and agencies should be consulted in case their scope of mandate is expanded. The Sunni Ulama council, Gauteng submit that sub-clause 10(1)(b)(vii) should be amended to include:

the responsibilities and rights of parents towards each other and towards the minor offspring and the advantages of parenting plans;

2.79 The Chief Family Advocate in turn submits that the following should be included under clause 10(1)(b):

- The best interests of children
- The role of the ADR process and practitioners
- Co-parenting and family cohesion
- Rights of children to participate in proceedings
- Parental responsibilities should form part of this information and education.¹⁰⁴

2.80 The reason for this is the extended role by the Office of the Family Advocate as set out in the draft Bill. Additionally, co-parenting, family cohesion and conflict resolution skills should inform this process as well.¹⁰⁵

2.81 Finally, a respondent suggests that the wording in clause 10(1)(a) and (b) be grammatically amended to read as follows: “as set out in hereunder and referred to as Part A of the programme” and “as set out in hereunder and referred to as Part B of the programme”.¹⁰⁶ And that clause 10(2) should be amended to provide “..... about the following matters set out hereunder and referred to as Part C of the programme.”¹⁰⁷

2.82 After consideration of the comment received, the SALRC is of the view that the current introductory wording in the sub-clauses should be retained as it prefers a plain

¹⁰⁴¹⁰⁴ Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape.

¹⁰⁵ Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape.

¹⁰⁶ Sunni Ulama council Gauteng.

¹⁰⁷ Sunni Ulama council Gauteng.

language approach. The SALRC regards sub-clause 10(1)(b)(iii) to be aligned with the Children’s Act and for this reason does not support a change to this sub-clause. It is of the view that the insertion of co-parenting and related matters is unnecessary as it is covered under sub-clauses (vii) (iii) and (iv). Further that, “family cohesion” is covered under the welfare of the child in sub-clause (iii), (iv) and (vii). As the responsibilities and rights of parents are covered under sub-clause (vii), the SALRC is of the view that it is neither necessary to list or unpack all of the responsibilities and rights nor to prioritise some rights e.g. maintenance. For this reason, the insertion of sub-clause 10(1)(b)(x) is not supported. The SALRC does, however recommend a change in terminology in sub-clause 10(a)(b)(vii) to “parental responsibilities and rights” instead of “responsibilities and rights of parents”.

Format of the programme

2.83 The Sunni Ulama Council, Gauteng suggests that the words “one or more” should precede the listing of the communication tools under clause 11(1). Other respondents to the discussion paper suggest the inclusion of an additional paragraph “(e) group meetings and presentations”;¹⁰⁸ the inclusion of workshops; and that language should be customised according to the needs of the parties and be age-appropriate for children.¹⁰⁹

2.84 The SALRC agrees that the format of the programme should be an open-ended list. It is of the view that the wording of section 213 of the Children’s Act i.e. “any of the following” would better capture the intention behind the proposed insertion of the words “one or more”. It therefore recommends the insertion “any of the following”. The SALRC supports the inclusion of “group meetings and presentations” and is of the view that this description is wide enough to include workshops without naming it as such.

Availability, administration and implementation of programme

2.85 In a general comment La Poppie Mediations welcomes the proposed Bill and finds it to be progressive and a step in the right direction in understanding the plight of vulnerable women engaged in family law disputes and in better regulating the fragmented legal system that results in unequal treatment in the court system. She notes that women are often frustrated when seeking to obtain relief by way of an immediate

¹⁰⁸ Lesley Blake Attorneys.

¹⁰⁹ Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape.

interim order in terms of section 10(6) of the Maintenance Act or interim financial relief in terms of Rule 43 or Rule 58, or an interim protection order in terms of the Domestic Violence Act. She further flags the non-compliance by the state in giving effect to regulations, policy documents and circulars. She is of the view that they have no value if not enforced and that information and education of the general population is necessary for them to access services in family courts that they are entitled to. La Poppie Mediations however cautions against haphazard awareness-raising campaigns of rights and obligations during the 16 days of activism. She informs the SALRC that there are free of charge services rendered at some service points such as the Western Cape Wynberg court which renders mediation services on a Wednesday to provide a restorative justice approach in domestic violence and harassment matters. Furthermore, La Poppie Mediations in collaboration with For the Sake of the Children renders other services including the compilation of parenting plans for single and divorced parents on a Saturday. Dr Razia Nordien-Lagardien, a lecturer at Nelson Mandela University submits that she is involved in voluntary mediation services at the New Law Courts in Port Elizabeth in conjunction with the Law Clinic and Nelson Mandela University. She cautions that providing services next door to an active court is not ideal. The suggestion is made that welcoming rooms should be made available that are conducive to constructive discussion.

2.86 The Commission for Gender Equality echoes the sentiment that services and the information and education programme should be accessible and implementable. It comments that access to justice is a central theme of the United Nations Sustainable Development Goal (SDG) 16, that is, to provide justice for all and build effective, accountable and inclusive institutions at all levels. It emphasises that equal access to justice should not become a tool of the rich only.

2.87 Zenobia du Toit of Miller du Toit Cloete Inc. submits that the information and education tool is vital. It is submitted that the information be developed between the Family Advocates and the Department of Social Justice and Development. Information could be disseminated through a number of platforms, e.g. radio stations, courts, video booths, WhatsApp programmes, pamphlets, structures in outlying areas such as traditional leaders, religious and cultural organisations, doctors and health centres, and so on. The view is held that “it is crucial that a vast roll out of information and educational processes be put into place so that there is delivery of justice, making people aware of their rights and choices in regard to alternative dispute resolution methods as well as in regard to their legal rights.” Furthermore, the information should be workshopped by the

Family Advocate's offices with the relevant Departments, and the Family Advocate should be resourced and equipped for this purpose.

2.88 Legal Aid SA submits that if it is not identified as a service provider of the information and education programmes, the envisaged process can easily be accommodated in its current programmes. Legal Aid SA comments that it will be able to refer clients to accredited service providers and ensure that clients have the necessary information on how to access the information and education programmes. It will also be able to ensure that their self-help modules include all the information that is required in terms of the standards that will be set by the Minister.

2.89 If Legal Aid SA will be required to be a service provider of the information and education programme it states that its current resources will be wholly insufficient and it will impact negatively on the sustainability of the organisation as it will be an unfunded mandate. Legal Aid SA argues that it does not have the capacity to provide the information and education programme to every person who seeks to initiate a legal process in family law matters. Such an unfunded mandate will result in a situation where Legal Aid SA will not have sufficient resources to deliver on its core mandate which is to provide legal representation to persons who cannot afford their own legal representation. It further argues that if the Minister sets standards for the electronic resources that exceed what it currently provides through self-help modules on its website, additional budget and resources must be allocated to Legal Aid SA to ensure that it will be able to meet the standards for the electronic resources in the information and education programme. Additionally, it submits that it will also not be in a position to fulfil the non-legal knowledge requirement in terms of the standards as this does not fall within its mandate. In its view the Office of the Family Advocate will perhaps be best suited to provide the information and education on the nonlegal knowledge requirement.

2.90 The Commission for Gender Equality notes that both the Minister for Social Development and the Minister of Justice and Constitutional Development must develop minimum standards for an information and education programme. The purpose of educational programmes is to assist prospective litigants to know their legal rights and responsibilities as parents; and the responsibilities and rights of their children. It recommends that the information and education programme must be gender sensitive and take into consideration the power dynamic that is present between men and women, LGBTIQ+ persons and the vulnerability of persons with a disability. It suggests that the programme must consider all forms of disabilities and be offered freely by the DoJ&CD.

2.91 SAAM comments that family dispute resolution professionals need to be categorized according to their experience and training; and that the Minister or the Office of the Chief Justice needs to confirm the status of a programme provider subject to the recommendation by a Family Dispute Resolution Service Provider and needs to be added to the register of Family Dispute Resolution Service Professionals held by the relevant Office of the Chief Justice or departments. It states that this will assist the administrative burden and provide functionality to the relevant departments. Further, in its view, this will also enable the current member organisations to remain relevant and further of assistance to the relevant departments having to provide solutions for the proposed implementation. SAAM submits that family dispute resolution professionals service providers should be approached by certified mediators to obtain guidance and confirm compliance in accordance with the standards to be provided and that the service providers would in turn submit applications for the approval of their members to the relevant institutions or departments as referred to.

2.92 While some respondents emphasise that the places used to provide information and education programmes must be easily accessible to the poor and vulnerable, others comment that the manner in which information and education programmes are administered and implemented should be spread over a seamless system which only provides the information and education needed at a specific point in time.

2.93 After consideration of the comment received and having regard to section 104 of the Children's Act the SALRC recommends that the designation "Minister" should be replaced with "MEC" in clause 12(1) as the concurrent functions should be considered. It is the role of the MEC to oversee the administration. The Minister provides national norms and standards and the MEC implements them. There are two role-players. Although consideration was given to removing clause 12 (4), it was decided that it should be retained as a dispute resolution professional who provides information and education will not be considered to be acting in dual sequential roles and may therefore be a programme provider.

2.94 The explanation by Lourens Grové of the capacity of law clinics to engage in the implementation of the information and education programmes is noted and welcomed.

Applicability of the programme

2.95 Lesley Blake Attorneys submits that it would place an undue burden on the maintenance court to require the information and education program be completed by every person attending maintenance court. It is suggested that it should be provided that parties in a maintenance matter need not participate in the information and education programme unless a maintenance officer determines that they should do so either before the commencement of proceedings in terms of Section 6 of the Maintenance Act or after the maintenance officer has commenced with proceedings in terms of section 6 of the Maintenance Act.¹¹⁰

2.96 The Black Lawyers Association, Limpopo is of the view that completing the information and education programme should also be compulsory for legal guardians as there is still a high number of disputes between the legal guardian and the surviving parent. Similarly, the Sunni Ulama Council Gauteng submits that even in matters outside of the court process the information, education and referral should apply.

2.97 The SALRC is of the view that parties before a maintenance court should be informed and educated accordingly. Once they have completed the programme they will not be required to do so again.¹¹¹ It further confirms that the programme applies to all family law disputes, which includes maintenance matters.

Certificate of attendance

2.98 No comment was received on draft clause 14 requiring a program provider to provide each party with a certificate of attendance after completion of the program and a list of mediators. The SALRC considers this clause uncontentious and agreed to.

Compliance

2.99 The Office of the Family Advocate submits that the consequences of non-compliance by a dispute resolution professional to inform parties of the information and education programme and consequences for non-compliance therewith; and non-referral to a programme provider where needed, should be incorporated into current mediation

¹¹⁰ Lesley Blake Attorneys.

¹¹¹ See clause 13(1)(b)(ii)(cc).

processes such as Section 21, 22 and 33 of the Children's Act and Mediation in Certain Divorce Matters Act.¹¹²

2.100 Some respondents however express the concern that the non-compliance sub-clause may have unintended consequences. Natalie Ruiters of La Poppie Mediations submits that the refusal to participate in terms of clause 15 may both be a negative and positive contribution to the law. She refers to the unreported judgment of Brasey AJ in the High Court of Gauteng Local Division *Brownlee v Brownlee: 2008/25274* where it reflects that Rule 41A is recommended but not forced on parties. Consequently, a cost order may be made by a presiding officer after hearing a matter to enquire about which matters could have been better served by mediation. She emphasizes that the tenets of the restorative justice model require that the model be victim centred. This means that an unwilling participant's refusal should be investigated before a cost order is considered. She further explains that some victims of domestic violence may refuse to participate based on the anticipated triggering of anxiety through hearing the other party's voice or seeing other non-verbal gestures. The Sunni Ulama Council Gauteng argues that in processes outside of the court process, the stringent rules found in clause 15 would negatively affect the principle of easy access to justice. It states that the non-compliance punitive actions will then move from the disputants who would invariably come from disadvantaged positions to the family dispute resolution professional.

2.101 Lesley Blake Attorneys suggests the insertion of clause 15(4) be read with the proposed insertion of clause 13(3) to provide enforceability for non-compliance when a maintenance officer has referred parties to an information and education programme. The suggested effect would be that the tariff of charges for legal costs applicable in the magistrates court should become applicable to the hearing of the maintenance matter and the court hearing the subsequent court proceedings should be entitled to make an order for payment of legal costs, notwithstanding the provisions of the Maintenance act.

2.102 The SALRC is mindful of its recommendations contained in the Project 100B Review of the law of maintenance. It is therefore hesitant to include provisions which mirror provisions to be included in the Maintenance Act. The SALRC is further of the

¹¹² Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape.

view that clause 15(3) does not allow for cost orders against persons at entry points, but may be made against family dispute resolution professionals.

E Recommendations

2.103 The revised Chapter 3 on Information and Education provides as follows:

| CHAPTER 3 INFORMATION AND EDUCATION | |
|---|--|
| Reception at entry point | |
| 8.(1) | A person at an entry point or a family dispute resolution professional consulted by a party to a family law dispute must inform the parties about— |
| | (a) the mandatory and non-mandatory aspects and content of the family law information and education programme as set out in this Chapter; and |
| | (b) the consequences of non-participation. |
| (2) | If the person at an entry point or the dispute resolution professional has not been appointed as a programme provider, he or she must refer the party to a programme provider appointed in terms of section 12(3) for purposes of participating in an information and education programme. |
| Information and education programme | |
| 9.(1) | The Minister, in collaboration with the Cabinet member responsible for social development, must develop— |
| | (a) minimum standards for an information and education programme for the purpose of educating family members about the effect of a family dispute on adults and children, and about the manner in which such a dispute may be resolved; and |
| | (b) an information and education programme in accordance with the minimum standards contemplated in paragraph (a) and in accordance with this Act. |
| (2) | The minimum standards developed in terms of subsection (1)(a) must address— |
| | (a) the nature of the programme; |
| | (b) the funding of the programme; |
| | (c) the effect of cultural diversity on the nature of the programme; |
| | (d) the importance of acknowledging the voice of the child; |
| | (e) arrangements for disputes in which domestic violence or child abuse may be a factor; |
| | (f) the qualifications of programme providers; |
| | (g) the means of evaluating and maintaining the programme; and |
| | (h) the support services available during and after the process. |
| (3) | Once the information and education programme has been developed, but prior to implementation, it must be submitted to the Office of the Chief Justice for consultation. |
| Content of information and education programme | |
| 10.(1) | The information and educational programme referred to in subsection 9(1)(b) must at a minimum include instruction about the following matters— |

- (a) as set out in Part A of the programme:
 - (i) Ways in which family law disputes may be resolved other than by the court;
 - (ii) the suitability of mediation, or of any other way of resolving disputes, such as family arbitration or collaborative family practice, as a possible way of resolving the dispute to which the matter concerned relates;
 - (iii) the nature of mandatory mediation as set out in this Act;
 - (iv) the availability of independent legal advice and representation to a party;
 - (v) the conditions for obtaining legal aid and where the parties can get appropriate legal advice;
 - (vi) referral to other non-legal service providers or agencies;
 - (vii) the legal process and procedures of divorce or separation and the responsibilities and rights of parties in all circumstances;
 - (viii) the nature of financial issues that may arise as a result of divorce or separation, and services that are available to assist the parties; and
 - (ix) protective measures available in the case of violence and all forms of abuse and how to obtain support and assistance; and
- (b) as set out in Part B of the programme:
 - (i) The role of the Office of the Family Advocate;
 - (ii) the emotional, psychological, physical and other short-term and long-term effects of conflict on both children and adults;
 - (iii) the importance of recognising the welfare, wishes and feelings of a child;
 - (iv) how the parties may acquire a better understanding of the manner in which their child may be assisted to cope with the breakdown of a relationship or with any other family dispute;
 - (v) the importance of avoiding the placing of a child in the centre of conflict;
 - (vi) information for a child and their parents about separation and divorce, and their adjustment after the separation or divorce;
 - (vii) the parental responsibilities and rights of parents towards each other and towards their child and the advantages of parenting plans;
 - (viii) the suitability of parenting coordination; and
 - (ix) the role of support systems.

(2) Apart from the matters referred to in subsection (1), the information and education programme must also include instruction about the following matters set out in Part C of the programme:

- (a) The developmental and psychological needs and responses of children;
- (b) the positive parenting behaviour skills needed to build a cooperative parallel parenting relationship; and
- (c) the importance of a parent taking care of themselves in order to be able to help their child adjust.

Format of the programme

11.(1) The format of the programme must include any of the following communication tools as prescribed:

- (a) online resources;
- (b) audio-visual materials;
- (c) in-person lectures;
- (d) literature; and

(e) group meetings and presentations.

(2) The communication tools referred to in subsection (1) above must be provided in a party's home language at prescribed locations.

Availability, administration and implementation of programme

12.(1) The MEC for social development must oversee the administration, adoption and implementation of the programme at all entry points, other than the courts, for use by participants who are required to attend.

(2) The Office of the Chief Justice must oversee the administration, adoption and implementation of the programme in the courts, for use by participants who are required to attend.

(3) An information and education programme must be presented by a person who—

(a) is qualified and was appointed as prescribed; and

(b) has no financial or other interest in any aspect of the family dispute between the parties.

(4) Subject to subsection (3), nothing precludes a family dispute resolution professional from acting as a programme provider.

(5) The information and education programme must be available at the places and times prescribed.

(6) Information as prescribed must be provided to parties (other than during an information and education programme) in cases where mandatory participation in a programme does not apply.

Applicability of programme

13.(1) The parties in any family law dispute that—

(a) does not affect the rights or interests of a child, must participate in the information and education programme contemplated in section 10(1)(a), as set out in Part A of the programme;

(b) affects the rights or interests of a child, must—

(i) participate in the information and education programme contemplated in section 10(1)(a) and (b), as set out in Parts A and B of the programme; and

(ii) ensure that a child involved in the family law dispute receives the information contemplated in section 10(1)(b)(vi),

before any proceedings may commence, unless—

(aa) a court determines, for reasons that may include urgency and possible harm or prejudice, that participation is not in the best interests of the parties or the child;

(bb) a party is or will be enrolled in an education programme that the court deems to be appropriate;

(cc) a court determines that a party has previously completed an educational programme pursuant to this section, or an appropriate programme, and the court is of the opinion that the party need not attend the programme again;

(dd) a family dispute resolution professional is of the opinion that the safety of the parties or of their children is at risk;

(ee) a party lives in an area where the programme is not available; or

(ff) the court determines that participation is unnecessary in the circumstances of the case concerned.

(2) Parties in any family law dispute that affects the rights or interests of a child may participate in the information and education programme contemplated in section 10(2), as set out in Part C of the programme, before any proceedings commence.

Certificate of attendance

14. A programme provider appointed in terms of section 12(3) must furnish each party who attends with a—

- (a) certificate of attendance as prescribed; and
- (b) list of available certified mediators.

Compliance

15.(1) Failure of a party to comply with section 13(1)(a) has the effect that—

- (a) when both parties refuse to participate, no further proceedings may take place; and
- (b) when one of the parties refuses to participate, a negative inference may be drawn regarding that party's bona fides and a punitive cost order, or any other appropriate order, may be made at the discretion of the court in the event of any subsequent court proceedings.

(2) Failure of a party to comply with section 13(1)(b) has the effect that—

- (a) when both parties refuse to participate, no further proceedings may take place; and
- (b) when one of the parties refuses to participate—
 - (i) a negative inference may be drawn as to that party's intentions regarding the best interests of the child concerned; and
 - (ii) a punitive cost order, or any other appropriate order, may be made at the discretion of the court in the event of any subsequent court proceedings.

(3) Failure of a dispute resolution professional to comply with section 8 will result in—

- (a) a negative inference being drawn with respect to the bona fides of the family dispute resolution professional, and when the rights or interests of a child are affected, to the professional's intentions regarding the best interests of the child concerned; and
- (b) a punitive cost order, or any other appropriate order, may be made, where applicable, at the discretion of the court in the event of any subsequent court proceedings.

CHAPTER 3: FAMILY MEDIATION

A Introduction and background

3.1 In the discussion paper the SALRC argues that mediation as one of the vehicles of ADR enhances access to justice. The benefits, particularly in light of the contracting economy in South Africa, are espoused as circumventing the high cost, delays, complexity and uncertainty associated with litigation.¹¹³ Additional benefits of using mediation are reflected as including higher rates of settlement and compliance with ensuing judgments.¹¹⁴

3.2 The SALRC explains in the discussion paper that the regulation of the mediation process itself will be primarily addressed in the envisaged overarching draft Mediation Bill being developed by the SALRC Project 94 investigation. The aforementioned draft Bill aims to provide a generic framework for the mediation of all matters, to the exclusion of provisions provided for in the proposed draft Family Dispute Resolution Bill. The draft recommendations in the attached draft Family Dispute Resolution Bill and its intersection with the draft Mediation Bill have been developed pursuant to an engagement with the advisory committee appointed to Project 94. Consequently, as the Project 94 investigation is currently in the discussion paper phase, the SALRC has decided, to make the proposals in the draft Family Dispute Resolution Bill workable, to include the regulatory framework for mediation in this Bill as a transitional arrangement.

3.3 This chapter seeks to consider proposals made in respect of Chapter 4 of the draft Bill which provides for mandatory mediation in family law disputes. It commences with an overview of the proposals contained in the discussion paper and thereafter considers comments received on this chapter of the draft Bill. An update on the regulatory framework is provided to place developments after the publication of the draft discussion paper in context. This chapter confirms the SALRC's preliminary view that mandatory mediation should be provided for, subject to exceptions to the general rule, and as such would be constitutional.¹¹⁵ In addition to providing timeous access to justice,

¹¹³ SALRC Discussion Paper (2019) 91.

¹¹⁴ SALRC Discussion Paper (2019) 92.

¹¹⁵ It is notable that in the matter of *Churchill v Merthyr Tydfil County Borough Council* Appeal No: CA-2022-001778 [75] dated 29 November 2023 the Judiciary of England and Wales

the view is held that embarking on this process will have a positive impact on the burgeoning backlog of cases.¹¹⁶ It further recommends that mediated matters should be expedited through the court process and that to this end consideration should be given to issuing court directives for a special roll for settlements and expeditions. The SALRC further confirms that a party who unreasonably refuses to engage in mediation may be met with a punitive costs order by a court. However, it is not in support of requiring a mediator to make a value judgment of the motives of the parties in this regard.

B Summary of proposals contained in the discussion paper

1 Mandatory vs voluntary mediation

3.4 The discussion paper explained that due to the context specific nature of whether mediation should be mandatory or voluntary, it would not be dealt with in the generic draft Mediation Bill, but rather in the draft Family Dispute Resolution Bill. Further that, the law makes provision for both mandatory and voluntary mediation. Mandatory mediation is already provided for in the Children’s Act in terms of section 21(3)(a) in respect of a dispute relating to parental responsibilities and the rights of unmarried fathers, whereby the matter **must** be referred to mediation to a family advocate, social

held that a court could stay proceedings for, or order parties to engage in a non-court-based dispute resolution as long as “it does not impair the essence of the claimant’s right to proceed to judicial hearing, and is proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost.”

¹¹⁶ A bulletin published by Deputy Judge President Roland Sutherland contains a sobering notice that parties engaged in opposed divorce cases applying for hearing dates are most likely only to be allocated dates 3 months in advance and if the hearing requires more than five days a date after 19 October 2026 will be allocated. One of the identified weaknesses is the shunning of engaging in voluntary alternative dispute resolution. Legalbrief Legal New Watch “Judiciary: Further backlogs stall Gauteng High Court (Johannesburg)” 1 August 2024 Issue No: 5939; Legalbrief Legal New Watch “Justice: Ministers must act urgently to advance mediation” 1 August 2024 Issue No: 5939; Civil trials in Pretoria are being set down for January 2029. Naude J “Too much work, too few judges at Gauteng High Courts” 26 July 2024 Independent Newspapers Available at <https://www.iol.co.za/pretoria-news/news/new/too-much-work-too-few-judges-at-gauteng-high-courts-d300fbe8-1da5-4670-9b4d-be22e640991c>. Dr Michael Louis, Chairperson of the One South Africa Movement notes that urgent change ushering in a culture of mediation is needed to address hopelessly overcrowded court rolls. Louis M “Court backlogs are a threat to justice - mediation is part of the answer” Daily Maverick 30 July 2024 Available at <https://www.dailymaverick.co.za/opinionista/2024-07-30-court-backlogs-are-a-threat-to-justice-mediation-is-part-of-the-answer/>.

worker, social service professional or other suitably qualified person; and section 33 in respect of parenting plans between co-holders of parental responsibilities and rights, whereby, before seeking the intervention of a court to address difficulties in exercising rights and responsibilities, they **must** first seek to agree on a parenting plan.¹¹⁷ Examples of instances where the court **may** refer matters to mediation include lay-forum hearings; family group conferences, other lay-forums, and pre-hearing conferences in terms of sections 49, 70, 71 and 69(1) of the Children’s Act respectively. In its analysis of the benefit or detriment of legislating for mandatory mediation, the SALRC highlights the apparent paradox thereof and the distinction between “coercion **into** mediation” and “coercion **within** mediation”.¹¹⁸

3.5 The SALRC further points out that no comprehensive family mediation legislation currently exists in South Africa. In light of this fact, it questions whether family dispute resolution should be housed in one or another of the following:

- Regulation as part of a general Mediation Bill;
- Regulation in a separate Family Dispute Resolution Bill;
- A comprehensive ADR Bill, including all of the above and the recently enacted international Arbitration Act 15 of 2017, all in separate chapters;
- Regulation through various pieces of legislation dealing with the issues at hand where required, for example the Children’s Act, the Maintenance Act, the Arbitration Act, the Superior Courts Act, or the Magistrate’s Courts Act, always ensuring that the different pieces of legislation are aligned; or
- Regulation through the Superior Courts Act and Magistrates’ Courts Act only.¹¹⁹

3.6 After concluding that a stand-alone Family Dispute Resolution Bill would be the preferred way forward, it presented a classification system of triggering laws, procedural laws, standard setting provisions and “beneficial” mediation laws as a framework against which the Project 94 draft Mediation Bill and the Project 100A (previously Project 100D) draft Family Dispute Resolution Bill should be evaluated.¹²⁰ At this juncture, it noted that the procedural aspects of mediation, standard setting provisions, and the rights and obligations of mediators would be fully considered in Project 94.¹²¹

¹¹⁷ SALRC Discussion Paper (2019) 97-98. Emphasis added.

¹¹⁸ SALRC Discussion Paper (2019) 103.

¹¹⁹ SALRC Discussion Paper (2019) 111.

¹²⁰ SALRC Discussion Paper (2019) 112-113.

¹²¹ See SALRC Discussion Paper (2019) 113.

2 Is mandatory family mediation unconstitutional?

3.7 In its exposition of this section the SALRC emphasised that the proposal of introducing mandatory mediation into South African law is based on the premise that “the adversarial court system is inadequate to resolve family law disputes, especially in so far as the protection of children and the dignity of the parties is concerned.”¹²² Mandating mediation would however require the enactment of new substantive law. It further, in light of the right to access to courts,¹²³ considered the constitutionality of mandatory family mediation. As a basis for the uptake of mandatory family mediation, it used the exposition of section 34 of the Constitution by Currie and De Waal¹²⁴ that this section guarantees three rights, namely:

- (a) to have a dispute decided by a court, tribunal or forum;
- (b) a fair public hearing; and
- (c) that a tribunal must be impartial and independent.

3.8 The SALRC conceded that mediation would, in light of the Constitutional court judgment in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews ao*¹²⁵ that private arbitration is a process distinct from the processes in section 34 of the Constitution, not be considered to be one of the forums provided for in this section. Pertinently mediation takes place in private and not in public and may be resolved by mediators who are not lawyers. Further that, in light of the *Lufuno* matter, embarking on a path of ADR would need to be as a result of a choice being made. The right to adjudication through the court is not waived when such a choice is exercised.¹²⁶ The provisional conclusion drawn was that mandatory mediation, as one of the forms of ADR, which seeks to resolve matters outside of the court system, may interfere with or at best delay a person’s direct access to a court, tribunal or forum as envisaged by section 34 of the Constitution.¹²⁷ However, on applying the criteria set out in section 36 of the Constitution in respect of the limitation

¹²² SALRC Discussion Paper (2019)139.

¹²³ Section 34 of the Constitution.

¹²⁴ Currie & De Waal 2015 at 711 as referenced in Discussion Paper (2019) 119.

¹²⁵ *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews ao* 2009 (4) SA 529 (CC)

¹²⁶ *Lufuno* at 217. See SALRC Discussion Paper (2019) 121.

¹²⁷ SALRC Discussion Paper (2019) 121.

of rights and the impact of enacting mandatory mediation, the SALRC argued that the purpose of mandatory mediation may be seen as protecting children and the right to privacy and dignity of all concerned parties, thereby constituting a legitimate and important government objective.¹²⁸ Furthermore, it would be important to consider whether the restriction prevented the concerned parties from accessing the court at all; whether it provided for judicial discretion or an opt-out option; and whether certain matters are excluded, for example, unsuitable matters such as allegations of sexual offences; or the option of approaching a court if the mediation was unsuccessful would be instructive on determining the limitation of the right.¹²⁹ The SALRC concluded that legislating for mandatory mediation would constitute a justifiable limitation of the right to access to court adjudication where this process allows for exceptions to the general rule, does not extinguish the right to access to court, does not delay the resolution of disputes, and does not involve costs that might preclude litigation by indigent parties.¹³⁰

3 Mandatory mediation – Costs, funding and fees

3.9 In the discussion paper the SALRC points out that if mediation were to be made mandatory, the majority of South Africans would not be able to afford the service of private mediators.¹³¹ Although it notes that funding and fees of mediation would be canvassed in the Project 94 investigation, it embarked on a preliminary discussion.¹³² Consideration was given to the use of the Short Process and Mediation in Certain Civil Cases Act, 103 of 1991 and the accompanying Rules for Short Process Courts and Mediation Proceedings in 1992¹³³ which seemingly have not been implemented. Furthermore, consideration was given to the possibility of applying a means test to provide pro bono services to those persons who are unable to pay for private mediation services, or applying a sliding scale of affordability; clarifying the concept of ‘community

¹²⁸ SALRC Discussion paper (2019)137. This stance is supported by the courts e.g. in *SDL v SJ* which was heard before the High Court of South Africa Gauteng Division, Johannesburg dated 2 August 2024 77 the court holds that “[T]he applicant could do well to consider mediation before a mutually agreed upon, accredited, independent mediator well versed in family law”.

¹²⁹ SALRC Discussion Paper (2019) 138.

¹³⁰ SALRC Discussion paper (2019) 142.

¹³¹ SALRC Discussion paper (2019) 144.

¹³² SALRC Discussion Paper (2019) 145.

¹³³ See SALRC Discussion Paper (2019) 156 and footnotes 48 to 49. Rules for Short Process Courts and Mediation Proceedings in 1992, R.2196 published in Gazette No. 14188 on 31 July 1992.

service' in terms of the Legal Practice Act 28 of 2014 to extend to the provision of pro bono mediation services by the legal profession; or to include state funded mandatory mediation under the auspices of the mediation stream of the Office of the Family Advocate.¹³⁴

3.10 The SALRC concluded that there was 'a fair amount of agreement' that mediation services should be provided by properly trained mediators both through government (including social workers) or the private sector (including ADR organisations).¹³⁵ However, it resolved that the State would need to be the primary source of funding.¹³⁶ Furthermore, the provision of State-funded mediation may extend to the use of legal interns, paralegals and students. It was further envisaged that existing private mediation services may provide services alongside government-funded mediation and that parties may bear the costs themselves if in a position to do so.¹³⁷ In this regard, the SALRC confirmed that the fees should be prescribed and reasonable.¹³⁸

4 Triggering legislation

3.11 In this part of the discussion paper the SALRC notes that South Africa currently has sixty-five statutes, in different areas of the law, which require or promote conciliation or mediation of disputes.¹³⁹ The fact that mediation in family matters is distinctive from other areas of the law, including the potential risks and modalities around domestic violence and sexual abuse was singled out for attention in respect of categorical or compelled mediation. While the considered view of the respondents was that a recognised screening methodology and risk assessment tool such as the Department of Social Development Risk Assessment Tool should be employed, the prevailing sentiment was that domestic violence may be mediated, dependent on the circumstances and provided that this process was additional to and not in lieu of obtaining a protection order.¹⁴⁰ The SALRC among others emphasised that the premise

¹³⁴ SALRC Discussion Paper (2019) 161.

¹³⁵ SALRC Discussion Paper (2019) 162.

¹³⁶ SALRC Discussion Paper (2019) 164.

¹³⁷ SALRC Discussion Paper (2019) 164.

¹³⁸ SALRC Discussion Paper (2019) 165.

¹³⁹ SALRC Discussion Paper (2019) 166.

¹⁴⁰ SALRC Discussion paper (2019) 174 – 175.

underpinning the use of mandatory mediation was that it would benefit children who are in family law disputes and that children should be given the “best possible decisions and processes” to yield “the best outcome for them.”¹⁴¹ It was observed that where mandatory mediation is already contained in the Children’s Act for example, these provisions may need to be amended consequentially in the event that overarching mandatory mediation is legislated for.

3.12 The prevailing position in South Africa at the time of publication of the discussion paper in 2019 was that while legislatively speaking mediation is not a precursor to instituting litigation, a court may stay a hearing to allow a party to participate in mediation. In this regard rules 3(1)(a), 6(2) and 7 of the “2011 Draft Mandatory Mediation Rules” made provision for parties to a dispute to apply to court to refer a dispute to mediation. Furthermore, the High Court could, in terms of Rule 37(8)(c) of the Uniform Rules, issue a directive during a pre-trial conference or thereafter, in respect of mediation with the parties’ consent. The court could also make an order referring a matter to mediation within pre-determined parameters.¹⁴² Section 49 of the Children’s Act was seen as being of particular importance. This section empowers the court to take special measures to “protect the child from the intimidating nature of adversarial litigation”.¹⁴³ These special measures have been interpreted to include referring matters to mediation where the Act refers to such matters and mediation is envisaged.

3.13 The SALRC proposed that family mediation be regulated through specific primary legislation. To this end, Chapter 4 (clauses 16 to 22) of the draft Family Dispute Resolution Bill, which accompanied the discussion paper, dealt with family mediation. Clause 17 of the draft Bill provides that once parties to a family law dispute have participated in an information and education program, and are not excluded due to grounds listed in clause 17(4), they are obliged to submit to mediation before any other proceedings may commence. In other words, mandatory mediation is proposed.¹⁴⁴ The parties may jointly agree to and engage a certified mediator, or have one appointed by

¹⁴¹ SALRC Discussion paper (2019) 181.

¹⁴² SALRC Discussion paper (2019) 185

¹⁴³ SALRC Discussion paper (2019) 186.

¹⁴⁴ In *Denver Wesley Damons v Ivana Laurielle Lee and Herschel Girls School* heard in the High Court of South Africa, Western Cape Division, Cape Town on 20 August 2024 (Case No:16939/2024) Judge Parker held that while he could not force parties to mediate, they were obliged to consider mediation and that although this matter could benefit from mediation, no meaningful mediation had to date been engaged in. See para [17] and [18].

a mediation service provider or the court.¹⁴⁵ The negation of mandatory mediation is brought about by the presence of one or more of six grounds, namely the intention of filing a jointly agreed upon consent order; prior attempts to mediate have been unsuccessful; the presence of violence which may in the opinion of the mediator affect the safety of the party or a family member, or the ability of the party to negotiate a fair agreement; the court is satisfied that abuse of a child has occurred or might occur if a delay was occasioned for protection of the child; or where a collaborative family practice participation agreement has been signed; or a court determines that participation is not in the best interests of the parties or the child, including urgency or potential hardship.¹⁴⁶

3.14 Clause 18 in turn provided that at any stage of litigation a court in a family law dispute may refer the dispute to mediation, or a litigant may apply for referral. Furthermore, a court may not hear a family dispute unless a certificate of outcome furnished by a certified mediator is filed with the court. Clause 19 provided for the parties to opt out of the mediation process five days after attending only one session of mediation with a certified mediator where the issue to be resolved is a question of law only, or good cause shown. Furthermore, as provided for in clause 20, if a party refuses to participate in further mediation a written explanation must be provided to the mediator and that the court after evaluating the reasons may impose a punitive costs order. The proposed timeframe of 90 days was proposed for the completion of the mediation in terms of clause 20. If not completed in this period the parties would be able to proceed with litigation, unless a reasonable explanation is provided in writing. Clause 21 provided that a certificate of outcome must be given to the parties by the mediator that either sets out the agreement reached or that agreement could not be reached. Clause 22 in turn sought to regulate the costs, funding and fees of mediation.

C Update on the regulatory framework

3.15 In May 2023, in the absence of specific legislation providing for mediation, the Rules Board introduced the Magistrates' Courts Mediation Rules, which are voluntary and not court-annexed.¹⁴⁷ The aim of the introduction of these Rules was two-fold. Firstly,

¹⁴⁵ See clause 17(2) of the draft Bill.

¹⁴⁶ See clause 17(4) of the draft Bill.

¹⁴⁷ Department of Justice and Constitutional Development Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa, Government Gazette 5 May 2023, No. 48518.

to address the recommendations made by the SALRC in its Project 142 Report on Legal Fees to among others ensure that “court rules and practice directives” be “made uniform across all courts;”¹⁴⁸ and secondly to make a “referral to ADR mandatory, except where a good cause can be shown.”¹⁴⁹ Although the Rules Board sought to align the Magistrates’ Courts Mediation Rules with that of the High Court Mediation Rules, it is trite that the court rules and practice directives have different foundational objectives and principles and that it would not be practical to bring about uniformity across the board. In giving effect to the recommendation for referral to ADR mechanisms, the Rules for the Magistrates’ Courts while similar to Uniform Rule 41A essentially remain voluntary. It provides that it is compulsory for parties to litigation to consider mediation and submit a notice indicating whether they consider that mediation is possible or not and to submit reasons therefor. This entails that parties must at the earliest point of litigation seriously consider whether mediation is possible. The court may in turn consider the reasons given for agreeing or refusing to mediate when determining an order for costs. Dr Michael Louis¹⁵⁰ however notes that the adoption of these rules has “failed dismally in achieving its intended purpose”. In his view trial lawyers give spurious reasons for not engaging in mediation resulting in a ‘tick-box’ exercise.

3.16 The Rules Board considered that mandatory referral to or consideration of ADR and mediation could not be made in the absence of empowering legislation and proposed that empowering provisions be included in the Lower Courts Bill and the Superior Courts Act, 2013. At the same time, the Rules Board repealed the Chapter 2 Rules of the Magistrates’ Courts which were published in *Gazette* No 37448 of 18 March 2014 as it was found to not be functioning optimally. The aim of the latter is to provide a workable solution for litigants in need of mediation as an ADR mechanism. It is argued that the empowering provisions of the 2023 Magistrates’ Courts Mediation Rules are housed in section 6(1)(t) of the Rules Board for Courts of Law Act, 1985¹⁵¹ and sections 9(6)(a) and

¹⁴⁸ See recommendation 2.2 of the South African Law Reform Commission *Investigation into Legal Fees – Including Access to Justice and Other Interventions* Project 142 Report (2022).

¹⁴⁹ See recommendation 2.5 (c) of the SALRC *Investigation into Legal Fees* (2022).

¹⁵⁰ Louis M “Court backlogs are a threat to justice - mediation is part of the answer” Daily Maverick 30 July 2024 Available at <https://www.dailymaverick.co.za/opinionista/2024-07-30-court-backlogs-are-a-threat-to-justice-mediation-is-part-of-the-answer/>.

¹⁵¹ Section 6(1)(t) of the Rules Board for Courts of Law Act 107 of 1985 “The Board may, with a view to the efficient, expeditious and uniform administration of justice in the Supreme Court of Appeal, the High Courts and the lower courts, from time to time on a regular basis review existing rules of court and, subject to the approval of the Minister, make, amend or repeal rules for the Supreme Court of Appeal, the High Courts and the

(b) of the Jurisdiction of Regional Courts Amendment Act, 2008.¹⁵² The Rules Board reasons that a Magistrate’s Court may in terms of the pre-trial procedure provided for in section 54(1)(e) of the Magistrates Court Act 1944 (Act 32 of 1944), on the written request of either party or on its own discretion direct that parties or their representatives should appear before it in chambers for conference to among others consider “such other matters as may aid in the disposal of the action in the most expeditious and least costly manner.”¹⁵³ Complimentary to this process, and further to the justification of publishing the Mediation Rules, is the power of the Minister to make rules in terms of section 13 of the Short Process Courts and Mediation in Certain Civil Cases Act 1991 (Act no 103 of 1991) to regulate the practice and procedure applicable to an interview with, and, investigation by a mediator contemplated in terms of section 3 of the Act. It submits that the Mediation Rules are designed to give effect to this imperative.¹⁵⁴

3.17 It is instructive that for the purposes of the Short Process Courts and Mediation in Certain Civil Cases Act, a mediator is defined as a mediator appointed in terms of section 2 of the Act. Any Rules issued in terms of section 13 of the Act are applicable only to mediators who have been appointed as such by the Minister of Justice and Constitutional Development for a particular area or district. Furthermore, such appointment may only be made from a list of names which have been submitted to act as mediators, by the “Association of Law Societies; the General Bar Council and the Department of Justice”.¹⁵⁵ Thereby restricting the nomination and appointment of a mediator to attorneys or advocates.

3.18 However, the Rules Board reasons that this apparent restriction would be overcome by the nature of the appointment of the Dispute Resolution Official, in that, although a Dispute Resolution Official’s office would be based in Court, such official

lower courts regulating –

(t) generally any matter which may be necessary or useful to be prescribed for the proper dispatch and conduct of the functions of the Supreme Court of Appeal, the High Courts and the lower courts in civil as well as in criminal proceedings.”

¹⁵² Correspondence between the SALRC Secretariat and the Rules Board Secretariat dated 5 February 2024 in which it states that subsection 6(b)(i) and (ii) of section 9 appears to cover the making of rules, relating to the mediation process, to the extent that they are aimed at simplified and expeditious procedures and limiting costs associated with litigation.

¹⁵³ Section 54(1)(e) of the Magistrates Act 32 of 1944.

¹⁵⁴ Email correspondence between the Secretariat of the SALRC and the Secretariat of the Rules Board for Courts of Law dated 5 February 2024.

¹⁵⁵ Section 2(1) of the Short Process Courts and Mediation in Certain Civil Cases Act.

would be appointed in terms of the Public Service Act 103 of 1994, presumably as an ‘employee’ as an “additional to the establishment of departments”, as provided for in section 8(1)(b) of the Act. Consequently, the Minister of Justice and Constitutional Development would not need to appoint such an official.

3.19 A shared concern relating to mandatory ADR and mediation centres around three main points, namely:

- (a) The right of access to courts as parties would first have to undergo mediation/ADR before accessing courts.
- (b) The implication for family matters, in particular gender-based violence matters whether parties are forced to sit together, particularly considering the right to dignity.
- (c) the additional layer of costs for parties where ADR/mediation processes are not funded by the state.¹⁵⁶

3.20 While it has not been promulgated into law yet, another development that deserves attention is that of the draft Maintenance Amendment Bill, which accompanied the SALRC Project 100B Report on the Review of the Maintenance Act. The report recommends that various amendments be made to the law on maintenance including the insertion of clauses pertinent to mediation and to provide for ADR. In that report, the SALRC recommends in favour of mandatory referral of parties to mediation after the initial investigation of the application or complaint by the maintenance officer. It further recommends that the Maintenance Act should be amended by the insertion of subclauses 6(4) and (7) to make the referral of parties to mediation mandatory at various stages of the process. The subclauses read as follows:

6(4)(a) After investigating the application or complaint, the maintenance officer must advise the parties to attempt to resolve the matter through mediation, which can be provided by:

- (i) a private mediator, whose costs must be shared equally between the applicant and the respondent unless they agree otherwise; or
- (ii) if such a mediator is available, a community-based mediator, whose costs, if any, must be shared by the applicant and the respondent unless they agree otherwise; or
- (iii) the maintenance officer dealing with the matter,

and which mediation must be concluded within 30 days, unless the mediator provides the parties with a reasonable explanation, in writing, for the delay.

¹⁵⁶

The Rules Board.

(b) If the parties would like to attempt mediation but have not agreed to opt for mediation as referred to in subsection (a) (i) and (ii), mediation must take place in terms of subsection (a) (iii).

6(7)(a) If the respondent appears on the return date in order to oppose the issuing of the maintenance order, the court must advise the parties that they may attempt to resolve the matter through mediation, which can be provided by:

- (i) a private mediator, whose costs must be shared equally between the applicant and the respondent unless they agree otherwise; or
- (ii) if such a mediator is available, a community-based mediator, whose costs, if any, must be shared by the applicant and the respondent unless they agree otherwise; or
- (iii) the maintenance officer dealing with the matter;

and which mediation must be concluded within 20 days, unless the mediator provides the parties with a reasonable explanation, in writing, for the delay.

and

“Alternative dispute resolution

14A. (1) Should the parties to a maintenance investigation or enquiry elect to resolve any dispute arising therefrom through mediation or arbitration, such dispute shall be referred for mediation or arbitration in accordance with the applicable rules of the Rules Regulating the Conduct of the Proceedings of the Magistrates’ Courts of South Africa.

(2) The “Rules Regulating the Conduct of the Proceedings of the Magistrates’ Courts of South Africa” means the rules made by the Rules Board for Courts of Law under section 6 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), read with section 9(6)(a) of the Jurisdiction of Regional Courts Amendment Act, 2008 (Act No. 31 of 2008), with the approval of the Minister responsible for justice.”.

D Submissions received and evaluation thereof

3.21 In the discussion paper, Chapter 4 of the draft Bill on ADR in Family Matters contained 7 clauses commencing with the application of the Mediation Act and concluding with the regulation of costs, funding and fees. For ease of reference, comment received and where applicable, the evaluation thereof, will be reflected under the respective clauses. However, general comments, followed by comments received on the four questions listed above will be addressed first.

3.22 In terms of general comment Dr George Fordam Wara¹⁵⁷ argues that traditional dispute resolution practices should be integrated into the draft Bill either by way of a dedicated chapter on traditional dispute resolution mechanisms or that the understanding of “family mediation” in Chapter 4 should be expanded to include

¹⁵⁷ Dr. George Fordham Wara, Post-doctoral fellow, University of the Free State, Free State Centre for Human Rights.

traditional dispute resolution mechanisms. He argues that the current definition of “dispute resolution process” is restricted to family mediation, family arbitration, collaborative dispute resolution and parenting coordination. However, sections 70 and 71 of the Children’s Act already provide an opportunity for disputing parties in family matters to involve traditional leaders, chiefs and elders in the community in resolving their disputes through family group conferences and lay forums. He suggests that family group conferences and lay forums should be included in the draft legislation. He further suggests that mediation conducted by traditional leaders, chiefs and elders should be recognised and that they should be considered to be mediators, although they are not certified as proposed. Dr Wara¹⁵⁸ is however mindful that fully integrating a traditional dispute resolution mechanism within a formal system of rules, regulations and procedures may be difficult without losing the benefits of what is an informal, self-regulatory and alternative process. Legal Aid SA similarly argues that the adversarial family law system is foreign to people with Afrocentric backgrounds. Therefore, despite the provisions contained in the Recognition of Customary Marriages Act, there is a preference for traditional, informal dispute resolution procedures at community level in the case of family breakdown rather than relying on the formal family law system. Added to this, Legal Aid SA argues, is the reality that their socio-economic and political circumstances put the family law system out of their reach. Legal Aid SA submits that creative ways must be found to make the family law system acceptable, applicable and accessible to a broader range of cultural groups. It further comments that as community-based organisations and traditional leaders today still play the most important role in resolving the family law disputes of the majority of the South African population, there is a serious need to formally recognise the informal dispute resolution procedures offered by these organisations or institutions. Zenobia du Toit affirms the need to take issues of culture, religion and customary law into account when mediating.¹⁵⁹

1 Mandatory vs voluntary mediation

3.23 Legal Aid SA recommends that family law mediation, especially if made mandatory, will serve the purpose of restorative and therapeutic justice for families concerned, sensitive to the plight and needs of the parties and above all vulnerable children. If mandatory mediation by the family advocate or community mediation services

¹⁵⁸ Dr. George Fordham Wara, Post-doctoral fellow, University of the Free State, Free State Centre for Human Rights.

¹⁵⁹ Miller du Toit Cloete Inc.

is introduced, the system may become mere acceptable, applicable and accessible to the indigent and vulnerable. The court annexed mediation which is funded by the state was therefore in its view a good idea as it would level the playing fields. It however cautions that mediation will only be as effective as the familiarity of the parties with the process of mediation, and their willingness to engage in it. It further cautions that parties who engage in a mandatory mediation model may in no way be denied the protection of the courts. All agreements should in its view be submitted to the courts for final revision and approval. Concomitantly courts should interfere where it is clear that an agreement is not in the best interests of any children involved or where the interests of one of the parties are seriously affected by such an agreement.¹⁶⁰

3.24 With this said, Legal Aid SA is of the view that parties should not be given a choice whether to participate in the mediation process or not; they should be compelled to do so and make a reasonable effort to reach an agreement. In its view, as a compulsory first step in the process, mandatory mediation forces parents to face and address issues affecting the future of the family before the courts may be approached.

3.25 Dr Fordam Wara¹⁶¹ states that while he supports mandatory mediation he cautions that there may not be enough family law practitioners trained in mediating family law disputes, which is a specialised field.¹⁶² The Legal Practice Council, Kwa-Zulu Natal agrees with Dr Wara and submits that mediators should ideally be legally qualified, or at least have thorough training due to the fact that underpinning family law disputes are often very complex and may fall outside the field of family law. In its view using mediators who have no legal training is untenable. Dr Wara also flags concerns around funding which is dealt with below. The Legal Practice Council, Kwa-Zulu Natal endorses the support of mandatory mediation in theory but adds that in practice making mediation mandatory without adequate resources may prove to be disastrous due to resource constraints.

3.26 Zenobia du Toit ¹⁶³submits that while mandatory mediation is supported, the question arises as to when it should take place. She explains that while there is much to

¹⁶⁰ Legal Aid SA.

¹⁶¹ Dr. George Fordam Wara Post-doctoral fellow, University of the Free State, Free State Centre for Human Rights.

¹⁶² This view is largely supported by the Legal Practice Council, Kwa-Zulu Natal.

¹⁶³ Miller du Toit Cloete Inc.

be said for mediation being compulsory before the trial and in heavily opposed cases at the end of the close of pleadings after discovery has been made, it may also take place at the commencement of the matter. The view is proffered that there should be an option to mediate at alternate stages. It is submitted that provision should be made, in the event of early mediation, for the early disclosure of financial information, duly vouched. The value of this provision would be that the parties will have seen each other's cases and have been able to have disclosure in regard to the financial disclosure as to direct and interests, assets and liabilities, incomes and expenses. The suggestion is that disclosure on affidavit be made, much as discovery, and documents be provided upfront if mediation takes place at an early stage.

3.27 La Poppie Mediations submits that mediation in restorative justice is based on the free voluntary will of participants and for this reason no party should be compelled to attend a mediation session despite the benefits it potentially may hold for the parties. It is of the view that Rule 41A of the High Court rules have been misinterpreted to mean that mediation should be compulsory. In its view in *Brownlee v Brownlee* the court held that it was merely advisable and not compulsory. It further submits that although it welcomes the proposed training in mediation of prosecutors and maintenance officers to mediate maintenance matters, it is of the view that they do not have the time nor psychological training to perform mediation in these matters. La Poppie Mediations explains that mediation is a specialised field and requires both patience and a conducive environment for these discussions. Due to the volume of cases, the roles these officials occupy and the court setting it is suggested that qualified external mediators would be better suited to mediate these matters. It additionally suggests that maintenance staff and prosecutors dealing with maintenance and domestic violence matters should go for regular counselling and debriefing after dealing with every 10 to 20 maintenance matters as dealing with these types of conflicts is mentally taxing.

2 Is mandatory family mediation unconstitutional?

3.28 Dr Spurrier¹⁶⁴ is of the view that as the parties still have a choice after attending one session of mediation to discontinue the mediation, it will not be unconstitutional to make engaging in mediation mandatory. She is of the view that all matters capable of being mediated, including all parenting plans, should be mediated.

¹⁶⁴ Dr Karen J Spurrier, Dr Karen Spurrier Counselling & Mediation Practice.

3.29 Legal Aid SA agrees and expands on its stance by explaining that there are two instances where the Children’s Act provides for the statutory mandatory referral of child centred disputes to mediation, and there are child-centred disputes that allow for court mandated mediation. Section 34 of the Constitution provides that everyone has the right to have their disputes resolved by law either in a fair public hearing in court or through an independent tribunal or forum. Legal Aid SA submits that this entails two aspects, namely a right of access to the courts and a fair hearing in court. Legal Aid SA notes that section 34 rights, including any other rights contained in the Bill of Rights, will not be infringed by mandatory family mediation and substantiate their view with the following reasons:

- (a) Parties are compelled to participate in the mediation process but not compelled to reach a settlement and therefore their access to courts is not limited.
- (b) Mandatory family mediation does not replace access to the courts. The adjudication process still remains available but another avenue is prescribed to settle disputes.
- (c) Mandatory family mediation provides a precursor to access to the courts and not a limitation on the right of access to the courts.
- (d) Mediation does not supplant the litigation process but rather supplements and complements it.
- (e) Mandatory mediation does not waive the right of access to the courts but merely suspends access to the courts to allow the mediation process to unfold.
- (f) Even if it is argued that mandatory family mediation limits the right of access to courts, we submit that Section 34 rights are not absolute and any perceived unconstitutionality of mandatory court based mediation is justified in terms of the limitations and the criteria set out in Section 36 of the Constitution. We argue that mandatory family mediation will serve a constitutionally acceptable purpose and we submit that the benefits derived will far exceed any harm suffered.¹⁶⁵

3 Mandatory mediation – Costs, funding and fees

3.30 Legal Aid SA argues that where mediation is made compulsory through legislation, it is the State’s responsibility to ensure the provision of country-wide quality mediation services to all its citizens. It submits that the office of the family advocate already has offices in several big cities in South Africa and is in a sense a pioneer in divorce mediation in SA. Legal Aid SA recommends that the Office of the Family

¹⁶⁵ Legal Aid SA.

Advocate should therefore carry out the important task of organising and regulating the mandatory mediation services in South Africa. Legal Aid SA further recommends that the Office of the Family Advocate should also be responsible for the standardisation of basic divorce and family mediation training programs and annual continuing education for all accredited mediators, the development of certain standards for the mediation process and practice to be met by all accredited mediators and the continual evaluation and monitoring of the quality of all accredited mediation services.

3.31 The Legal Practice Council, Kwa-Zulu Natal however comments that with both Legal Aid SA and the Office of the Family Advocate struggling to deal with their existing functions due to budgetary constraints, they will find it difficult to take on the additional task of providing mandatory mediation services to the indigent if they are designated as the service providers. The inevitable outcome would be that those who are reliant on state-funded services, would be likely to be subjected to lengthy delays in obtaining mediation. This will undermine the ideal of promoting access to justice and expediting the resolution of family law disputes. Furthermore, for those who can afford private mediation services, this will increase costs if the dispute is not resolved through mediation.

3.32 Legal Aid SA is in turn of the opinion that the mediation process would not be fair if it will be available and affordable only to those who can afford to pay for private mediators. Hence, Legal Aid SA recommends that the government should provide funding for indigent persons. Legal Aid SA supports the view that where mandatory mediation is funded by the government alone or in partnership with the private sector, there must be some screening to ensure that those who are indigent get to use the service for free and those who fall in the middle, can be subsidized. It submits that those who can afford can then pay fully for the services. Since mediation will reduce the time required in court or overall require less capacity of the court the cost saving should be utilised for the government to make services available particularly if it is court annexed mediation. With regard to fees and funding Legal Aid SA is of the opinion that:

- (a) If the model uses court annexed mediation then the Department of Justice and Constitutional Development or the Office of the Chief Justice should be responsible for payment and;
- (b) With regards to private mediators, provision should be made for the indigent to appoint private mediators. In this regard it is of the view that funding be made available to institutions who will then appoint and pay for the services of a mediator.

3.33 Furthermore, if Legal Aid SA is required to pay for these services then specific funding should be made available to be able to appoint and pay for private mediators.

3.34 A number of respondents¹⁶⁶ submit that mandatory mediation should include a sufficiently well-resourced implementation plan which is publicly funded. Zenobia du Toit submits that there should be a compulsory number of pro bono hours and pro bono programmes in place for mediation.¹⁶⁷ Dr Fordam Wara cautions against reliance on private funding as this may result in a denial of the right of access to justice, as the mandatory mediation program may be vulnerable to conflicts of interest and financial power imbalances. He further questions whether there is sufficient funding to sustain the program. He therefore proposes that mandatory mediation should be qualified by making the program subject to judicial discretion until such time that it is sufficiently resourced.

3.35 The proposed qualification reads as follows:

- (a) As per section 18 of the draft Family Dispute Resolution Bill, 2020, provide for judicial discretion to refer a family matter to alternative dispute resolution, including traditional dispute resolution, with or without the consent of the parties to the proceedings.
- (b) In addition, and borrowing from the Children's Act, 2005, allowing the Court to
 - (i) prescribe the manner in which a record is kept of any agreement or settlement reached between the parties and any fact emerging from the alternative dispute resolution process which ought to be brought to the notice of the court; and
 - (ii) consider a report on the proceedings before the alternative dispute resolution process to the court when the matter is heard.
- (c) Deleting the mandatory provisions of section 17 or otherwise clarifying that the program is subject to judicial discretion. The Judge could then be given more leeway to make a mandatory mediation order by, for example, making the order non-appealable.
- (d) Through these changes, the draft legislation will permit the Court to refer any matter to mediation/traditional dispute resolution mechanisms by order.

Application of Mediation Act

3.36 Clause 16 of the draft Bill provided for the application of the envisaged overarching Mediation Bill flowing from the SALRC Project 94 investigation. As discussed above the SALRC, after considering that Project 94 is at the discussion paper phase in the SALRC research series and the Project 100A Care and Contact with

¹⁶⁶ Dr. George Fordam Wara Post-doctoral fellow, University of the Free State, Free State Centre for Human Rights.

¹⁶⁷ Miller du Toit Cloete.

Children investigation is at the report phase, decided that transitional provisions would be included in the draft Bill on Family Dispute Resolution until such time as an overarching Mediation Act has been enacted and promulgated. For this reason, the SALRC has removed this clause from the draft Bill on Family Dispute Resolution and has substituted it with a clause which provides for the certification of mediators. In order to ensure alignment with the proposed generic law on mediation, the SALRC has elected to substitute this clause with the relevant parts of clause 5 of the draft Mediation Bill contained in the SALRC Discussion Paper 168, subject to the necessary changes in terms of context. The SALRC recommends that the Chief Justice, after consultation with the Heads of Court, be tasked with recognising one or more organisations to register persons as certified mediators. This will ensure that only mediators who are certified by the recognised organisation(s) will be able to provide their services in terms of the proposed draft Bill on Family Dispute Resolution. The clause further provides a threshold of minimum requirements for certification. To further align the draft Bill, the definitions of “agreement to mediate” and “mediated settlement agreement” have been inserted in the draft Bill on Family Dispute Resolution. The definition of “certified mediator” has been reframed to refer to a mediator who has been certified in terms of clause 16 of the draft Bill. As only certified mediators have a function in terms of the draft Bill, the definition of “mediator” has been omitted.

Commencement of mediation before litigation

3.37 The Islamic Forum Azaadville comments that provision should be made for registration of mediation in a court register. It further submits that education and information should be provided for both at the beginning of the process in respect of the process itself together with rights and obligations, and at the end of the process in respect of the consequences of the agreement reached or where no resolution has been achieved on the way forward. Further that assessments should be made in respect of the children’s rights, whether parenting coordination should be provided for, and whether the Family Advocate should be notified. Dr Karen J Spurrier¹⁶⁸ suggests that Magistrates should be encouraged to place mediated cases first on the roll for the day as these matters are comprehensive and easy to finalise.

3.38 Although the Office of the Family Advocate supports the need for legislation relating to mediation in principle, it is of the view that mediation is not suitable in all

¹⁶⁸ Dr Karen Spurrier Counselling & Mediation Practice.

matters, and particularly unsuitable in high conflict matters.¹⁶⁹ It submits that blanket application of mandatory mediation may therefore be unsuitable and prolong the finalisation of matters which is likely to negatively impact on the child. It is similarly of the view that mandatory mediation may be unsuitable in cases involving rape victims and victims of abuse which may result in the victim experiencing trauma during the mediation session. It cautions that the Office of the Family Advocate has experienced incidents in which parties were subjected to violence in the office during a mediation session. It further cautions that a dispute resolution process (mediation) does not necessarily result in justice. It relates that many of the victims of domestic violence feel completely powerless against the wrongdoer. When there is a history of domestic violence there is a power imbalance within the relationship placing the victim(s), mostly women and children, at a disadvantage from the outset. The Office of the Family Advocate explains that its service delivery mandate towards children broadly must be juxtaposed against the number of children and the urgency of matters it is required to deal with. While the creation of a new legal dispensation for parents and other interested persons becomes necessary in light of the socio-economic realities in South Africa, the high number of children who have been orphaned by HIV/AIDS, abandoned or displaced makes the work of the Office of the Family Advocate a daunting task.¹⁷⁰

3.39 The Office of the Family Advocate recommends that in respect of clause 17(1) and (2) its role should be extended to any legislation which relates to children in family law within the ADR and arbitration landscape. This would require that all agreements and or directives emanating from all ADR practitioners in family law matters before they are made an order by way of court or arbitration or a binding directive should be sent to the Office of the Family Advocate for interrogation. It explains that this is to ensure constitutional consistency and to ensure that all children in family law matters and or ADR and arbitration landscape are afforded the same benefits in matters impacting on them as children in civil matters and terms of the Children's Act.¹⁷¹

¹⁶⁹ Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape.

¹⁷⁰ Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape.

¹⁷¹ Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development;

3.40 Dr Suzette Moss¹⁷² fully supports the application of mandatory mediation. She submits that mandatory mediation constitutes a legitimate infringement of the Constitutional right to access court. She further states that from a social work perspective mediation provides, especially in cases with high conflict, the first platform for dialogue between the disputing parties. Dr Moss however concedes that where there is a power imbalance between the parties, parties could be left without proper protection. In her view, this is especially applicable when the less powerful party is not legally represented. She further submits that some cultural practices could disempower one of the parties, or when one of the parties has mental health issues. Dr Moss is of the view that mandatory mediation in these cases will require that safety measures are built in as protection for these vulnerable groups, as is the case in the Australian Family Law Legislation Amendment Act 2005. Dr Moss submits that if there are no allegations that one of the parties have abused the children involved, mediation could still be conducted.

3.41 These mechanisms could be:

- If a person is not legally represented, legal representation should be appointed to such a person prior to mediation.
- When mediation deems not to be possible, the mediation process should be terminated and the parties be referred to the Office of the Family Advocate for an investigation to ensure that the rights of the party is not infringed upon.
- A mental-health professional to be present.
- The parties be allocated to separate rooms during the mediation process and should direct contact between the parties be avoided.

3.42 Dr Moss explains that these precautions should be built in so that the vulnerable party is not forced into an agreement during the mediation process. These safety mechanisms at least afford all parties to be heard. She further submits that the argument that if the mediation process does not achieve a settlement, mediation is nothing more than a process that prolongs the parties' access to justice, and does not hold water when it comes to children. In her view, any attempt that could promote communication between parties or lessen conflict is in the best interest of the children and not time wasting. Aspects such as restoring security and balance in the lives of children as soon as possible are beneficial and could prevent possible attachment issues between a child and their parents. Although she is further of the view that attempting mediation as a first stop in the process would not speed up the process should the legal route be inevitable, the benefit lies therein that mandatory mediation as a platform for dialogue starts the

Office of the Family Advocate Western Cape.

¹⁷² Social Work Policy Manager: Families, Department of Social Development.

conversation between the parties that often still have years ahead of continuous contact and discussion about the well-being of their children. Without a form of dialogue, conflict can only escalate. Should conflict escalate despite mediation attempts, it would be meaningful information for the court to consider.¹⁷³

3.43 A proposal is further made to amend the procedure in divorce proceedings to require that when a summons is issued, financial disclosure on the affidavit is annexed to the summons and similarly when the plea and counterclaim are provided, a similar disclosure on affidavit is made.¹⁷⁴ Zenobia du Toit further suggests that the process in family law matters should also be streamlined and shortened so that the parties are able to know their rights and the parameters of their claims earlier and be able to meaningfully participate in ADR as well as curtail court processes, minimize the effect of the traumatic and drawn out proceedings on the family, and finalise their disputes in a much more cost effective way.¹⁷⁵

3.44 The SALRC supports the proposal that mediated matters should be accelerated through the court process.¹⁷⁶ High Courts are piloting specialised family courts where family law matters have a special roll and judges. One of the considerations could be that when there is a settlement and it is put on the roll it should be expedited further. Court directives could be issued for a special roll in settlements and expeditions. The SALRC recommend that this be considered.

3.45 As the SALRC is not proposing any new changes to the Mediation in Certain Divorce Matters Act, it is of the view that the concerns raised by the Office of the Family Advocate in this regard should be allayed.¹⁷⁷ All agreements and or directives emanating

¹⁷³ Dr Suzette Moss, Social Work Policy Manager: Families, Department of Social Development.

¹⁷⁴ Cape Town and National Family Law Committees' of the Law Society of South Africa endorsed by Zenobia du Toit, Miller du Toit Cloete Inc.

¹⁷⁵ Zenobia du Toit, Miller du Toit Cloete Inc.

¹⁷⁶ The impact of chronic litigation is not insignificant. At the time of latest judgment in *SDL v SJ* before the High Court of South Africa Gauteng Division, Johannesburg dated 2 August 2024 [6] the divorce litigation had spanned a period of 12 years, with the consequent impact on the court roll. Furthermore, it had cost in excess of R10 million rand in legal fees, see paragraph [82].

¹⁷⁷ However, notice has been taken of the *Centre for Child Law v T S and Others* [2023] ZACC 22 and the finding of unconstitutionality of section 4 of the Mediation in Certain Divorce Matters Act. As the Department of Justice and Constitutional Development is attending to this amendment and there are interim measures in place it is deemed unnecessary to include this amendment in the Schedule to the draft Bill.

from all ADR practitioners in family law matters, before they are made an order by way of court or arbitration or a binding directive should be sent to the Office of the Family Advocate for interrogation. Furthermore, the concerns raised regarding abuse and domestic violence are catered for under clause 17(4)(a) to (f) which provides exceptions to mandatory mediation. While the comment regarding procedural matters is recognised, the view is held that the mediation in terms of the proposed Family Dispute Resolution Bill will be done before the institution of the divorce action. Mediation may occur at other junctions in terms of other legislation as provided for under clause 18.

Jurisdiction of court

3.46 Lesley Blake Attorneys submits that section 6 of the Maintenance Act already provides for mediation. She further submits that as maintenance officers may educate the parties on their remedies, allowing a maintenance court to refer a dispute to a certified mediator would be unduly and additionally burdensome for users of that court system. She suggests that an additional sub-clause be added to clause 18 to read as follows:

(4) the maintenance courts may not refer a matter to a certified mediator, in that a maintenance officer already performs such mediation in terms of section 6 of the maintenance act.

3.47 The Sunni Ulama Council Gauteng suggest that the following sub-clause should be added to clause 18 providing as follows:

(4) Where a mediated agreement is reached and the interest of a minor or minors are affected and or a financial or any other commitment is agreed upon which would require enforcement then such agreement must be ratified by the court.

3.48 It submits that a mediation agreement must be entered into by the parties and the mediator(s) must consent to act as such in line with section 23 (1).¹⁷⁸

3.49 The SALRC does not agree with the proposed exclusion of mediation in maintenance matters. It argues that it has been provided for in the draft Maintenance Amendment Bill and has garnered substantial support. The SALRC agrees with the Sunni Ulama Council Gauteng that an enforcement provision and making the Mediation in Certain Divorce Matters Act applicable deserve consideration. It agrees to the need

¹⁷⁸ Sunni Ulama council Gauteng.

for including an enforcement provision. But is of the view that certain aspects of the submission are already covered in the aforementioned Act.

Refusal to submit to mediation

3.50 The view proffered by one of the respondents is that an opt out clause, as is provided for in clause 19, is generally problematic. However, if the mediator is biased, or if one of the parties (for whatever reason) distrusts the mediator, the mediation will fail.¹⁷⁹

3.51 SAAM comments in respect of the refusal to participate in the mediation and the option of a punitive cost order for unreasonably refusing to engage in mediation as provided for in sub-clause 19 (2) and (3) that section 21(c) should be amended by adding the following sub-clause:

21(c) “Stating whether the parties’ conduct during the mediation process was bona fide and whether they participated”.

3.52 SAAM is of the view that this is a great mechanism to oblige parties to seriously consider mediation. This approach is welcomed and recommended. The only dilemma to consider is when a party chooses to participate in the mediation and essence does not participate, merely avails oneself for the mediation in order to comply with the pre-requisite attendance to institute proceedings. It explains that the practical limitation in adding the above would be that a mediator should not divulge information, however, should a party merely attend mediation and not participate, no negative inference will be drawn when costs are considered. The concern is that attorneys will advise clients to attend mediation and make an unreasonable offer and stop participating in the process in order to proceed with the normal litigation route and the cost order won’t have any founded reason to give an adverse cost order as the parties did attempt mediation. The reason for the failure of the mediation, if caused by a non-participating party ought to be drawn to the attention of the presiding judge. The integrity of the mediation process should be protected, and this is a means of providing the same, the mediator should not be held accountable for the failure of a conducive mediation process, and the participation of the parties should indicate and/ or be considered as part thereof.

3.53 In Australia, the Family Law Act requires parties to a family law dispute to make a genuine effort to resolve the dispute through mediation before approaching a court to resolve the dispute. In terms of section 60I(7), a court is prevented from hearing an

¹⁷⁹ Zenobia du Toit, Miller du Toit Cloete Inc.

application relating to children unless a certificate from a family dispute resolution practitioner (or mediator) is also filed. In essence, this certificate must state whether or not the parties attended mediation and further whether or not a genuine effort was made to resolve the dispute.¹⁸⁰ Mediators are therefore responsible for certifying whether or not the parties have made a genuine effort¹⁸¹ and therefore have a new role involving assessing the performance of their clients in mediation.¹⁸² If litigation follows, the court may take into account the kind of certificate granted in considering whether to make an order referring the parties back to mediation¹⁸³ and in determining whether to award costs against a party.¹⁸⁴ Consequently, if one party is regarded as failing to make a genuine effort, they may become liable to pay all or part of the costs of subsequent legal proceedings.¹⁸⁵ As regards their new role as assessors in deciding whether the parties have made a genuine effort to resolve their disputes in the mediation process, some mediators argue that it compromises their independence and may change their relationship with the parties.¹⁸⁶ Nonetheless, others are content with this new role and confident that they can use the 'genuine effort' requirements to remind parents of their obligation to take mediation seriously.¹⁸⁷

3.54 The SALRC is of the view that, as the certification will not be left to the generic Mediation Bill, and it is necessary to include a statement of the behaviour of the parties, the comment by SAAM will be incorporated under clause 29 of the draft Bill where the certificate of outcome will include, where applicable, the reasons why a party refused to further participate in mediation. However, it notes that currently in terms of the Children's Act when one of the parties is not bona fide or is obstructive it can be reported. The conduct of the parties is not reflected as is done in Australia. There is also provision for a certificate in terms of section 33(2) and (5) of the Children's Act regarding the outcome of the mandatory mediation in respect of a parenting plan; however, the certificate does

¹⁸⁰ Section 60I(8) of the Family Law Act (Australia).

¹⁸¹ In terms of s 60I(7) of the Family Law Act and reg 26 of the Family Law (Family Dispute Resolution Practitioners) Regulations.

¹⁸² Astor H 'Genuine Effort in Family Dispute Resolution' (2010) 84 *Family Matters* n 231 61.

¹⁸³ Section 13C(1)(b).

¹⁸⁴ Section 13D and section 117. See also item 1(3) of Part 2 of Schedule 1 of the Family Law Rules 2014.

¹⁸⁵ Astor, 'Genuine Effort in Family Dispute Resolution' 61.

¹⁸⁶ Astor n 231 63.

¹⁸⁷ Astor n 231 63.

not make provision for anything to be said of the conduct of the parties. Rule 41(A) of the High Court Rules and the new Chapter two of the Magistrates Courts Rules provides for a costs order if one of the parties refuses to mediate. Consequently, clause 19 of the draft Bill dealing with the refusal to submit to mediation provides that a court may impose a punitive cost order, or another appropriate order if a party unreasonably refuses to engage in mediation.

Time limit for completion of mediation

3.55 The Islamic Forum Azaadville submits that provision for the extension of time should be allowed with the consent of all parties and the court should be notified of such agreed extension. It states that the rules regarding the mediation agreement must be included. One of the respondents commented that she is uncertain whether the time period for mediation would automatically be extended upon providing a reasonable explanation for the delay. She submits that if it is to be extended, the consequences of instituting legal proceedings in such circumstances ought to be dealt with, and the extension period must be considered.¹⁸⁸ Advocate Kushmiri Garach¹⁸⁹ is, however, of the view that the 90-day period is too long for the mediation process as the parties are already in conflict and the timeframe provided will just prolong it. It is further submitted that the summons should note that the agreement has been discussed with the children and that they are happy with the arrangement.

3.56 Legal Aid SA in turn submits that it is generally accepted that the earlier mediation takes place the more favourable the outcome for the parties. It comments that the current rules in Ontario now require a mediation session to take place within 180 days after the first defence has been filed. It was hoped this flexibility would improve the settlement rates and reduce the time needed to solve disputes. Legal Aid SA notes that although the draft Bill provides for time limits, it is of the view that there is no need to add this in substantive legislation. It submits that this matter may be catered for in the Rules of Court.

3.57 SAAM welcomes the inclusion of a time limit for the conclusion of the mediation.¹⁹⁰ It submits that the current mediation members forums may regulate the

¹⁸⁸ Journé Le Roux, family mediator.

¹⁸⁹ Family Counsellor, Office of the Family Advocate: Durban-Kwazulu Natal

¹⁹⁰ Endorsed by Natalie Ruiters, La Poppie Mediations.

progress of matters facilitated by its members and or dispute resolution professionals. In its view, this will oblige the service providers to play an active role in reporting back to court and regulating their members' conduct for non-compliance with the time frames. Furthermore, this will promote the integrity of mediation and the courts' willingness to refer matters to be resolved.

3.58 The Sunni Ulama Council Gauteng suggests that the timeframe should provide an exception providing that the time limit must be complied with

unless the mediator provides the parties with a reasonable explanation, in writing, for the delay or where the delay in completion was a result of matters which needed to be addressed in order to reach a lasting solution such as:

- a. Referral to third party experts for assessment and preliminary treatment e.g. psychiatrist;
- b. The court taking into account the reasons for the delay extends this period:
Death in the family where a mourning period was needed etc.

3.59 The SALRC notes that mediation of a single issue may of course be dealt with in a much shorter period of time. However, it will be difficult to mediate all aspects of a divorce in less than 90 days. For this reason, the 90-day limit is retained and is necessary for purposes of prescription.¹⁹¹ Further that, while topical, the SALRC is of the view that it is unnecessary to give examples of what would constitute reasonable explanations for a delay. As a result of reconsideration of the clauses in the Bill's chapter on family mediation and the inclusion of transitional provisions in the Bill, the SALRC concluded that the clause on time limits should be incorporated into a clause dealing broadly with the commencement and completion of the mediation. This clause has been incorporated into the Bill as clause 24. Clause 24 provides for the commencement of the process by way of a signed agreement to mediate; provides for a time limit of 90 days for completion of the process; provides for the conclusion of the process by way of the resolution of a part of or the whole matter or the termination of the process; and concludes with an explanation of when the process is considered terminated by way of opting out, refusal

¹⁹¹ The SALRC has in its Project 125 **Report on the Harmonisation of existing laws providing for different Prescription Periods** made a recommendation regarding the suspension of prescription periods. It is common cause that the report is currently being considered by the Department of Justice and Constitutional Development and that it is the prerogative of the Minister of Justice to promote the legislation contained in that report. The SALRC is of the view that until such time as that draft Bill has been promoted, including an identical clause in this draft Bill would be appropriate. The Report is available at <https://www.justice.gov.za/salrc/reports/r-pr125-PrescriptionPeriods.pdf>

to mediating, the initiating of a process without agreement of all of the parties etc or the withdrawal of the mediator from the process.

Certificate of outcome

3.60 With regard to the certificate of outcome the Islamic Forum Azaadville submits that the outcome must be recorded in court and that the process must be “non-prejudicial”. Following its submission on sub-clauses 19(2) and (3) SAAM suggests that an addition be made to clause 21 which provides as follows:

21(c) Stating whether the parties’ conduct during the mediation process was bona fide and whether they participated.

3.61 La Poppie Mediations endorses the issuing of a certificate of outcome by the mediator to the parties. It recommends that where public prosecutors make use of a mediation process roneo forms are developed that set out clearly what and how an agreement was reached and how much time was spent on mediation. It comments that prosecutors may compel a party in a family dispute to comply with a requirement for mediation or may face the wrath of the criminal court which in its view is not the true restorative justice method of dealing with family law disputes.¹⁹²

3.62 Although some of the comment on this clause is dealt with above under the discussion of clause 19, it stands to be noted that the SALRC agrees that the certificate of outcome should reflect the reasons why a party refused to participate in further mediation. It however does not agree that a value judgement be made as to the intent of the parties as mediators should not be involved in making a judgement of the parties. The amended certificate of outcome is provided for under clause 29 of the draft Bill. The certificate of outcome is needed to initiate or resume litigation. To create alignment with the draft Mediation Bill two additional clauses are added to clarify that a mediator may not make a report or other communication to the court, arbitrator, or other authority that may make a ruling on the family law dispute; and that any such communication in violation thereof may not be considered by a court, arbitrator, or other authority.

¹⁹² Natalie Ruiters, La Poppie Mediations.

Costs, funding and fees

3.63 The Islamic Forum Azaadville is of the view that fees should be capped. The Black Lawyers Association Limpopo similarly submits that the fees to be charged by mediators, arbitrators and coordinators should be regulated in the same way that costs are regulated in litigation to avoid exploitation of parents.

3.64 The Office of the Family Advocate comments that in its view the discussion paper does not adequately address the issues of costs relating to ADR processes with specific regard to the high costs attached to family law litigation, and mediation and ADR processes which include facilitation, parent coordination, and collaboration. It submits that currently only the employed and financially strong can afford these processes which is a small percentage of the population. It comments that this places the principles of access to justice for the poor and indigent and the benefits of mediation and other ADR processes on tenuous ground as they can ill afford the related costs whether on a sliding scale or not. It concludes that the upshot is that a distinction is drawn between the services provided to children whose parents are financially strong and children growing up in a poor and indigent household. The Office of the Family Advocate further states that the sustainability of costs also impacts on the cycle of the ADR process. It postulates that if tariffs related to mediation and ADR processes are set fairly low it might be a disincentive for private practitioners to participate. Another consequence of this approach is that if state funded structures in and outside of government are regarded as only being of relevance to the poor and not the financially strong or wealthy; even though this may be the choice of the client or parent it presupposes that government services are not there for all. It proposes that having a lower scale tariff for mediation and ADR would equalise the playing fields and the benefits to the consumers of the process.

3.65 In the same vein the Office of the Family Advocate submits that providing for tariffs on a sliding scale is of little benefit to those “in the socio-economic demographics of South Africa who are disadvantaged”. The growing unemployment and the divorce statistics mean that such processes may not be accessible to the majority of the unemployed nor those who are divorcing or divorced. It reports that statistics on the divorce rate under unrepresented litigants is higher than represented litigants. Consideration should be given to how state funded structures could best support the

demand for mediation and ADR as being a cost-effective response to the burgeoning statistics on unemployment and divorce.¹⁹³

3.66 The Office of the Family Advocate flags what it considers to be two pivotal matters that it believes will impact on accessibility of these services, namely affordability and physical access. It argues that these matters are integral to the reasons given for the benefit of ADR i.e. access to and quick effective service. It notes a gap in research on the accessibility of appropriately experienced and qualified private practitioners in all areas, e.g. rural areas; the accessibility of state-funded organs in all areas; the tariffs of private practitioners relating to ADR; research on state-funded organs/bodies to support legislation in all areas; and the availability of skill and experience for these processes in a way that is child focussed.¹⁹⁴

3.67 Journé Le Roux submits that in respect of the liability for the cost of conducting the mediation as provided for in clause 22(2) and particularly where one party has made an undertaking to pay the fees in full, it may be prudent to determine that the other party should still contribute, even if it is a nominal amount, to create a sense of commitment. She explains that in her experience as a former Family Advocate, it often appeared that certain parties were less inclined to fully participate in the mediation process as the service was being provided free of charge and the failure of such process thus did not have immediate monetary consequences for them.¹⁹⁵ SAAM, however, is of the view that although providing that both parties should pay for mediation so that they understand that the process incurs expenses and needs to be taken seriously, it may have an unintended outcome. A non-breadwinner in a divorce action or a custodian parent attempting to resolve a maintenance matter may not be in a position to pay the required contribution to the cost of mediation. This might prove to be problematic as the other party can claim that mediation was not attempted. The procedure for divorce mediation and matters *pendete lite* would require a more definitive system that provides for one party to pay the total costs, alternatively to provide for pro-bono mediators.

¹⁹³ Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape.

¹⁹⁴ Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape.

¹⁹⁵ Journé Le Roux, family mediator.

Natalie Ruiters¹⁹⁶ suggests that to avoid the situation where one party is unable to pay, the fees should rather be paid proportional to the parties' income and means.

3.68 The Black Lawyers Association, Limpopo submits that the tariff of fees chargeable must be applicable to all service providers.

3.69 The Sunni Ulama Council Gauteng submits that clauses 30 to 33 dealing with privilege, admissibility and discovery; waiver and exclusion of privilege; limits of privilege; and severability also find application under this chapter on mediation and should be replicated here.

3.70 The SALRC confirms that costs, funding and fees will be regulated "as prescribed" and will be applicable across the board. It agrees that parties should contribute financially, proportionally according to their income and that this should be included. It proposes that the word "equally" should be substituted with the word "proportionally". This will ensure that both parties are committed to the process. It is also agreed that clauses similar to clauses 30 to 33 of the draft Bill should be incorporated under the chapter on mediation.

E Recommendations

3.71 The revised clauses and additional transitional provisions inserted in the draft Bill to give effect to mediation in family law disputes read as follows:

Certification as a mediator

16. (1) The Chief Justice must, after consultation with the Heads of Court, without delay and by way of notice in the Government Gazette, recognise one or more organisations to register persons as certified mediators.

(2) The Chief Justice may from time to time recognise additional organisations, by way of notice in the Government Gazette, to register persons as certified mediators.

¹⁹⁶ Natalie Ruiters, La Poppie Mediations.

(3) When the Chief Justice has recognised an organisation in accordance with subsections (1) or (2), the persons certified as mediators of family law disputes by that organisation are deemed certified mediators, for purposes of this Act and any other law that requires family law mediation services to be rendered.

(4) Prior to recognising any organisation in terms of subsections (1) or (2), the Chief Justice must ascertain details of the –

- (a) qualification and certification standards used by the organisation, including any such standards that may be applicable to mediation in family law disputes;
- (b) manner in which the organisation requires persons to be assessed for certification against these standards;
- (c) codes of conduct that the organisation requires certified mediators to comply with, as well as the complaints and disciplinary procedures that apply to mediators certified by the organisation; and
- (d) manner in which the mediator standards, the codes of practice, the complaints and disciplinary procedures, and the register of mediators certified by the organisation, are published.

(5) The Chief Justice may when recognising an organisation in terms of subsection (1) or (2) stipulate that the organisation is only recognised to register persons as certified mediators for family law disputes.

(6) Subject to subsection (4), the decisions in accordance with subsections (1), (2) and (5) must be at the discretion of the Chief Justice, provided that the Chief Justice may consult with any relevant stakeholders prior to making any such decision.

(7) The Chief Justice may from time to time, after consultation with the body, at their discretion, withdraw the recognition of any organisation previously made in accordance with sections (1), (2) or (5).

(8) The minimum requirements for a person to be certified as a mediator include that such person must –

- (a) provide proof of having met the following training requirements:
 - (i) training in a family mediation training course accredited by a organisation recognised in terms of subclause (1), with assessment and certification of their attendance and competence; and
 - (ii) completion of additional training, which includes training in psychology, training in family law, or training in both.
- (b) provide proof of having met the minimum practice requirement of participation in at least three supervised mediations.

(c) be a certified member of an organisation recognised in terms of subsection (1).

(9) A minimum period of recurring annual community service as prescribed is required from certified mediators upon which continued certification as a mediator is dependent.

(10) Any additional requirements for certification as a mediator may be imposed by the Chief Justice or prescribed by regulation.

Commencement of mediation before litigation

17.(1) In order to attempt the resolution of a family law dispute, the parties to a dispute must, once they have complied with section 13, submit to mediation in terms of this Act before any other proceedings (including the issuing of summons, or a notice of motion) may commence.

(2) The mediation must be performed by a certified mediator agreed on by the parties or, if the parties are unable to agree, by a certified mediator appointed by an organisation recognised in terms of section 16(1) of the Act or by the Court.

(3) Subject to subsection (2), nothing precludes a programme provider from making available their services to the parties to facilitate the mediation as a certified mediator.

(4) The parties are not compelled to submit to mediation if—

- (a) they intend to file a settlement agreement and both parties consent to the agreement being made an order of court by incorporating it in the divorce order;
- (b) they have previously attempted to mediate the dispute concerned but that mediation was unsuccessful;
- (c) a mediator, after assessing, as prescribed, whether domestic violence as defined in section 1 of the Domestic Violence Act 116 of 1998 may be present, is of the opinion that domestic violence is present and that the domestic violence may adversely affect the safety of the party or a family member of that party or the ability of the party to negotiate a fair agreement;
- (d) a court is satisfied that there are reasonable grounds to believe that abuse of a child by one of the parties has occurred or there would be a risk of abuse of the child if there were to be a delay in applying for protection of the child; or
- (e) they have signed a collaborative family practice participation agreement; or

- (f) a court determines that participation is not in the best interests of the parties or the child, including urgency or potential hardship.

Jurisdiction of court

18.(1) A court may at any stage of litigation, if it deems it in the best interests of any member of the family concerned, refer a matter to a certified mediator to facilitate mediation of the family law dispute between the parties, and may do so with or without the consent of the parties to the proceedings.

(2) A litigant may, at any stage of the litigation, apply to court for the referral of a dispute to mediation with such order as to costs as the court deems appropriate.

(3) Where a family law dispute is referred to mediation the time limits prescribed for the delivery of pleadings and notices and the filing of affidavits or the taking of any step shall be suspended for every party to the dispute from the date of signature of the agreement referred to in section 21 to the time of completion or termination of the mediation;

(4) Subject to section 17(4), a court exercising jurisdiction under this Act must not hear a family dispute unless a party files with the court a certificate of outcome furnished to that party by a certified mediator in terms of section 29.

Refusal to submit to mediation

19.(1) Notwithstanding the provisions of sections 17 and 18, a party may, within five days after attending one session with a certified mediator to determine whether mediation appears to be appropriate for the resolution of the dispute, or the parties and the circumstances, opt out of further mediation contemplated in those sections, on the following grounds:

- (a) The issue constitutes a question of law only; or
- (b) any other good cause shown, including urgency and potential harm or prejudice.

(2) Parties who refuse to participate in further mediation must provide the mediator with written reasons for their refusal.

(3) The court may impose a punitive cost order, or another appropriate order, if, during a subsequent hearing, it concludes that a party unreasonably refused to engage in mediation.

Termination of appointment of a certified mediator

20.(1) If a mediator appointed under this chapter is—

- (a) found to be non-compliant with the training or practice requirements as set out in section 16(8)(a) or (b);
- (b) found to no longer satisfy the requirement for certification as required under section 16(8)(c);
- (c) found to have financial or personal interest in the family law dispute;
- (d) found to have obtained their appointment by way of fraud or any other improper means; or
- (e) unable to serve as a mediator for the mediation,

the parties may terminate the appointment of the mediator and appoint another certified mediator for the mediation or request an organisation recognised in terms of clause 16(1) of the Act to appoint another certified mediator.

(2) Notwithstanding subsection (1), the parties may agree to terminate the appointment of a mediator, or agree to replace a mediator at any time, for any reason whatsoever.

Agreement to mediate

21.(1) Before commencement of the mediation in terms of clauses 17 or 18, a certified mediator must enter into a written agreement to mediate with both or all parties.

(2) The agreement to mediate must set out–

- (a) the role and functions of the certified mediator and their affiliation with an organisation recognised in terms of section 16(1) of the Act;
- (b) the rights and obligations of the parties in respect of the mediation process, including the duty to disclose all relevant documentation and information voluntarily, openly and honestly;
- (c) the fact that the mediation occurs without prejudice of rights;
- (d) the professional fees payable to the mediator; and
- (e) other matters the parties and the mediator deem appropriate.

Procedure to be followed during mediation and the role of mediator

22.(1) A mediator may determine the manner in which the mediation is to be conducted after consultation with the parties, taking into account –

- (d) the circumstances of the case;
- (e) any wishes that the parties may express; and
- (f) the need for a speedy settlement of the dispute.

(2) The parties to a family law dispute are required to attend mediation proceedings.

- (3) A mediation must be conducted in private unless otherwise agreed by the parties.
- (4) A party may have their legal representative or a support person attending the mediation process, but the mediation must take place between the parties to a family law dispute themselves.
- (5) The mediator may, if they deem it in the interests of justice, and subject to the application of sections 25 and 26, include or exclude any legal representative or support person from the proceedings.
- (6) Notwithstanding subsection (3)a non-party of a mediator's choice may participate in a mediation to assist the mediator during the mediation, subject to the consent of the parties.
- (7) A mediator must act independently and impartially and seek to maintain fair treatment of the parties and, in so doing, must take into account the circumstances of the case including the best interest of any children.
- (8) Prior to accepting the appointment, the prospective mediator must ensure their availability to conduct the mediation diligently and efficiently.
- (9) At any stage of a mediation a mediator may meet or communicate with the parties together or with each of them separately.
- (10) A mediator may not act as a representative or an advisor of a party in any arbitral, judicial or other dispute resolution proceedings in respect of the dispute that is related to the mediation.
- (11) A mediator may assist the parties to reach a satisfactory resolution of the family law dispute and may suggest options for the settlement of the dispute.

Immunity of mediator

23. A mediator is not liable for any act or omission in respect of anything done or omitted to be done in the discharge of their functions as a mediator unless the act or omission is shown to have been in bad faith.

Commencement and completion of the mediation

24.(1) The mediation process commences when the parties and a certified mediator sign an agreement to mediate.

(2) The time limit for completion of the mediation is 90 days from the date of referral, and on expiry of this date the parties may institute legal proceedings even if the mediation has not been completed, unless the certified mediator, in writing, extends such time period for completion of the mediation process on good cause shown.

- (3) The mediation process is concluded by —
- (a) the resolution of the matter as reflected in a signed mediated settlement agreement, on the date of such signature;
 - (b) the resolution of a part of the matter as reflected in a signed mediated settlement agreement in which the parties agree that any remaining parts of the matter must not be included in the process; or
 - (c) the termination of the process.
- (4) The mediation process terminates when —
- (a) a party opts out of the mediation process or refuses further mediation in terms of clause 19;
 - (b) a party initiates a proceeding in connection with the matter without the agreement of all the parties;
 - (c) in pending proceedings in connection with the matter a party —
 - (i) initiates an action, motion, or application;
 - (ii) requests that the proceeding be put on the court's active roll; or
 - (iii) takes similar action that requires a notice to be delivered to the parties; or
 - (d) a mediator withdraws from the process.

Confidentiality of any communication made during the mediation process

25. (1) Any communication made during the mediation process is confidential unless the parties agree otherwise, or any other law provides otherwise.

- (2) A communication made during the mediation process includes -
- (a) an invitation by a party to engage in mediation or the fact that a party was willing to participate in mediation;
 - (b) views expressed, or suggestions made by a party during the mediation in respect of a possible settlement of the family law dispute;
 - (c) statements or admissions made by a party in the course of the mediation;
 - (d) proposals made by the mediator or the parties;
 - (e) the fact that a party had indicated their willingness to accept a proposal (or parts thereof) for settlement made by the mediator or the parties; and
 - (f) a document prepared primarily for purposes of the mediation.

Privilege, admissibility and discovery

26.(1) Subject to sections 27 and 28, any communication made during the mediation process is privileged in terms of subsection (2), is not subject to discovery, and is not admissible in evidence.

(2) In court or arbitration proceedings, the following privileges apply:

- (a) a party may refuse to disclose, and may prevent any other person from disclosing, any communication made during the mediation process; and
- (b) a non-party participant may refuse to disclose, and may prevent any other person from disclosing, any communication made during the mediation process made by the non-party participant.

(3) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely on account of its disclosure or use in the mediation process.

Waiver and exclusion of privilege

27. (1) A privilege in terms of section 26 may be waived in writing in a record or orally during proceedings if it is expressly waived by all parties and, in the case of the privilege of a non-party participant, if it is also expressly waived by the non-party participant.

(2) A person who makes a disclosure or representation about any mediation communication which prejudices another person in legal proceedings may not claim privilege in terms of section 26, but this limitation only applies to the extent that it is necessary for the person prejudiced to respond to the disclosure or representation.

Limits of privilege

28.(1) There is no privilege in terms of section 26 for any communication made during the mediation process that is—

- (a) available to the public in terms of any law or made during a session of the mediation process that is open, or is required by law to be open, to the public;
- (b) a threat or statement of intention to inflict bodily harm or commit a crime of violence;
- (c) intentionally used to plan a crime, commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity;
- (d) part of an agreement resulting from the mediation process, reflected in a document signed by all parties to the agreement; or

- (e) not subject to the privilege in accordance with the terms of an agreement to mediate between the parties and the mediator.
- (2) Privileges in terms of section 26 do not apply to the extent that a communication is—
- (a) sought or presented to prove or disprove a claim or complaint of professional misconduct or malpractice arising from or relating to the mediation process; or
- (b) sought or presented to prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult, unless the child protection services agency or adult protection services agency is a party to or otherwise participates in the process.
- (3) There is no privilege in terms of section 26 if a court, tribunal or forum finds, after a hearing *in camera*, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, the need for the evidence substantially outweighs the importance of protecting confidentiality, and the communication made during the mediation process is sought or presented in—
- (a) court proceedings involving an offence; or
- (b) proceedings seeking rescission of a contract arising out of the mediation process or in which a defence to avoid liability under the contract is raised.
- (4) If any communication made during the mediation process is subject to an exception in terms of subsection (2) or (3), only that part of the communication necessary for the application of the exception may be disclosed or admitted.
- (5) Disclosure or admission of evidence excluded from privilege in terms of subsection (2) or (3) does not render the evidence or any other communication made during the mediation process discoverable or admissible for any other purpose.
- (6) The privileges under section 26 do not apply if the parties in a signed document agree in advance, or if a record of proceedings reflects that the parties agree, that all or part of the mediation process is not privileged.

Certificate of outcome

- 29.(1)** A mediator must provide the parties with a certificate of outcome—
- (a) setting out the agreement reached between the parties; or
- (b) stating that an agreement between the parties could not be reached;
- and
- (c) if applicable, setting out the reasons why a party refused to participate in

further mediation as provided for in clause 19(1) and (2).

(2) Except as required in subsection (1) a mediator may not make a report, evaluation, recommendation, finding, or other communication regarding a mediation to a court, arbitrator, or other authority that may make a ruling on the family law dispute that is the subject of the mediation.

(3) A communication made in violation of subsection (2) may not be considered by a court, arbitrator, or other authority.

Mediated settlement agreement and enforcement thereof

30.(1) Once the parties agree on the terms of a settlement to resolve all or part of the family law dispute, they must prepare and sign a written settlement agreement.

(2) The mediator must provide support to the parties in preparing and accurately recording the settlement agreement.

(3) A mediated settlement agreement is binding on the parties.

(4) Where a mediated settlement agreement is reached it may be made an order of court; provided that where the interests of a child is affected, such agreement must be ratified by a court.

Issuing of Directives and Rules

31.(1) The Chief Justice, and the Heads of Court under the Superiors Courts Act, may issue relevant practice directives among others, on the following –

- (a) mediation under this Act;
- (b) screening guidelines for referring matters to mandatory mediation;
- (c) expedited processes for the enforcement of mediated settlement agreements.

(2) The Chief Justice and the Heads of Court must consult with the Legal Practice Council and members of organisations recognised in terms of section 16 before issuing any practice directive in terms of sub-section (1).

(3) The Rules Board for Courts of Law established under the Rules Board for Courts of Law Act, 1985 (Act No, 107 of 1985) may make rules for family mediation in the superior courts and the magistrates' courts under this Act.

Costs, funding and fees

32.(1) The parties participating in the mediation process must pay the costs of the mediation in full, except when the services of the mediator are provided free of charge

or when a sliding scale, as prescribed, applies owing to the indigence of a party or the parties.

(2) Liability for the costs of the mediation must be borne proportionally between the opposing parties participating in the mediation process: Provided that the parties may agree otherwise.

(3) The phrase "costs of the mediation" includes only:

- (a) the fees of a mediator;
- (b) the travel and other expenses of a mediator;
- (c) the cost of any expert advice requested by a mediator with the agreement of the parties;
- (d) the cost of any assistance of a selecting authority for appointing a mediator provided pursuant to sections 17 and 18; and
- (e) the costs of the venue of the mediation.

CHAPTER 4: COLLABORATIVE FAMILY PRACTICE

A Introduction and background

4.1 The discussion paper explains that collaborative dispute resolution is one of the ADR mechanisms employed to resolve family law disputes.¹⁹⁷ This process allows for the parties in the dispute to be guided by a multidisciplinary team with a view to resolving parenting, financial and personal issues amicably. Other than mediation, the multidisciplinary team may be made up of legal representatives, mental-health professionals, financial specialists etc. who jointly function as advisers, advocates or educators. To foster commitment to the process the parties agree in writing that they will not litigate while the process is underway. Importantly legal representatives who are part of such a team are disqualified from handling any subsequent litigation if the negotiations should fail. The discussion paper flagged some concerns around this practice. The primary concern is that if the process fails the parties would need to engage new counsel starting the briefing process afresh. The parties may therefore be placed under undue pressure to settle. A secondary concern is that this process caters towards those parties who are in the high- to upper-middle income bracket, which is a very select category of disputants. The third concern is that legal practitioners have been known to bypass the requirement to withdraw from an unsettled matter, by not signing the participation agreement until after settlement has been reached. The proposed system of collaborative dispute resolution was included in clauses 23 to 33 of the draft Bill for consideration. The SALRC has subsequently concluded that the term “collaborative family practice” more accurately describes this process and has elected to substitute the terminology in favour of the term “collaborative family practice”. As the former term was used in the discussion paper it will be retained and used interchangeably in respect of the submissions received.

This chapter provides an overview of the proposals contained in the discussion paper; considers the submissions received on this topic and concludes with an evaluation thereof and the final proposals in this regard. For the most part, the SALRC has confirmed the recommendations contained in the discussion paper providing for a

¹⁹⁷ SALRC Discussion Paper 216.

collaborative approach guided by a team of experts seeking to resolve the family law dispute as amicably as possible.

B Summary of proposals contained in the discussion paper

4.2 The draft Bill provided that the proposed system of collaborative family practice may only commence once a certificate of attendance of the information and education programme has been issued. Further that, an agreement to engage in this process must be voluntary and in writing, signed by both parties and state the intention of the parties to resolve the matter in this manner.¹⁹⁸ If a matter is already before the courts, an agreement must be placed on record before the court, thereby staying the matter.¹⁹⁹ The dispute is resolved through the signing of a settlement to some or all of the matters in dispute. The process may, however, be terminated with or without cause and without reaching settlement.²⁰⁰ The time limit for completion of the process is stipulated as 90 days from the signature of the agreement.²⁰¹ A legal representative, who is part of the multidisciplinary team seeking resolution, may not represent either of the parties in subsequent litigation and neither may any legal representative associated with their law firm. They may, however, seek the court's approval of an agreement flowing from the process or to seek or defend an urgent application in carefully circumscribed circumstances.²⁰² The proceedings are confidential to the extent agreed upon by the parties. Although privilege in respect of the agreement may apply, the parties may waive the same.²⁰³ Grounds for limitation of privilege are further provided for under clause 32.

C Submissions, evaluation and recommendations

4.3 At the outset it stands to be noted that few submissions were received regarding changes to this chapter, with none opposing the inclusion thereof. For this reason and

¹⁹⁸ See clauses 23 and 24.

¹⁹⁹ See clause 25(2).

²⁰⁰ See clause 24(7).

²⁰¹ See clause 27.

²⁰² See clause 28(3).

²⁰³ See clauses 30 and 31.

due to the fact that collaborative practice has only been piloted by a few lawyers of own accord in South Africa the SALRC engaged further with local and international specialists to test the veracity of the proposal in this regard. These views will be reflected alongside the submissions in this part. The SALRC is mindful that this option would only be available to a small cohort of wealthy people who have the financial ability to appoint a collaborative team. As many of the matters that are currently clogging courts are sustained by parties with financial staying power or until such staying power runs out, it is believed that this option would be better than a fully opposed divorce case and might gain traction if legislated for. Electing this option would exclude such parties from the requirement of mandatory mediation. The parties would however still need to reach an agreement to engage in this manner and have to meet the information and education requirements.

4.4 With this said, Legal Aid SA notes that collaborative law enables legal representatives engaging in collaborative family practice to create an environment for parties to see the bigger picture and in the process attempt to minimise the costs relating to their dispute by being reasonable in their demands.²⁰⁴ This is particularly so when parties have children because they will continue to play a role in each other's lives. Thus, this process aims to preserve the relationship of the parties. It is of the view that round table conferences are ideal platforms for developing collaborative practice in SA. Engaging in collaborative family practice will in its view require practitioners to change their attitudes and not be litigation orientated. Once divorce instructions are received, it might be ideal to inquire from the client what their views are on the resolution of the divorce in a collaborative way wherein the needs and interests of both parties will be duly considered to reach an amicable solution. It is however also of the view that by providing more options such as collaborative law or arbitration to the process, and thereby adding more role players to the process, this will undoubtedly increase the costs and the time it takes to resolve an issue. This would in turn create a barrier and will exclude the indigent and vulnerable in society from enjoying the benefits of this process. It comments that a fine balance is necessary to include all in society. Legal Aid SA holds the view that collaborative law can play a positive role during round table discussions, for example, a financial planner may be able to assist both parties during these meetings instead of employing financial planners for each of the parties.

²⁰⁴ This sentiment is endorsed by Pat Mkhize, Mandulo Foundation.

4.5 The Islamic Forum Azaadville submits that a professional should not be precluded from operating in different or consecutive functions. The measure should be the consent of the parties to the dispute. In its view, the benefit would be saved costs and time utilised. The outcome should however be reviewable and benchmarked against the principles of fairness and justice.²⁰⁵ Furthermore, provisions should be made for registration of the process in a court register; that assessments should be made with regard to the children's rights; fees should be capped; provision should be made for the extension of time with the consent of all parties and subject to notification of the court of the extension; and the outcome must be recorded in court.²⁰⁶

4.6 Nicolle Kopping-Pavars observes that the proposed model of collaborative dispute resolution contained in the draft Bill has evolved. She comments that the process is very much a team-based approach whereby the team assists the parties from a legal perspective, family or parenting perspective, and financial and property perspective. She explains that the lawyers play a secondary role in that they provide legal advice and draft a separation agreement, whereas the family or financial professional plays the primary role of guiding the parties through the process. Her main concern lies in the availability of trained financial or other professionals to make this a viable option.

4.7 The SALRC confirms that the Bill in its entirety provides parties with the option of choosing which ADR process they wish to engage with prior to going to court. Further that, a certificate would be required by a court prior to being able to proceed with litigation. It views engaging in collaborative family practice as one such process. The view is further held that most lawyer mediators will opt for collaborative divorce, once it is properly regulated. The SALRC is mindful that there are multiple models of collaborative family practice. It is of the view that the model of collaborative family practice proposed in this chapter is the model most appropriate to providing a minimum framework for family law dispute resolution. The team involved in the process may augment the process to fit the needs of the parties and the dispute they are facing, as long as the basic principles are followed. One of these principles is that, whereas the lawyers representing the parties may play a limited role in comparison to other team players, they are the convenors of the process. The distinct feature of collaborative law is that parties are represented by lawyers ("collaborative lawyers") during negotiations. Highlighting the role of the lawyers becomes necessary due to the fact that by engaging

²⁰⁵ Islamic Forum Azaadville.

²⁰⁶ Islamic Forum Azaadville.

in a collaborative family practice process these lawyers are contractually bound not to litigate on behalf of the parties if the negotiations should break down. The parties in turn demonstrate their commitment to the process and the understanding that if the process does not culminate in an agreement they will incur the substantial cost of retaining a new legal team to litigate. The SALRC does not agree that ADR agreements should be registered in court as these processes should take place before any court action or application is brought.

Requirements for a collaborative family practice participation agreement

4.8 Pat Mkhize of the Mandulo Foundation submits that with regard to clause 23 which provides for the requirements for a collaborative dispute resolution participation agreement the following should be inserted after sub-clause 23(1)(e) as follows:

(e) identify the collaborative legal practitioner who represents each party in the process, and the role of the collaborative legal practitioner in a collaborative dispute resolution should be spelt out;

4.9 Nicolle Kopping-Pavars notes that it would seem that clause 23 only provides for legal professionals in the participation agreement. She advises that the evolved Team Approach model requires that the team members be provided for.

4.10 After considering the comment, the SALRC agrees to the addition to subclause 23(1)(e) and suggests the addition of a new sub-clause 23(1)(e) as follows:

23(1)(e) identify the collaborative legal practitioner who represents each party in the process, and their role in the collaborative family practice process;

and

23(1)(f) identify the neutral professionals involved in the collaborative family practice process and their role therein;

4.11 It further recommends that the heading “collaborative law”, should in light of the comment received be changed to “collaborative family practice” to align with the proposed long title of the Bill. The preferred term is therefore collaborative family practice.

Commencement and conclusion of a collaborative family practice process

4.12 Ms Kopping-Pavars submits that if a collaborative family practice process terminates due to the initiation of court proceedings, there should be a cooling off period.

She suggests a waiting period of at least 60 days after termination of the process. The belief is held that this will prevent a party from retaining lawyers to litigate and immediately entering into the litigation process.

4.13 The SALRC has considered the comment by Ms Kopping-Pavars, but is unsure of how a cooling off period would work and is concerned about the infringement of the parties constitutional right to access court. It is of the view that a cooling off period of 60 days would counter the right to access the remedies provided by a court. Additionally, training and education are provided in terms of this draft Bill. The SALRC is of the view that an agreement would not need a court order, it would be the same as a settlement agreement as is the case in any other unopposed divorce.

Proceedings pending before court

4.14 The question is posed as to how proceedings which are before a court should be addressed. The view is held that (the then) clause 25 read together with clause 28 reflects that collaborative legal practitioners and legal practitioners in an associated law firm may not litigate on behalf of the parties. The concern is raised that this would necessitate reverting to the litigation practitioners if the matter is not resolved in 90 days.²⁰⁷

4.15 The SALRC is of the view that the furnishing of the status report by the collaborative legal practitioners to the court in terms of clause 35 of the revised Bill is at the court's request and should not be seen as a recommencement of litigation between the parties. The collaborative legal practitioner would therefore be able to present such a report to the court.

Time limit for completion of collaborative family practice process

4.16 Ms Kopping-Pavars expresses her concern regarding the proposed 90-day timeline for completion of the collaborative family practice process. She is of the view that bearing the number of issues to be addressed such as disclosure, pre-brief and de-brief sessions and property issues, amidst the emotional trauma families suffer when going through a separation or divorce process, a trauma she considers to be akin to a death, requires compassion and time. In her experience, a timeline like this is not healthy and doesn't consider that the process is made up of several 4–6-way meetings.

²⁰⁷ Nicolle Kopping-Pavars

4.17 While being mindful of the potential pitfalls of rigid timelines, the SALRC has applied the time limit of 90 days to all ADR processes in the Bill with the aim of containing and expediting the resolution and cost of these matters. It is however mindful that some of the matters may not have reached a resolution and as such has provided for an extension of time where sufficiently motivated. This requirement seeks to ensure accountability on the part of the collaborative legal practitioner.

4.18 No comment was received on the clauses dealing with the confirmation of the agreement by court (clause 26); disqualification of the collaborative legal practitioner and legal practitioners in associated law firms (clause 28); confidentiality of collaborative dispute resolution communication (clause 29); privilege, admissibility and discovery (clause 30); waiver and exclusion or privilege (clause 31); limits of privilege (clause 32); or severability (clause 33).

D Recommendations

4.19 The SALRC recommends the enactment of the following clauses to give effect to collaborative family practice:

| CHAPTER 5 | |
|---|--|
| COLLABORATIVE FAMILY PRACTICE | |
| Requirements for a collaborative family practice participation agreement | |
| 33.(1) | A collaborative family practice participation agreement must— |
| (a) | be in writing; |
| (b) | be signed by the parties; |
| (c) | state the intention of the parties to resolve a matter through a collaborative family practice process in terms of this Act; |
| (d) | describe the nature and scope of the matter; |
| (e) | identify the collaborative law practitioner who represents each party in the process, and the role of the collaborative law practitioner in the collaborative family practice process should be explained; |
| (f) | identify the neutral professionals involved in the collaborative family practice process and their role therein. |
| (g) | contain a statement by each collaborative law practitioner confirming the legal practitioner's representation of a party in the process; and |

(h) include a statement that the representation of each collaborative law practitioner is limited to the collaborative family practice process and that the collaborative law practitioners are disqualified from representing any party or non-party participant in proceedings other than a collaborative family practice in connection with a collaborative matter consistent with this chapter.

(2) Parties may agree to include additional provisions not inconsistent with this Act in a collaborative family practice participation agreement, including, but not limited to—

- (a) an agreement concerning confidentiality of communications made during the collaborative process;
- (b) an agreement that a part or the whole of the collaborative family practice process must not be privileged in any proceeding;
- (c) the scope of voluntary disclosure;
- (d) the role of non-party participants; and
- (e) the retention and role of non-party experts.

Commencement and conclusion of a collaborative family practice process

34.(1) Parties may engage in the collaborative family practice process only once they have obtained a certificate in accordance with section 13.

(2) Participation in a collaborative family practice process is voluntary and the process commences when the parties sign a collaborative family practice participation agreement.

(3) A court may not order a party to participate in a collaborative family practice process in the face of that party's objection to participation.

(4) A collaborative family practice process is concluded by —

- (a) the resolution of a collaborative matter as reflected in a signed settlement;
- (b) the resolution of a part of the collaborative matter as reflected in a signed settlement in which the parties agree that any remaining parts of the matter must not be included in the process;
- (c) the termination of the process; or
- (d) a method specified in the collaborative family practice participation agreement.

(5) A collaborative family practice process terminates when a party—

- (a) gives notice in writing to other parties that the process has ended;

- (b) initiates a proceeding other than a collaborative family practice process in connection with a collaborative matter without the agreement of all the parties;
 - (c) in pending proceedings other than a collaborative family practice process in connection with the matter—
 - (i) initiates an action, motion, or application to show cause;
 - (ii) requests that the proceeding be put on the court's active roll;
 - (iii) takes similar action that requires a notice to be delivered to the parties; or
 - (d) except as otherwise provided in subsection (7), discharges a collaborative law practitioner or when a collaborative law practitioner withdraws from further representation of a party.
- (6) A party's collaborative law practitioner must give prompt notice in writing to all other parties of a discharge or withdrawal.
- (7) A party may terminate a collaborative family practice process with or without cause.
- (8) Notwithstanding the discharge or withdrawal of a collaborative law practitioner, the collaborative family practice process concerned continues if, not later than 30 days after the date on which the notice of the discharge or withdrawal in terms of subsection (6) was delivered to the parties—
- (a) the unrepresented party engages a new collaborative law practitioner; and
 - (b) in a signed notice—
 - (i) the parties consent to continue the process by reaffirming the collaborative family practice participation agreement;
 - (ii) the agreement is amended in order to identify the new collaborative law practitioner; and
 - (iii) the new collaborative law practitioner confirms their representation of the party concerned in the collaborative process.
- (9) The provisions of subsection (4) notwithstanding, a collaborative family practice process does not conclude until a party, with all the consent of the parties, requests a court to approve the resolution of the collaborative matter or any part thereof as recorded in a signed document.
- (10) A collaborative family practice participation agreement may provide additional methods of concluding a collaborative family practice process.

Proceedings pending before court

35.(1) Persons in proceedings pending before a court may enter into a collaborative family practice participation agreement seeking to resolve a collaborative matter related to the proceedings.

(2) The parties must, within three days of the conclusion of the agreement, file a duly signed record of the agreement with the court.

(3) Subject to subsection (6), the filing operates as an application for a stay of the proceedings.

(4) The parties must, within three days of the conclusion of the collaborative family practice process, file a duly signed record of the conclusion with the court, which filing will have the effect of lifting the stay of the proceedings in terms of subsection (3).

(5) The notice may not specify any reason for termination of the process.

(6) A court in which proceedings have been stayed in terms of subsection (3) may require the parties and collaborative law practitioners to furnish a status report on the collaborative family practice process and the proceedings, which—

- (a) may include only information on whether the process is ongoing or concluded; and
- (b) may not include a report, assessment, evaluation, recommendation, finding, or other communication regarding a collaborative family practice process or collaborative family practice matter.

Confirmation of agreement by court

36. A court may confirm a settlement agreement resulting from a collaborative family practice process.

Time limit for completion of collaborative family practice process

36. The time limit for completion of the collaborative family practice process, after the collaborative agreement has been signed, is 90 days, and on expiry of that date the parties may institute legal proceedings, even if the collaborative family practice process has not been completed, unless the collaborative law practitioner provides the parties with a reasonable explanation, in writing, for the delay.

Disqualification of collaborative law practitioner and legal practitioners

in associated law firm

38.(1) Except as otherwise provided in subsection (3), a collaborative law practitioner is disqualified from appearing before a court or in arbitration proceedings to represent a party in a matter relating to the collaborative matter.

(2) Except as otherwise provided in subsection (3), a legal practitioner in a law firm with which the collaborative law practitioner is associated is disqualified from appearing before a court to represent a party in proceedings relating to the collaborative matter if the collaborative law practitioner is disqualified from doing so in terms of subsection (1).

(3) A collaborative law practitioner or a legal practitioner in a law firm with which the collaborative law practitioner is associated may represent a party—

- (a) to request a court to approve an agreement resulting from the collaborative family practice process; or
- (b) to seek or defend an urgent application to protect the health, safety, welfare or interests of a party, or family member of a party, if a new legal practitioner is not immediately available to represent that person.

(4) If subsection (3)(b) applies, a collaborative law practitioner, or a legal practitioner in a law firm with which the collaborative law practitioner is associated, may represent a party or a family member of a party only until the person is represented by a new legal practitioner or reasonable measures are taken to protect the health, safety, welfare, or interests of the person.

Confidentiality of collaborative family practice communication

39. A collaborative family practice communication is confidential to the extent agreed on by the parties in a signed document or as provided by law of the Republic other than this Act.

Privilege, admissibility and discovery

40.(1) Subject to sections 41 and 42, a collaborative family practice-communication is privileged in terms of subsection (2), is not subject to discovery, and is not admissible in evidence.

(2) In court or arbitration proceedings, the following privileges apply:

- (a) A party may refuse to disclose, and may prevent any other person from disclosing, a collaborative family practice communication; and
 - (b) a non-party participant may refuse to disclose, and may prevent any other person from disclosing, a collaborative family practice communication made by the non-party participant.
- (3) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely on account of its disclosure or use in a collaborative family practice process.

Waiver and exclusion of privilege

41.(1) A privilege in terms of section 40 may be waived in writing in a record or orally during proceedings if it is expressly waived by all parties and, in the case of the privilege of a non-party participant, if it is also expressly waived by the non-party participant.

(2) A person who makes a disclosure or representation about a collaborative family practice communication which prejudices another person in legal proceedings may not claim privilege in terms of section 40, but this limitation only applies to the extent that it is necessary for the person prejudiced to respond to the disclosure or representation.

Limits of privilege

42.(1) There is no privilege in terms of section 40 for a collaborative family practice communication that is—

- (a) available to the public in terms of any law or made during a session of a collaborative family practice process that is open to, or is required by law to be open, to the public;
- (b) a threat or statement of intention to inflict bodily harm or commit a crime of violence;
- (c) intentionally used to plan a crime, commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity;

- (d) part of an agreement resulting from the collaborative family practice process, reflected in a document signed by all parties to the agreement; or
 - (e) not subject to the privilege in accordance with the terms of a collaborative family practice participation agreement between the parties.
- (2) Privileges in terms of section 40 do not apply to the extent that a communication is—
- (a) sought or presented to prove or disprove a claim or complaint of professional misconduct or malpractice arising from or relating to a collaborative family practice process; or
 - (b) sought or presented to prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult, unless the child protection services agency or adult protection services agency is a party to or otherwise participates in the process.
- (3) There is no privilege in terms of section 40 if a tribunal finds, after a hearing *in camera*, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, the need for the evidence substantially outweighs the importance of protecting confidentiality, and the collaborative family practice communication is sought or presented in—
- (a) court proceedings involving an offence; or
 - (b) proceedings seeking rescission of a contract arising out of the collaborative family practice process or in which a defence to avoid liability under the contract is raised.
- (4) If a collaborative family practice communication is subject to an exception in terms of subsection (2) or (3), only that part of the communication necessary for the application of the exception may be disclosed or admitted.
- (5) Disclosure or admission of evidence excluded from privilege in terms of subsection (2) or (3) does not render the evidence or any other collaborative family practice communication discoverable or admissible for any other purpose.
- (6) The privileges under section 40 do not apply if the parties in a signed document agree in advance, or if a record of proceedings reflects that the parties agree, that all or part of a collaborative family practice process is not privileged.

Severability

42. If any provision of this chapter or its application to any person or circumstance is held to be invalid, the invalidity does not affect other provisions or applications of this Act, which can be given effect to without the invalid provision or application, and to this extent the provisions of this Act are severable.

CHAPTER 5: FAMILY ARBITRATION

A Introduction and background

5.1 The discussion paper explained that section 2 of the Arbitration Act, 42 of 1965 currently prohibits arbitration in family matters.²⁰⁸ Consequently, to the extent that an arbitration award of a family matter and particularly in respect of determining the rights or interests of children falls within the ambit of section 2, it would seem to be unenforceable as being contrary to public policy.²⁰⁹ The SALRC considered whether there was a need to legislate for arbitration in family law disputes particularly where children are involved, and if this is the case, whether this should be done by way of specialised legislation such as the draft Family Dispute Resolution Bill, rather than the Arbitration Act.²¹⁰

5.2 The SALRC recognised that a tribunal's arbitral award will bind only the parties involved in the arbitration to the arbitration agreement. However, the award may affect the children of the parties. Although a child may be considered to be a de facto third party to the agreement they are not bound to the arbitration agreement. This is of consequence as a child's interests are not necessarily identical to those of the parent responsible for the care of that child.²¹¹

5.3 A further consideration entertained in this regard was the possible reach or user uptake of this mechanism. Due to various factors, but primarily cost, it is envisaged that only a small sector of wealthy families would, alongside the proposed mechanism of parenting coordination be in a position to make use of arbitration to resolve their disputes.

5.4 A related consideration is whether arbitration in family law disputes should be considered as one of a suite of ADR mechanisms or a mechanism which acts in parallel to litigation. The SALRC considered the court's judicial authority as the upper guardian of children; and questioned what safeguards would be necessary to protect children if

²⁰⁸ SALRC Discussion Paper (2019) 240.

²⁰⁹ SALRC Discussion Paper (2019) 241 par 9.1.7.

²¹⁰ SALRC Discussion Paper (2019) 244 par 9.2.8.

²¹¹ SALRC Discussion Paper (2019) 249 par 9.3.4 and 9.3.5.

family arbitration was legislated for; the law that should be applied; and the requirements for arbitrator accreditation, training and practice supervision standards.²¹² It concluded that the role of the High Court as the upper guardian of all children could not be ousted by an arbitral process. The SALRC found that the function of the High Court as upper guardian of all children, and highest instance for resolving disputes and issues of status involving children was established and that the High Court could further intervene in matters relating to children if it was in the best interest of the child. These powers were not available in terms of the Arbitration Act. It further found that the High Court would not be bound by an arbitral award in respect of children and while unlikely to come to a different conclusion was not obliged to mirror the award.²¹³

This chapter seeks to provide an overview of the proposals contained in the discussion paper; to consider the submissions received on these proposals; and to provide the SALRC's recommendations in this regard. The conclusion is drawn that for the purposes of arbitration of family law disputes where children are involved, the Family Dispute Resolution legislation should apply; and where there are no children the Arbitration Act should apply.

B Summary of proposals contained in the discussion paper

5.5 The SALRC made the preliminary finding that although family arbitration would not have universal appeal, it should be encouraged. Furthermore, its awards should be enforceable for those who elect to use this ADR mechanism to resolve their family law disputes.²¹⁴ It tentatively found that if arbitration was supported as a mechanism to resolve family law disputes this would entail separate legislation. It tabled a list of questions and related proposals for consideration, namely:

- “a) Arbitration of matrimonial property and financial disputes when no children are directly involved, in terms of the Arbitration Act, 1965;
- b) Section 2 of the Arbitration Act could be revised as follows:
 - (i) Any family dispute affecting the rights or interests of a child should be excluded from the ambit of the Arbitration Act.

²¹² SALRC Discussion Paper (2019) 251, par 9.3.14.

²¹³ SALRC Discussion Paper (2019) 257 par 9.4.19.

²¹⁴ SALRC Discussion Paper (2019) 266 par 9.5.5.

- (ii) Reference to the term “status” in section 2 of the Arbitration Act should be removed and replaced with the test set out in clause 5(2) of the updated Domestic Arbitration Bill. This would also bring the section into line with the International Arbitration Act 15 of 2017 and would promote harmonisation of statutes.
- c) In accordance with similar developments worldwide, arbitration of all matters incidental to divorce or family breakdown, including children’s issues, could be provided for in separate legislation, subject to –
 - (i) an appropriate form of review or appeal; and
 - (ii) provision for legal counsel for children and the parties concerned being considered.
- d) Which law should apply to family arbitration? Who should act as arbitrators? Should family arbitration processes be privately or statutorily regulated?
- e) That an arbitrator’s award regarding care and contact with children should also be submitted to the Office of the Family Advocate so that it can be monitored in the same way as settlement agreements or parenting plans are.
- f) Despite a court’s powers to hear the matter *de novo*, the court’s role should nonetheless be to give effect to an arbitrator’s award if the court considers it to be just and equitable. As is the case in England, an award should serve as a lodestone that points the way to court approval. To reduce ill-founded applications for a hearing *de novo*, there could perhaps be some cost implications for an applicant who is not successful in improving his or her position on review.
- g) The distinction between non-binding arbitration and parenting coordination should be determined and a decision should be taken as to whether both forms of ADR should be supported, and if so, how.
- h) Once agreement has been reached on the nature of the arbitration legislation, an in-depth study should be made to determine the consequential amendments that would be necessary to the legislation affected by the proposed amendment.”²¹⁵

5.6 The discussion paper provisionally inserted (the then) clauses 34 to 41 in Chapter 6 of the draft Family Dispute Resolution Bill to provide for family arbitration. The proposal made provision for self- and voluntary court referral of a family law dispute to arbitration.²¹⁶ The draft Bill attached to the discussion paper provided that where there are children involved, arbitration would be regulated in terms of the draft Family Dispute Resolution Bill and where children are not involved, arbitration of family matters would be regulated by the Arbitration Act. Clause 36 of the draft Bill in the discussion paper amongst others provided that a mediator may not act in a dual consequential role as arbitrator if the mediation was not successful. Clauses 37 and 38 of the draft Bill in the discussion paper provided that an arbitration award pertaining to children would not be given effect unless confirmed by the High Court. A provisional amendment to section 2 of the Arbitration Act, by way of a schedule to the draft Bill, was also proposed to the

²¹⁵ SALRC Discussion Paper (2019) 265 – 266 par 9.5.4.

²¹⁶ See clauses 34 and 35 of the draft Bill.

effect that arbitration in terms of this Act would not be allowed in respect of family law disputes affecting the rights and interests of children, or any matter incidental thereto.

C Submissions, evaluation and recommendations

5.7 Zenobia du Toit of Miller du Toit Cloete Inc. submits that the need for arbitration in family matters is supported by clients, practitioners, experts and ADR institutions such as the Family Law Arbitration Forum of South Africa (FLAFSA). Ms du Toit submits that despite many submissions to the government, the Rules Board and other related interested institutions recommending that there should be a specialised family law trained judge or magistrate and, or a stream of family courts hearing family law matters, this has not realised due to resource constraints and the volume of cases before the courts. She further submits that the benefit of engaging in the arbitration of family law disputes is that discreet points of law could be heard for substantially less and earlier than would be the case in opposed court proceedings. Ms du Toit further clarifies that it is to be kept in mind that the parties mediate and come to settlement agreements in a round table meeting, which settlement agreements are submitted to a court for approval. The settlements reached by parties and arbitration awards do not oust the jurisdiction of the court. These awards would still have to be condoned by a court as part of a final order of divorce and the High Court will remain the upper guardian of minor children, meaning that this function will not be usurped by an arbitrator. She submits that a set of rules should incorporate appropriate remedies for parties after arbitration, which remedies would safeguard their interests, e.g. appeal, review, etc.

5.8 In light of clause 37 of the draft Bill which proposed that no arbitration award affecting the rights or interests of a child may come into effect unless confirmed by the High Court, the Black Lawyers Association of Limpopo questions whether it would be less complicated and cost-effective to provide that the award be referred by the arbitrator to the court for confirmation without having to bring a fully-fledged application. The Office of the Family Advocate submits that the Children's Court and Regional Courts should be included in this confirmation process as well as the Office of the Family Advocate.²¹⁷ Furthermore, the duties of a Family Advocate should be expanded to include that all

²¹⁷ Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape.

pleadings and consent papers, agreements and applications for arbitration should be filed with the Office of the Family Advocate for consideration. And that all forms and applications from children's courts should be filed with them.²¹⁸ As far as the Arbitration Award is concerned, with reference to subclause 37(4) the comment is made that it should be just and equitable. A question to be raised is that of onus.²¹⁹

5.9 Furthermore, Ms du Toit and FLAFSA submit that in the same way that mediated or settlement agreements are considered by the Family Advocate's offices for their comment before a court order is made, an arbitration award should be submitted to the Family Advocate's office for comment.²²⁰ Ms du Toit submits that it should be provided that any commencement of proceedings for arbitration where children are involved should also be filed at the Family Advocate's offices similar to court pleadings. The usual procedures of serving and filing Annexure A, B and Form 8 with the Family Advocate should occur simultaneously with the commencement of the arbitration process. This process would mirror the requirements applicable in terms of the Mediation in Certain Family Matters Act. There should be a provision that the Family Advocate would be able to intervene in the same way as would apply in court proceedings and would also be able to mediate and/or investigate if deemed necessary. Arbitrators, parents and the legal representatives involved would inevitably have to certify that they have safe guarded the children and issues relating to them. She further submits that parenting co-ordination should not be conflated with family law arbitration as it is very different.

5.10 The Chief Family Advocate in turn comments that the existing role that the Office of the Family Advocate has should be extended to any legislation which relates to children in family law within the ADR/arbitration landscape. This would require that all agreements and or directives emanating from all ADR practitioners in family law matters before they are made an order by way of court or arbitration or a binding directive should be sent to the Office of the Family Advocate for interrogation. This is to ensure constitutional consistency in that all children in family law matters and or ADR/Arbitration

²¹⁸ Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape.

²¹⁹ Zenobia du Toit, Miller du Toit Cloete Inc

²²⁰ Endorsed by Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape.

matters are afforded the same benefits in matters impacting on them as children in civil matters and in terms of the Children's Act.²²¹

5.11 The Office of the Family Advocate suggests that provision should be made for a family advocate to attend the family arbitration tribunal proceedings as provided for in clause 36 of the draft Bill either to provide assistance by interrogating parties and evidence by other experts or to be an arbitrator. It states that a family advocate could provide evidence in the form of a family counsellor or psychologist testimonies, but that a family advocate should not be subpoenaed as a witness. The Office of the Family Advocate further submits that part of the application should also indicate that the award was made after the intervention of the Office of the Family Advocate and the application should attach the comments by the Office of the Family Advocate and that the initial application and subsequent award was served on the Office of the Family Advocate.²²² The Sunni Ulama Council of Gauteng submits that clause 36 should be amended by the addition of a sub-clause (3) which should read as follows:

(3) Ensure that an arbitration agreement setting out amongst others the nature, scope and methodology has been included.

5.12 Ms du Toit cautions that if the Arbitration Act is amended in terms of the proposed schedule it would exclude arbitration relating to children, which seems to be allowed in terms of the proposed Bill. Both FLAFSA and Ms du Toit are in favour of family law arbitration in terms of the proposed Family Dispute Resolution Bill.

5.13 Although it is submitted that arbitrators in these matters should only be legal practitioners such as part-time or retired judges, advocates, attorneys, academics in law etc, Ms du Toit submits that arbitration should not be "an exclusive elitist form of dispute resolution". She agrees with FLAFSA's suggestion that pro bono programs providing arbitration services should be launched in various centres such as regional courts and in outlying areas, so that there are obligatory hours for pro bono services for arbitrators. Ms du Toit and FLAFSA envisage that arbitrators who cannot afford the fees to qualify as arbitrators, should also be trained on a pro bono basis and be mentored and guided by

²²¹ Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape.

²²² Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape.

a qualified arbitrator. The view is held that similar to litigation and mediation, co-existing and assisting each other, mediation and family law arbitration will be able to assist each other in moving settlement or agreements or outcomes forward. It emphasises that arbitration should not be seen as a competitor for mediation. However, it is of the view that it has to be accepted that there are instances where mediation fails. This does not mean that mediation cannot be re-introduced from time to time and this in fact should be encouraged. Arbitration can resolve discreet issues of dispute, where the matter can be referred back to mediation. It concludes that the two processes could operate in tandem as litigation and mediation currently do.

5.14 Ms du Toit is also of the view that arbitration on discrete issues would also benefit litigants who are unable to appoint legal representation. It is believed that arbitration would give them access to justice and provide guidance and an outcome quickly as to the way forward. FLAFSA submits that a panel of experts from whom arbitrators may select a single expert should be available. Preferably only one joint expert should be appointed. It further submits that consideration should be given to traditional structures of dispute resolution and the involvement of these traditional, customary law, religious and cultural structures for assistance to the arbitrator in arbitration.

5.15 FLAFSA argues that arbitration should take place in respect of children and if not then in the least in respect of paying of maintenance. In its view, this is a purely financial matter, regulated by the Maintenance Act. It states that the arbitrator would be bound (e.g. in terms of FLAFSA's proposed rules) to the Children's Act's provisions regarding representation of children and children's involvement. Children may be represented in various ways, for example, by a legal representative, a guardian, or a curator and their views may be reflected by experts, the Family Advocate and so forth. The view of FLAFSA is that the arbitration procedure should be regulated by statute and that the statute should incorporate the requirements for and qualifications of arbitrators.

5.16 FLAFSA concludes that parent coordination is not arbitration. It is a very different procedure and is informal in nature, does not follow the necessary disclosure or other processes, reasons do not have to be given, records need not be kept, and so on. The same relief does not apply in regard to directives.

5.17 Ms du Toit submits that the Bill does not appear to cater for financial arbitrations. She holds the view that the Bill should incorporate financial arbitration of matrimonial property and financial disputes. Furthermore, it would not suffice to have these issues

heard in terms of the Arbitration Act as various provisions in the aforementioned Act do not facilitate family law arbitration. The view is held that matrimonial arbitration would require specific rules and regulations. Additionally, issues such as disclosure, subpoenas, exchanging information etc would require a specific set of procedures.

5.18 With regard to the requirements pertaining to a family arbitration tribunal prescribed in terms of clause 39 of the draft Bill included in the discussion paper, Sandra Ferreira of UNISA suggests that these should be included in the Act. She motivates her suggestion by stating that depending on circumstances, specialists other than legal practitioners, such as psychologists or religious leaders, might be equally or more suitable as arbitrators.

5.19 Ms du Toit suggests that clause 40 which provides for the court's jurisdiction to review an arbitration award not relating to a child, should be re-looked at in view of the possible conflict with the other provisions. Furthermore, that family law should be defined.²²³

5.20 In contrast, Legal Aid SA does not support the use of arbitration in family matters. It argues that arbitration adds an extra layer of costs and time to dispute resolution. Furthermore, its value is limited as it would be unable to resolve status issues. Legal Aid SA recommends that when mediation is not able to resolve the division of assets and liabilities of the estate, the court should consider ordering the automatic appointment of liquidators and distributors to attend to these issues.

5.21 The SALRC is of the view that the succinct aim of this chapter is to amend section 2 of the Arbitration Act to provide for family arbitration as it is currently prohibited. The SALRC is further of the view that arbitration of all family law disputes, not just those affecting the rights or interests of a child, should be dealt with in terms of the Family Dispute Resolution Bill. In family law, there are unique public policy considerations, distinguishable from those applying in the world of commercial contracts, which must be considered. Such considerations include not only that the best interests of the child must be prioritised, but also that the constitutional values of equality and non-discrimination must be upheld. Since the Family Dispute Resolution Bill covers all family law disputes, it would have been inconsistent to exclude family law disputes that do not affect the rights

²²³ Zenobia du Toit, Miller du Toit Cloete Inc.

or interests of a child from the ambit of Chapter 6 of the Bill. This position is supported by the comments received from stakeholders.

5.22 The SALRC welcomes the development of the FLAFSA rules and recognises the value thereof. It however is of the view that these guidelines may be better placed as a lodestar for regulations or practice guidelines as opposed to being included in legislation. The draft Bill makes provision for specific rules, regulations and procedures to be prescribed by regulation to facilitate the resolution of family law disputes through arbitration. Additionally, the SALRC is of the view that there is no reason why parties cannot agree on applicable rules themselves. Although an arbitrator's powers in respect of how discovery should be made; pleadings should be delivered; and the taking of evidence are set out in section 14 of the Arbitration Act, parties may determine their own procedural and discovery rules for the process in their arbitration agreement. By agreement proceedings may be established which are less formal and more flexible, with regard to the relaxed rules of evidence, and scheduling proceedings at mutually convenient times.²²⁴ Clause 41 of the draft Bill makes the Arbitration Act applicable to Chapter 6 of the draft Bill. This inter alia means that the parties to an arbitration in terms of the Family Dispute Resolution Bill may, as parties to an arbitration in terms of the Arbitration Act, select their own arbitrator based on their expertise in the subject matter of a dispute. Although the arbitrator is not bound by substantive law, they are obliged to follow a fair process for all involved. This is important as clause 41 allows parties to choose any law for use in a family law arbitration under the draft Family Dispute Resolution Bill, including for example, Sharia law or the Beth Din, as long as no inroads are made on the best interests of children and the constitutional values of equality and non-discrimination by an arbitration award. The SALRC has accommodated the proposal made by Ms Ferriera that dependent on the circumstances various specialists should be able to act as arbitrators. It is trite that the current Arbitration Act gives no indication of who should act as arbitrators and it sets no qualifications for arbitrators.²²⁵ De Jong in her review of a number of jurisdictions, found that the office of family arbitrator is generally reserved for experienced legal practitioners who specialise in family law and have undergone specific training in arbitrating family disputes.²²⁶ In addition, they are

²²⁴ De Jong M "Arbitration of family separation issues: A useful adjunct to mediation and the court process" 2014 17 *PER/PELJ* 2358.

²²⁵ De Jong M "Arbitration of family separation issues: A useful adjunct to mediation and the court process" 2014 17 *PER/PELJ* 2395.

²²⁶ De Jong M "Arbitration of family separation issues: A useful adjunct to mediation and the court process" 2014 17 *PER/PELJ* 2395.

usually required to be members of an organisation, which keeps a list of all accredited arbitrators. However, de Jong notes that in some jurisdictions such as Canada and the United States, it appears that family arbitrators could also be other professionals licensed and experienced in the subject matter of a specific dispute, including psychologists and social workers.²²⁷ She notes that lay women from a local community may act as arbitrators in India. The downside of restricting family arbitration to legal practitioners is that it may increase the complexity and formality of the arbitration process due to advocates, attorneys or retired-judge-arbitrators being prone to resort to the customary tactics of adversarial litigation, thereby transforming divorce arbitration into a privately instituted court proceeding. Furthermore, they may not have the specialist non-legal experience required by the parties. However, the benefit of so doing is that involving only legal practitioners in arbitration could reduce the time and costs of the process. As arbitrators need not necessarily be limited to experienced family law practitioners, and recognising that they might be the best qualified to handle the arbitration of all issues arising from divorce or family breakdown from start to finish in a holistic manner the SALRC has provided for the appointment of such an arbitration tribunal in two iterations of clause 46 in the alternative. The first option provides a generic requirement which would allow parties to refer only one or more specific issues, such as care and contact arrangements, the valuation of properties or business assets, to arbitration, where the arbitrator could be someone with specialist technical knowledge in the area of the dispute, such as a psychologist, valuator or a remuneration expert, or even a lay third party who has the respect of the parties, such as a religious leader or an elder from the community.²²⁸ The second option specifically includes a religious body.

5.23 The understanding that arbitration relating to children's matters should not be final as the High Court is the upper guardian of all children is confirmed. It is satisfied that applications for confirmation of a family arbitration award affecting the rights or interests of a child must be submitted to the Office of the Family Advocate. The High Court will require an endorsement from the Office of the Family Advocate that the award is in the best interests of the children involved in the matter. The SALRC confirms that notification of arbitration would be made to the Office of the Family Advocate as would be done with any other settlement agreement. This would mean that an arbitrator's award would be monitored as would any other settlement agreement or parenting plan. Once

²²⁷ De Jong M "Arbitration of family separation issues: A useful adjunct to mediation and the court process" 2014 17 *PER/PELJ* 2395.

²²⁸ De Jong M "Arbitration of family separation issues: A useful adjunct to mediation and the court process" 2014 17 *PER/PELJ* 2396.

there is a divorce summons or an application in a family law matter regarding children Annexure A must be completed and submitted to the Office of the Family Advocate. The SALRC is aware that this would not apply to disputes where there is no divorce summons in respect of an application regarding rights and responsibilities where parties are not married. Consideration was given to whether Annexure A should be included under the clause dealing with additional duties of the family arbitration tribunal so that court processes are followed where parties are not married and that the Office of the Family Advocate is notified of the application for arbitration e.g. “notice of application to the Office of the Family Advocate”. Two possible solutions were considered, either Annexure A should be completed at the commencement of the arbitration process or the arbitration award should be considered an agreement under the Mediation in Certain Divorce Matters Act. The SALRC agrees with the submissions from various stakeholders that the Office of the Family Advocate should be involved across the lifespan of the process and it was therefore decided that as both solutions have merit that both should be included as options.

5.23 The request by the Office of the Family Advocate to include its office in legislation for them to act was considered. The SALRC agrees that all settlement agreements including arbitration awards must first go to the Office of the Family Advocate. The wording of regulation 2(1)(a) to the Mediation in Certain Divorce Matters Act should be considered providing for the submission of all Annexure A and settlement agreements (see regulation 2(2)). The question is whether the Family Advocate should be involved prior to arbitration or after the award is made. The SALRC has considered the Mediation in Certain Divorce Matters Act and is of the view that the involvement of the Office of the Family Advocate should be clear and provision should be made for completion of Annexure A in all such matters as provided for in the regulations. The Office of the Family Advocate should therefore firstly be made aware of any agreement to refer a family law dispute affecting the rights or interests of a child to arbitration through the completion and submission of Annexure A in terms of the regulations under the Mediation in Certain Divorce Matters Act, and secondly, a family arbitration award affecting the rights or interests of a child.

5.24 Although the SALRC can see the allure of the High Court being requested to confirm the award on application thereby simplifying the process followed, the SALRC is of the view that this would not be possible in respect of children as these matters must go to court as the court is the upper-guardian of all minor children. However, an arbitral

award in respect of family matters that does not involve children and only financial matters, will be final.

5.26 The SALRC agrees that there is an omission in that Civil Regional Courts should be included. Similarly, as the powers of Children’s Courts have been extended, including guardianship matters for unmarried fathers, it was decided to also include these courts in the clause dealing with the confirmation of the family arbitration award. However, married parties obtaining a divorce would still need to go to the High Court to settle guardianship. The amendment to clause 50 would include the High Court, Civil Regional Courts or the Children’s Courts.

5.25 It stands to be noted that although the discussion paper referred to the inclusion of arbitration of family law disputes in a Bill regulating Islamic marriages, at the time of writing this report no legislation to this effect had been promulgated. The draft Muslim Marriages Bill emphatically entrenched the role of the High Court with respect of children and its right to refuse to confirm any arbitral award if the same did not ensure the best interests of the child.²²⁹ It however is significant that the Constitutional Court held in *Women’s Legal Centre Trust v President of the Republic of South Africa and Others*²³⁰ (2022) ZACC 23 that Muslim Marriages are to be legally recognised and certain sections of the Divorce Act 70 of 1979 and the Marriage Act 25 of 1961 are declared unconstitutional. Consequently, the Divorce Amendment, Act 1 of 2024 was promulgated on 14 May 2024, recognising Muslim marriages and protecting women and children in such unions at dissolution.²³¹ Catto states that the recognition of Muslim marriages opens the door to the recognition of various other unions,²³² and in turn the dissolution thereof and how this affects families and society.

²²⁹ <https://probono.org.za/legal-recognition-of-muslim-marriages-by-the-constitutional-court/>

²³⁰ *Women’s Legal Centre Trust v President of the Republic of South Africa and Others* (2022) ZACC 23.

²³¹ Divorce Amendment Act 1 of 2024, Government Gazette, 14 May 2024 No. 50651; Mnkwa N “Women and children in Muslim marriages now protected by law!” South African Government Available on <https://www.gov.za/blog/women-and-children-muslim-marriages-now-protected-law> Accessed on 29 November 2024; Catto A “Constitutional Issues in Family Law” Clarks Attorneys 11th Annual Johannesburg Family Law Conference 1 November 2024.

²³² Catto A “Constitutional Issues in Family Law” Clarks Attorneys 11th Annual Johannesburg Family Law Conference 1 November 2024.

D Recommendations

5.26 The SALRC recommends the enactment of the following clauses to give effect to family arbitration:

**CHAPTER 6
FAMILY ARBITRATION**

Parties may refer family law disputes to arbitration

44. The parties to a family law dispute may, subject to sections 13 and 17 above, agree, as prescribed, to refer the dispute to an arbitration tribunal to be resolved through arbitration in terms of this Act.

Court may refer matter

45.(1) A court presiding over a family law dispute may, with the consent of all the parties to the proceedings, make an order referring the proceedings, or any part thereof, or any matter arising therefrom, to an arbitration tribunal for arbitration in terms of this Act.

(2) If the court makes an order in terms of subsection (1), it may, if necessary, adjourn the proceedings and may make any additional order as it deems appropriate to facilitate the effective conduct of the arbitration.

Requirements for a family arbitration tribunal

46. An arbitration tribunal which conducts a family arbitration in terms of this chapter must comply with the prescribed requirements.

Alternatively:

46.(1) The requirements for appointment as an arbitration tribunal in terms of this Chapter must be prescribed by regulation.

(2) An arbitration tribunal which conducts a family arbitration in terms of this Chapter must comply with the following minimum requirements:

(c) If the arbitration tribunal consists of a legal expert, such expert must have experience in dealing with family law disputes of at least 10 years and undergo ongoing training as prescribed;

(d) If the arbitration tribunal consists of a mental health expert, such expert must have experience in dealing with family law disputes of at least 10 years and undergo ongoing training as prescribed;

If the arbitration tribunal consists of a religious body, such body must be one that is formally recognised by its observant followers and undergo ongoing training as prescribed.

Additional duties of a family arbitration tribunal

47.(1) The arbitration tribunal presiding over a family law dispute must ensure—

- (a) compliance with sections 13 and 17 of this Act;
- (b) that the consent of the parties to have the dispute resolved through arbitration constitutes informed consent;
- (c) the principles of good faith and therapeutic justice are followed in the arbitration proceedings;
- (d) that any other parties who may have an interest in the outcome of the arbitration are notified of that outcome; and
- (e) that an arbitration agreement setting out amongst others the nature, scope and procedure must be followed.

(2) In addition, the arbitration tribunal presiding over a family law dispute affecting the rights or interests of a child must ensure that —

- (a) the child's voice is heard, and that legal representation is available if required; and
- (b) the report and recommendations contemplated in section 4(1) of the Mediation in Certain Divorce Matters Act, 1987, is considered, where an enquiry has been instituted by the family advocate; and
- (c) an arbitration agreement setting out amongst others the nature, scope and procedure has been included.

(3) The arbitration tribunal is precluded from making their services available to the parties in terms of subsection (1)(a) to facilitate the mediation as a certified mediator.

Rules applicable to a family arbitration

48. Rules may be prescribed by regulation to facilitate the resolution of family law disputes through arbitration.

49. Notification of the Office of the Family Advocate

Prior to an application being made in terms of section 50 for confirmation by the High Court, the Civil Regional Court or the Children's Court of any arbitration award which affects the rights and interests of a child, a completed form, duly sworn or affirmed, corresponding substantially with Annexure A of the regulations published in terms of the Mediation in Certain Divorce Matters Regulations Act, 1987 must be filed with the Office of the Family Advocate for consideration and comment.

Confirmation of the family arbitration award that affects the rights and interests of a child

50.(1) No arbitration award affecting the rights or interests of a child may come into effect unless it has been confirmed by the High Court, the Civil Regional Court or the Children's Court on application to that court and on notice to all parties who have an interest in the outcome of the arbitration.

(2) An application to the relevant court in terms of this section must be made within 30 days after delivery of the award to the applicant, or such further period as the Court may allow on good cause shown.

(3) A court may—

- (a) confirm the award;
- (b) declare the whole or any part of the award to be void;
- (c) substitute another award the court deems appropriate for the award;
- (d) vary the award on appropriate terms; or
- (e) remit the matter to the arbitration tribunal with appropriate directions.

(4) In considering an application contemplated in sub-section (1) for the confirmation of an arbitration award, the court must be satisfied that the award is in the best interests of all children concerned and to this end the court —

- (a) may refer the matter for an enquiry;
- (b) may, in such circumstances as prescribed in terms of the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), cause an enquiry as contemplated in that Act to be instituted by a family advocate in whose area of jurisdiction that court is with regard to the welfare of any minor or dependent child affected by the proceedings in question, whereupon the provisions of that Act, with the amendments required by the context will apply;
- (c) must, if an enquiry is instituted by the family advocate in terms of section 4 of the Mediation in Certain Divorce Matters Act, 1987, consider the report and recommendations contemplated in section 4(1) of that Act;
- (d) must, if a report or recommendations by a family advocate, a social worker or other suitably qualified person have been ordered in terms of

section 29(5) of the Children's Act, 2005, consider the report and recommendations.

- (5) The court must, on application by a party, confirm the award unless—
- (a) the application is opposed on one or more of the grounds set out in section 33(1) of the Arbitration Act, 1965 (Act No. 42 of 1965); or
 - (b) the court is not satisfied that the award is not in the best interests of all children concerned, in which case the court must proceed to hear and determine all relevant issues.

Court's jurisdiction to review arbitration award

51. Nothing in section 50 must be construed as limiting the court's jurisdiction in terms of any law to review an arbitration award in so far as it relates to a family law dispute that does not affect the rights or interests of a child.

Application of Arbitration Act to special laws

52. The provisions of the Arbitration Act, 1965, with the amendments required by the context, must apply to an arbitration conducted in terms of this chapter in accordance with section 39 of that Act.

CHAPTER 6: PARENTING COORDINATION (FACILITATION OR CASE MANAGEMENT)

A Introduction and background

6.1 The discussion paper recognised that due to various reasons, including the changing developmental phases of children, even a detailed parenting plan may not avoid all sources of potential conflict. It considered whether a parenting coordinator could assist in times of conflict, with a view to maintaining a safe, healthy and meaningful relationship between a child and their parents.²³³ It further considered whether this role needed to be formalised in legislation.²³⁴

6.2 The SALRC explored in the discussion paper whether parenting coordination is a form of mediation, non-binding arbitration, or a process which runs alongside ADR as a complementary process. It concluded that it might be better described as a legal-psychological hybrid process containing elements of mediation and arbitration.

6.3 The SALRC questioned whether a court may delegate its decision-making authority (judicial authority) to a third party.²³⁵ It found that as the law stands judicial authority rests in the courts,²³⁶ and that this power may not be constrained. The High Court, as the upper guardian of all children, alone has the “judicial power or authority to make, rescind, vary and suspend any order pertaining to guardianship, care, contact and maintenance.”²³⁷

This chapter seeks to document the proposals on parenting coordination contained in the discussion paper; present a summary of the recommendations received on this aspect; and to reflect the final recommendations as found in the report. This chapter confirms that a parenting coordinator issues a binding directive in the capacity of an

²³³ SALRC Discussion Paper (2019) 274 par 10.1.10.

²³⁴ SALRC Discussion Paper (2019) 272 par 10.1.3.

²³⁵ SALRC Discussion Paper (2019) 204 par 10.2.42.

²³⁶ SALRC Discussion Paper (2019) 296 par 10.2.47.

²³⁷ SALRC Discussion Paper (2019) 296 par 10.2.50. and 10.2.53.

expert and not as an arbitrator. Therefore, the directive is not final and may be overturned by a court.

B Summary of proposals contained in the discussion paper

6.4 The SALRC submitted that although disputing parties have the right to have their dispute resolved by a court, an agreement to resolve the dispute by way of a different process, such as parental coordination should, unless the agreement is against good morals (harmful) as a tentatively constitutionally viable alternative, be supported.²³⁸ The SALRC found that in the absence of legislation regulating the appointment of parenting coordinators, they have been appointed in terms of a parenting plan or settlement agreement by the parties; by way of a court order confirming a parenting plan or settlement agreement; or by a court in the absence of an agreement.²³⁹ In effect the parenting coordinator acts as an expert who issues a binding directive in this capacity and not as an arbitrator. The directive is not final and may be overturned by a court.

6.5 The SALRC proposed that a parenting coordinator may be appointed pursuant to a parenting coordination agreement, provided that –

- “(aa) an agreed parenting plan or court order is in existence with respect to parenting arrangements, contact with a child or prescribed matters;
- (bb) the role of the parenting coordinator is expressly limited to supervising the implementation of and compliance with the parenting plan or court order;
- (cc) any decision-making powers conferred on the parenting coordinator is confined to ancillary rulings that are necessary to implement the parenting plan or court order, but do not alter the substance of the parenting plan or court order or involve a permanent change to any of the rights and obligations defined in the parenting plan or court order;
- (dd) a short-term, emerging and time-sensitive dispute or situation arises;
- (ee) all rulings or directives of the parenting coordinator are subject to judicial review on limited grounds;
- (ff) the person proposed for appointment as the parenting coordinator is suitably qualified and experienced to fulfil the role of parenting coordinator; and
- (gg) the fees charged by the proposed parenting coordinator are fair and reasonable in the light of his or her qualifications and experience, that the parents can afford to pay for the services of the parenting coordinator,

²³⁸ SALRC Discussion Paper (2019) 310 par 10.4.5 to 10.4.7.

²³⁹ SALRC Discussion Paper (2019) 309 par 10.4.

and that at least one of the parents agrees to pay for the services of the parenting coordinator.”²⁴⁰

6.6 It also proposed that a parenting coordinator may be appointed by “a court order that provides for the exercise of co-parents’ parental responsibilities and rights.”²⁴¹

6.7 The SALRC considered whether parenting coordination should be utilised in high-conflict cases only or whether this process would be more suitable to parties who were not chronically resistant to intervention. It provisionally proposed that the level of conflict should not determine access to this process and that parties should be able to agree on the appointment of a parenting coordinator.²⁴² It was further proposed that a parenting coordinator should be jointly chosen by the parties from a list of qualified parenting coordinators.²⁴³ Furthermore, where a parenting coordinator needs to be replaced for whatever reason, the replacement should be appointed by the chairperson of a dispute resolution body.²⁴⁴ Although the discussion paper touched on qualifying requirements including training and experience, it also reflected that a number of stakeholders were of the view that no one other than a court should make decisions of this nature.²⁴⁵ Consequently, no firm proposal was made in this regard. The SALRC further observed that in both instances, namely where the parties agree to the appointment of a parenting coordinator or the court orders the appointment of a parenting coordinator, the decision hinges on whether the parents are in a position to pay for these services.²⁴⁶

6.8 It was recommended that if the practice of parenting coordination was to be endorsed, the decision-making powers of the parenting coordinator should be restricted to those issues outlined in Arizona’s law, namely “a short-term, emerging, and time-sensitive situation or dispute within the scope of authority of the parenting coordinator . . . that requires an immediate decision for the welfare of the children and parties”. Furthermore, the decision taken by the parenting coordinator would then be a binding

²⁴⁰ SALRC Discussion Paper (2019) 311 par 10.4.7.

²⁴¹ SALRC Discussion Paper (2019) 320 par 10.4.38

²⁴² SALRC Discussion Paper (2019) 314 par 10.4.18.

²⁴³ SALRC Discussion Paper (2019) 315 par 10.4.19.

²⁴⁴ SALRC Discussion Paper (2019) 315 par 10.4.20.

²⁴⁵ SALRC Discussion Paper (2019) 317 par 10.4.27.

²⁴⁶ SALRC Discussion Paper (2019) 320 par 10.4.39.

temporary decision.²⁴⁷ The aim being to assist the parties with an expedient resolution of conflicts within the parameters of the court order.²⁴⁸ The SALRC held that to ensure a fair process a consultation, as opposed to a hearing, should be convened by an impartial parenting coordinator where both parties are given an opportunity to state their case and test the other party's view; and as such should be transparent.²⁴⁹ It was explained that a complementary goal of parenting coordination is to assist parents with skills to resolve disputes on their own and to provide an understanding of the deleterious effects of chronic high conflict on their children.²⁵⁰

6.9 Consequently, Chapter 7 (clauses 42 to 53) of the draft FDR Bill set out enabling clauses, requirements, powers, processes, and fees pertinent to parenting coordinators, as well as the removal of a parenting coordinator if this should be required.

C Submissions, evaluation and recommendations

6.10 The evaluation of the comment received and the Commission's recommendations will commence with general comment received on the matter from respondents followed by comment from respondents with respect to the numeric sequence of the clauses in the draft Bill contained in the discussion paper.

6.11 While the Islamic Forum Azaadville is of the view that parenting coordination should not be legislated for independently but be integrated into the processes of mediation, collaborative family practice and family arbitration,²⁵¹ the Sunni Ulama Council Gauteng is of the view that parent coordination should preferably not be legislated for at all. It argues that the additional financial burden attached to the creation of additional structures would deny access to justice to a large majority of society thereby countering a fundamental goal of the draft Bill. It submits that the process of mediation, arbitration or court procedures should include the use of specialists from the field of humanities such as a social worker, psychiatrist, religious and traditional leaders and the Office of the Family Advocate to reach a solution. The outcome of this approach would

²⁴⁷ SALRC Discussion Paper (2019) 323 par 10.4.48 and 325 par 10.4.56.

²⁴⁸ SALRC Discussion Paper (2019) 326 par 10.4.61.

²⁴⁹ SALRC Discussion Paper (2019) 331 par 10.4.76.

²⁵⁰ SALRC Discussion Paper (2019) 331 par 10.4.77.

²⁵¹ Endorsed by the Sunni Ulama council Gauteng.

be that the need for parent coordination would be met. The Sunni Ulama Council Gauteng argues that many people may feel comfortable with a religious or traditional resolution of matters as compared to a legal resolution whereas others would feel more comfortable with a legal resolution rather than a religious or traditional resolution. This choice (which includes the rights of religion and choice) must be respected to ensure the ultimate goal of a fair, just and lasting resolution. In its view, the court in its role as “judicial authority” has the right to make the final decision. It submits that legislating for parenting coordination will require additional time to finalise the matter and such time would:

- a. Allow the festering of the inherent problem(s) leading the dispute to fester further making an amicable (the prime goal rather than a coerced) resolution either more difficult or not possible.
- b. Will negatively impact on the principle of access to justice.²⁵²

6.12 Craig Schneider²⁵³ of Craig Schneider Associates, Attorneys, mediators & conveyancers expresses his concern that the approach to ADR and hence legislation in this regard is too legalistic. He believes that a different mindset and language approach is needed. However, he supports the inclusion of parenting coordinators under the nomenclature of “parenting coordination”. He suggests that Chapter 7 of the draft Bill should include an explanation of the parenting coordination process and its aim and purpose i.e. to create a space where parents are assisted in resolving conflict by being empowered, informed and enlightened; that it is a less formal process to ensure parties are heard and encouraged to resolve their own disputes. It should also include that it is to be seen as a process to hear the voice of the child directly in a less formal and adversarial manner; to assist the parties in implementing and complying with the parenting plan; to achieve the aims and objections of a healthy family and the tenets of the aims of the South African Constitution.²⁵⁴

6.13 Craig Schneider²⁵⁵ further submits that parenting coordinators should be appointed in all matters rather than only high conflict matters. He explains that if there are no subsequent disputes parties will not need to make use of a parenting coordinator. Appointing a parenting coordinator at the outset and including it in all parenting agreements or court orders, will provide parties with a safety net of knowing that they

²⁵² Sunni Ulama council Gauteng.

²⁵³ Craig Schneider Associates, Attorneys, mediators & conveyancers.

²⁵⁴ Craig Schneider Associates, Attorneys, mediators & conveyancers.

²⁵⁵ Craig Schneider Associates, Attorneys, mediators & conveyancers.

have created a safe space to resolve their own disputes in an informal, less adversarial and more direct manner. In his view, this obviates the need to go to court to appoint a parenting coordinator and also reduces the pressure on the courts in dealing with ‘minor’ parenting disputes.

6.14 In turn Dr Martalas states that one of the criticisms against parenting coordination has been that the mediation aspect of parenting coordination is not traditional mediation (with all its qualities of confidentiality and voluntary participation, etc.). She advises that a different style of mediation, called solution-focused mediation²⁵⁶ has been introduced in training in Cape Town, Australia and the Netherlands. She is of the view that, in addition to other mechanisms, such as informing the parties that the mediation aspect of parenting coordination has been concluded, applying solution focused mediation, will set mediation in parenting coordination sufficiently apart from traditional mediation to avoid confusion for the parties involved.

The SALRC is of the view that the autonomy of the parties to find solutions to conflict on day-to-day matters relating to their children should not be unnecessarily usurped. While the option of appointing a parenting coordinator is available to any parent concluding a parenting agreement or may be imposed by the court where chronic conflict affects the resolution of matters that the court need not be burdened with, the SALRC is of the view that parents should still have the choice of whether to appoint a parenting coordinator or not. It has become necessary to legislate in order for parties to make a choice to this effect and to provide a framework for the recognition of parenting coordination that courts have already given to this process²⁵⁷ The ever-growing repository of case law in which various courts have provided guidance is not uniform and has created confusion on how the process should be dealt with.²⁵⁸ Arguably the legislature is best placed to provide

²⁵⁶ For more information on solution-focused mediation, see Bannink FP, “Solution Focused Mediation” *The Jury Expert* 2008.

²⁵⁷ De Jong M “Towards a More Uniform Approach to Parenting Coordination in South Africa” PER/PELJ 2022(25) – DOI <http://dx.doi.org/10.17159/1727-3781/2022/v25i0a12776>.

²⁵⁸ In *Denver Wesley Damons v Ivana Laurielle Lee and Herschel Girls School* heard in the High Court of South Africa, Western Cape Division, Cape Town on 20 August 2024 (Case No:16939/2024) [18] Judge Parker notes that where communication relations between parties are highly volatile and fractious appointing a mediator may assist with cost effective and efficient joint decision making.

structure to a process that is aimed at necessary but the least invasive partial usurping of parental decision-making in a manner that is in the best interests of the child.²⁵⁹

Parenting coordinator

6.15 It is suggested that the reference to clause 43 should rather be clause 44.²⁶⁰ As the then numbered clause 43 contains the requirements for appointment as a parenting coordinator the SALRC believes that the reference is correct and should not be changed.

6.16 Craig Schneider suggests that the purpose of the parenting coordination should be included i.e. that the parenting coordinator may issue directives to implement the terms of the parenting plan and, or the parenting coordination services agreement.²⁶¹

The SALRC agrees that the purpose of the parenting coordinator should be included and is of the view that it is explained in clause 55 of the revised draft Bill contained in this report as it stipulates the circumstances in which a parenting coordinator may assist parties in resolving their disputes.

Requirements

6.17 Some respondents are of the view that the current draft clauses limit the parenting coordinator's scope to assist the parties in a meaningful manner.²⁶² When the court or parents eventually appoint a parenting coordinator, the parenting coordinator is tasked with matters the courts and legal practitioners were most often not able to resolve in the first place. To refer the matters back to court is not practical and clearly does not address the problem. These respondents suggest that in light of less skilled and knowledgeable magistrates and judges in these matters, considered alongside high volumes of work and turnover of staff at the family advocates offices, the competency of parenting coordinators to resolve these disputes may be addressed by establishing national accreditation board exams for parenting coordinators to qualify to work as parenting coordinators.²⁶³

²⁵⁹ De Jong M "Towards a More Uniform Approach to Parenting Coordination in South Africa" PER/PELJ 2022(25) – DOI <http://dx.doi.org/10.17159/1727-3781/2022/v25i0a12776> 10.

²⁶⁰ SAAM; Johan Venter and Lynette Roux.

²⁶¹ Craig Schneider Associates, Attorneys, mediators & conveyancers.

²⁶² SAAM; Johan Venter and Lynette Roux.

²⁶³ SAAM; Johan Venter and Lynette Roux.

6.18 Furthermore, the view is held that a requirement for a parenting coordinator should be that the person is a suitably qualified mental health professional or lawyer of not less than 5 years' experience in family dispute resolution matters with training as a mediator and 40 hours of training as parenting coordinators.²⁶⁴ With regard to clause 43(1) Dr Lynette Roux and Dr Martalas agree that specific training in parenting coordination is required due to the specificity of the role. Dr Martalas included a pro forma agreement for ease of reference. She further suggests that in addition to the parenting coordination service agreement, it would be useful to include a *pro forma* "dispute resolution clause" which provides a clear mandate for the parenting coordinator.²⁶⁵

6.19 Dr Martalas expresses her concern that the draft Bill includes arbitration training as a requirement for parental coordination. In her view parental coordinators require specialised parenting coordination training and, since limited decision-making is but one aspect of the role of parental coordination, such decision-making skills should be incorporated in parenting coordination training rather than it being a requirement for parental coordinators to undergo arbitration training. In her view, the focus in arbitration is on the decision that the arbitrator has to make, which is not the focus of parenting coordination. The focus of parenting coordination is the resolution of a dispute which dispute can be resolved in many different ways, the main vehicle being mediation rather than decision-making.²⁶⁶ One respondent points out that as family arbitration is not allowed at present, parenting coordinators would not be able to comply with clause 43(2)(c).²⁶⁷ Other respondents comment that specific accreditation standards and requirements for appointment should from a practical perspective be included in the legislation as arbitrators referred to in clause 43(2)(c) need to possess the necessary knowledge and skills to arbitrate family law disputes.²⁶⁸ Craig Schneider submits that this

²⁶⁴ Craig Schneider Associates, Attorneys, mediators & conveyancers; endorsed by Dr Ronel Duchon and Dr Lynette Roux in the stakeholder meeting of 8 June 2022.

²⁶⁵ This clause is obviously not used by everyone, and it would greatly assist the public if there was a standard clause.

²⁶⁶ My empirical research showed that the majority of disputes were resolved in the mediation phase of parenting coordination, see Martalas AM, "Alternative Dispute Resolution Post-Divorce or -Family Separation" 2018, p 339-341, available at www.pomegranate.org.za/PhD.

²⁶⁷ Sandra Ferreira, UNISA.

²⁶⁸ SAAM; Johan Venter and Lynette Roux.

sub-clause should be replaced with the following: “have received an accredited 40 hour PC course and has a minimum of five years’ experience in family disputes.”²⁶⁹

6.20 Clause 43(2)(4) of the draft Bill in the discussion paper, which prohibits serving in sequential or multiple roles, is supported.²⁷⁰ Dr Roux submits that the parenting coordinator should be prohibited from obtaining the “voice of the child” when it is required. The role of being a parenting coordinator and being an assessor to obtain the voice of the child are two different roles and conducting both is multiple roles. The view is held that the child’s ‘voice’ should be obtained by an independent mental health practitioner and fed back into the parenting coordination process.²⁷¹

6.21 A group of Cape Town stakeholders²⁷² suggest that sub-clause 43(2) to (4) of the draft Bill in the discussion paper should be reworded as follows:

- (2) The minimum requirements for a person to be appointed as a parenting coordinator include that such person must –
 - (a) be a mental-health professional, lawyer or suitably qualified person as determined by the regulations from time to time;
 - (b) who has a minimum of five years experience in working with children and families in the context of disputed residence and contact; and
 - (c) has training and experience in family mediation and be an accredited family mediator in terms of the Mediation Act, 20XX and
 - (d) Has completed a 40-hour parenting coordination training course.
- (3) The parenting coordinator is not appointed as a psychotherapist, counsellor or attorney for the child or the parents. No psychotherapist/patient or attorney/client relationship is created by this appointment or otherwise exists between the parenting coordinator and any of the parents, nor will the parenting coordinator be considered to be engaging in the unauthorised practice of law.
- (4) A person serving as a parenting coordinator with respect to a family dispute in terms of this Act may not create a professional conflict by serving in prior, sequential or multiple roles with respect to the same parties.

6.22 The Black Lawyers Association of Limpopo comments that a parenting coordinator who is not a legal practitioner must submit the parental plan or mediation agreement to a licensed legal practitioner for court signature. However, it should not be required for a licensed legal practitioner to countersign after mediation.²⁷³

²⁶⁹ Craig Schneider Associates, Attorneys, mediators & conveyancers.

²⁷⁰ Dr Lynette M.Roux.

²⁷¹ Dr Lynette M.Roux.

²⁷² Sunel Beeselaar, Esna Bruwer, Janet Bytheway, John Day, Elmarie du Plessis, Astrid Martalas, Craig Schneider and Adv Joy Wilkin.

²⁷³ Black Lawyers Association Limpopo.

The SALRC welcomes the comments received on the minimum requirements to be appointed as a parenting coordinator and has amended the clause accordingly. It is agreed that the requirement for training in arbitration is misplaced and should be removed. As this clause allows for the promulgation of regulations to further augment the understanding of suitability for appointment as a parenting coordinator, the view is held that it is unnecessary to unpack this in granular detail. Furthermore, it should be noted that the guidance for parenting coordinators concerning minimum qualifications, ethical obligations and conduct, practice and procedure, and children's participation in the process is guided by South African Guidelines on the Practice of Parenting Coordination drafted by a task team of NABFAM.²⁷⁴

When parenting coordinators may assist

6.23 Johan Venter and Lynette Roux comment that decisions around children are serious and have long reaching consequences and that wrong decisions may place children at risk. They submit that the proposed draft Bill limits parent coordinators from assisting the parties in a meaningful manner. It is surmised that the limitations have to do with concerns around the competency of parent coordinators and the suggestion is made that this concern may be addressed by establishing national accreditation board exams to accredit parent coordinators.²⁷⁵ Johan Venter and Lynette Roux emphasise that by the time a parenting coordinator is appointed the courts and legal practitioners have most often not been able to resolve matters relating to the children.²⁷⁶ For this reason, referring matters back to court does not address the problem. In their view limiting the powers of parenting coordinators simply delays the implementation of common-sense practical outcomes for the children and contributes to the spiralling legal fees of the parents. Johan Venter and Lynette Roux therefore submit that the proposals need to be geared towards challenges experienced in South Africa such as access to family courts and the Office of the Family Advocate which is compounded by high volumes of work and turnover of staff.

²⁷⁴ De Jong M "Towards a More Uniform Approach to Parenting Coordination in South Africa" PER/PELJ 2022(25) – DOI <http://dx.doi.org/10.17159/1727-3781/2022/v25i0a12776>. The SA Guidelines are available at FAMAC 2016 <http://www.famac.co.za/parenting-coordination>.

²⁷⁵ Journé Le Roux similarly submits that this position needs to be regulated to ensure professional competency and efficacy.

²⁷⁶ Endorsed by Journé Le Roux.

6.24 Journé Le Roux, a family mediator and former family advocate emphasises the importance of parenting coordinators particularly where conflict between holders of parental responsibilities and rights continues after divorce. She argues that this form of conflict could be destructive towards the children who are involved in these matters and limits the possibility of creating a warm and constructive environment of co-parenting. Several legal practitioners are usually involved in such matters, a number of court actions and/or applications would have been instituted, and the Office of the Family Advocate would have been approached to evaluate the issues at hand, however, in these instances, the conflict between the parties appears to remain uncontained and unresolved. She submits that parenting coordinators seek to regulate conflict experienced in the daily living of a family. The role of the parenting coordinator is to navigate through the conflict and generate immediate decisions regarding the best interests of the child, without unreasonable delay, and in consultation with the parties involved.

6.25 The Black Lawyers Association Limpopo however submits that the status quo on how parties reach a settlement agreement and the endorsement by the family advocate should remain. However, it argues that an exception should be made in high-conflict matters which could employ the services of a parenting coordinator. The Association reasons that putting another responsibility on the battling office of the family advocate would frustrate access to justice.

6.26 Lesley Blake Attorneys submits that it would be apposite to include a provision which allows a parenting coordinator to be appointed by the court and accordingly proposes the insertion of subclause 44(3) as follows:

A parenting coordinator may be appointed by a court upon the conclusion of a family dispute, in which case a specific parenting coordinator shall be nominated by the court and provisions for the replacement or change of the said parenting coordinator and their powers shall be made part of the order of that court.

6.27 Dr Roux confirms that in practice parenting coordinators are often appointed by court order.²⁷⁷ This may be as a result of the parties agreeing to appoint a parenting coordinator. However, often one party refuses to agree to appoint a parenting coordinator. If the court is not empowered to appoint a parenting coordinator, or fails to do so, it leaves the parent who has applied or agreed to a parenting coordinator without

²⁷⁷ Dr Lynette M. Roux.

an avenue for resolving disputes other than through the courts. Often speedy resolutions are required which parenting coordinators are able to assist with. Most of all the children are left “in limbo” with no resolution to the issues and conflict that exists in their worlds at the time. She supports an inclusion in the Bill of a clause that clearly states that courts can appoint a parenting coordinator even when it is not by agreement of the parties.²⁷⁸ The Black Lawyers Association of Limpopo suggests that a dispute resolution body, preferably the Family Advocate or FAMSA could be empowered to appoint a coordinator should the parties fail to agree on who to be appointed.

6.28 A group of Cape Town stakeholders²⁷⁹ suggest that clause 44 of the draft Bill contained in the discussion paper should be amended as follows:

When parenting coordinators may assist

44.(1) A parenting coordinator may assist parties in resolving a family dispute when a child or children is/are involved and in accordance with a parenting coordination service agreement—

- (a) if there is a parenting plan or court order in place with respect to parenting arrangements, contact with a child or other prescribed matters; and
- (b) for the purpose of implementing the parenting plan or the court order; or
- (c) if a short-term, emerging and time-sensitive situation or dispute arises; and
- (d) if the consent on which the parenting coordination service agreement of the parties is based, constitutes informed consent; or
- (e) if determined by a court.

(2) A parenting coordination service agreement may be entered into in anticipation of, or as a result of, the **[need to appoint]** appointment of a parenting coordinator.

The SALRC agrees that court appointments of parenting coordinators should be legislated for. Clause 55 of the draft Bill in the report has been updated accordingly.²⁸⁰ The SALRC however believes that there is a difference between a “parenting coordination agreement” and a “parenting coordination service agreement”. The latter of which is activated by a particular matter requiring the services of the parenting coordinator; and the former of which is prior to or as a result of the need to appoint a

²⁷⁸ Endorsed by Sandra Ferreira, UNISA.

²⁷⁹ Sunel Beeselaar, Esna Bruwer, Janet Bytheway, John Day, Elmarie du Plessis, Astrid Martalas, Craig Schneider and Adv Joy Wilkin.

²⁸⁰ Davis with reference to *TC v SC* 2018 (4) SA 530 (WCC) summarizes the lawful dual scope of a parenting coordinator as supervising the implementation of and compliance of an existing court order; and making decisions relating to ancillary rulings which are necessary to implement the court order. The later power not altering the substance of the court order or involving permanent change. The distinction is between unlimited decision-making powers, and ancillary rulings within the framework of a court-ordered parenting plan. See Davis D SC “TC v SC and the Law of Unintended Consequences: Tackling the difficulties with parenting coordination” paper delivered at Clarks Attorneys 11th Annual Johannesburg Family Law Conference 31 October 2024.

parenting coordinator. It should be noted that De Jong is of the view that the requirement that the situation or dispute to be addressed must be “short-term, emerging and time-sensitive” might be too restrictive.²⁸¹ She argues that this process may be useful to phase in contact with a child as was the case in *S v S*²⁸² Although she further argues that the requirement of informed consent by both parties to the appointment of the parenting coordinator “seems to be out of touch with practice and reality”,²⁸³ the draft Bill has been amended to provide that a court may appoint a parenting coordinator if it is in the best interest of the child.²⁸⁴

Parenting coordination service agreement

6.29 Craig Schneider suggests that a template of a parenting coordination service agreement should be included in the regulations with a view to standardising the parenting coordination industry.²⁸⁵

6.30 Some respondents suggest that the words “or later date” should be included in clause 45(2) of the draft Bill.²⁸⁶ Furthermore, as court orders appointing parenting coordinators have to date often been open ended with no termination date, provision should be made to accommodate such existing orders, at least as a transitional arrangement.²⁸⁷ In respect of subclause 45(3), it is submitted that the tenure of a parenting coordinator authority ought to begin two years after the first dispute has been

²⁸¹ De Jong M “Towards a More Uniform Approach to Parenting Coordination in South Africa” PER/PELJ 2022(25) – DOI <http://dx.doi.org/10.17159/1727-3781/2022/v25i0a12776> 10.

²⁸² *S v S (GSJ)* (unreported) case number 2019/13892 of 12 February 2020. Davis furthermore notes that carefully crafted parenting plans allow for an agreed framework within which a parenting coordinator may make decisions, thereby allowing for a change in contact arrangements which are particularly of relevance for young children. In her view these agreements may be loosely framed with broad principles or be tightly worded, with detailed provisions. See Davis D SC “TC v SC and the Law of Unintended Consequences: Tackling the difficulties with parenting coordination” paper delivered at Clarks Attorneys 11th Annual Johannesburg Family Law Conference 31 October 2024.

²⁸³ De Jong M “Towards a More Uniform Approach to Parenting Coordination in South Africa” PER/PELJ 2022(25) – DOI <http://dx.doi.org/10.17159/1727-3781/2022/v25i0a12776> 11.

²⁸⁴ Clause 55(1)(b) of the draft Bill in the report.

²⁸⁵ Craig Schneider Associates, Attorneys, mediators & conveyancers.

²⁸⁶ SAAM; Johan Venter and Lynette Roux.

²⁸⁷ SAAM; Johan Venter and Lynette Roux.

referred to the parent coordinator.²⁸⁸ The reason given is that while a parenting coordination services agreement may be signed, a dispute may only arise two or three years later.²⁸⁹

6.31 Dr Roux proposes that in respect of subclause 45(3) parties should be able to reappoint the same person as their parenting coordinator, even after the envisaged extension has expired, for a period of two years at a time. She motivates her proposal by explaining that parties may not wish to begin the whole process again which would require providing the whole history of their matter to a new parenting coordinator. This proposal is supported by SAAM; Johan Venter and Lynette Roux who recommend the inclusion of the words “at a time” after the words “two years”.

6.32 The view is held that parties may not agree to terminate the parenting coordination service agreement as provided for by subclause 45(4)(a) if it is in contravention of a court order.²⁹⁰ It is further submitted that a proviso should be included as follows:

provided that the PC facilitated the appointment of a replacement PC or the parties themselves have appointed a new PC in compliance with the necessary requirements.²⁹¹

6.33 A group of stakeholders from Cape Town²⁹² propose that the following changes should be made to clause 45 with the understanding that the regulations should include a pro forma parenting coordination service agreement. They state that it is unclear how the court should be notified of the termination of the agreement. Further, the two years should start running from the date of the first dispute meeting as a dispute may only arise a few years after the agreement is signed. Deletions are reflected in bold and square brackets and insertions are reflected by way of underlining.

²⁸⁸ Craig Schneider Associates, Attorneys, mediators & conveyancers.

²⁸⁹ Craig Schneider Associates, Attorneys, mediators & conveyancers.

²⁹⁰ Journé Le Roux, family mediator; SAAM; Johan Venter and Lynette Roux.

²⁹¹ SAAM; Johan Venter and Lynette Roux. Endorsed by Journé Le Roux, family mediator.

²⁹² Sunel Beeselaar, Esna Bruwer, Janet Bytheway, John Day, Elmarie du Plessis, Astrid Martalas, Craig Schneider and Adv Joy Wilkin.

Parenting coordination service agreement

45. (1) The parenting coordinator can only assume their duties once a parenting coordination service agreement has been signed by the parties and the PC.

(2) A parenting coordinator's authority to act terminates two years after the **[parenting coordination service agreement was signed]** first dispute meeting unless the parenting coordination service agreement or a court order specifies that the parenting coordinator's authority must terminate at an earlier date or on the occurrence of a specified earlier event.

(3) Despite subsection (2), a parenting coordination service agreement may be extended for **[no more than]** a further two years by a further parenting coordination service agreement provided the parties and the parenting coordinator agree, or a court order.

(4) Despite subsection (2), a parenting coordination service agreement may be terminated at any time—

(a) by agreement between the parties or by a court order made on application by either of the parties;

(b) by the parenting coordinator, on giving notice to the parties and, if the parenting coordinator is has been appointed in terms of an order, to the court.

The SALRC welcomes the guidance received from the stakeholders who have submitted comments. The comment received on this clause is agreed with and has been integrated into clause 55 of the draft Bill in this report.

Exclusive jurisdiction of the court

6.34 While respecting the inherent jurisdiction of the court regarding children and the right of an aggrieved party to approach a suitable court concerning a directive issued by a parenting coordinator it is submitted that the specific manner in which shared residency and contact are exercised, frequently constitutes the crux of a dispute between parties.²⁹³ Journé Le Roux²⁹⁴ argues that the value of the parenting coordinator can in such instances, among others, be found in the ability to effect immediate observations concerning the feasibility of arrangements and to adjust the same accordingly in the best interests of the child. In her view depriving the parenting coordinator of such powers, could create a delay in addressing urgent issues and be the cause of further conflict. She is further of the view that the same logic would apply regarding disputes around maintenance. She suggests that any concerns regarding the ability of the parenting coordinator to deal with maintenance could be remedied by implementing appropriate

²⁹³ Journé Le Roux, family mediator.

²⁹⁴ Journé Le Roux, family mediator.

provisions regarding competency and training.²⁹⁵ Some respondents support this reasoning as they explain that in practice, maintenance matters are often resolved in terms of section 6 of the Maintenance Act by a clerk at the court or between the parties informally and simply made an order of the court. In their view in light hereof the proposed exclusion of the maintenance calculation is neither rational nor practical.²⁹⁶ They suggest that maintenance calculations based on the pro rata calculation principle informed by factors such as lack of means and substantial changes to the party's earnings should be allowed. Furthermore, many calculations may also be necessary because existing orders may not have provided for an escalation clause or an agreement with the parties to now pay certain service providers directly etc.²⁹⁷

Assistance from parenting coordinators

6.35 Ms du Toit submits that there is a disagreement between members of a committee she represents and the Western Cape Family Law Forum regarding parent coordination.²⁹⁸ She explains that there are strong views against parent coordinators being able to issue broad directives, and there are strong supporters of parent coordinators. There is particularly a strong feeling that the parent coordinator should not be able to make binding directives other than the manner in which contact is exercised and to manage ongoing disputes between the parties. Further that parenting coordinators should not be able to amend primary care or residence of the child, deal with guardianship issues relating to a child, relocation issues or any major decisions in regard to a child on a directive basis.²⁹⁹

6.36 Dr Lynette Roux comments that a court order may empower a parenting coordinator to issue a directive for supervised contact for a limited period. She explains that the issuing of such directives is occasionally necessary. An example of this is when a parent has a well-documented history of addiction to substances and/or alcohol. In the event of a relapse, it may be in the best interests of the children for the parenting

²⁹⁵ Journé Le Roux, family mediator.

²⁹⁶ SAAM; Johan Venter and Lynette Roux.

²⁹⁷ SAAM; Johan Venter and Lynette Roux.

²⁹⁸ Zenobia du Toit, Miller du Toit Cloete Inc.

²⁹⁹ Zenobia du Toit, Miller du Toit Cloete Inc. Davis shares this view as guardianship and care fall within the exclusive jurisdiction of the court. See Davis D SC "TC v SC and the Law of Unintended Consequences: Tackling the difficulties with parenting coordination" paper delivered at Clarks Attorneys 11th Annual Johannesburg Family Law Conference 31 October 2024.

coordinator to put a supervisor in place for that parents' contact. Dr Roux's view is that although this may result in very limited contact for the children with that parent, it is preferable to no contact with that parent as long as that parent is sober at the time of contact. Without the intervention of the parenting coordinator in instances of high-conflict, the other parent may effectively use such or similar events to stop all contact with the children with that parent until the courts have dealt with the matter. In her view this is not in the children's best interests, especially considering that there are often extensive delays to getting matters finalised in court.³⁰⁰

6.37 The Black Lawyers Association Limpopo submits that the words "child daily routine" in clause 47(2)(a)(i) should be removed or rephrased. It states that the normal daily routine of a child should be left to the person who has been granted primary care and residence. The daily routine of a child has to accommodate a parent's daily routine to a certain extent. Should the coordinator decide on the child's daily routine, he or she will be deciding on the parent's daily routine and a larger scope deciding on the family's daily routine. It is suggested that clause 2(a)(i) should be phrased as follows

- (i) The implementation of the child's schedule in respect of parenting time and contact with the child.

6.38 Ms Le Roux submits that issues of mental healthcare should be included in subclause 47(2)(a)(i) to avoid uncertainty and disputes in this regard.³⁰¹ SAAM; Johan Venter and Lynette Roux agree but suggest that as disputes of this nature often arise other health care needs provided for in subclause 47(2)(a)(v) should be defined in the Act to include mental health disciplines. Ms Le Roux further submits in respect of subclause 47(2)(a)(ii) read with subclause 47(2)(b)(iii) that provision should be made, based on the relationship between the child and a parent as well as the level of security experienced by the child in this regard, to curtail, phase in, or extend contact.³⁰² In her view, the supervision or contact ought only to be implemented in exceptional circumstances, especially where unsupervised contact has been exercised in the past. Should such circumstances arise, however, it may not necessarily be logistically viable to approach a competent court on an urgent basis, possibly to the detriment of the child. Providing the parenting coordinator with powers in this regard, even if limited, maybe a

³⁰⁰ Dr Lynette M. Roux.

³⁰¹ Journé Le Roux, family mediator.

³⁰² Journé Le Roux, family mediator.

valuable measure to safeguard the best interests of the child.³⁰³ With regard to subclause 47(2)(b)(iii) SAAM; Johan Venter and Lynette Roux question its inclusion. They suggest the addition to this subclause with the following:

“unless-;

- a rights and responsibilities agreement have been made an order of the court in respect of the person or was registered with the Office of the Family Advocate;
- or a person has been specifically excluded in the parenting plan or rights and responsibilities agreement from having contact with the child;
- or an allegation is made that the proposed person may pose a danger to the child”.

6.39 They motivate for the above insertion based on the fact that they often see that parents attempt to exclude the in-law grandparents purely on emotional, or subjective reasons flowing from the breakdown of their relationship. They are of the opinion that in instances of this nature, the standard best interest of the child standard is simple to apply. They further submit that the economic position of parents and other factors are vastly different from those in North America and Canada that these professions are based on. Courts are not as efficient and both the parents as well as the courts should not waste time to address some of these aspects through the courts.³⁰⁴

6.40 SAAM; Johan Venter and Lynette Roux suggest that the word “and” should be substituted with “with the parenting coordinator or directed by” in subclause 47(2)(a)(ix). Ms Le Roux additionally suggests that reference to “guardianship” in subclause 47(2)(b)(i) should be substituted with parental responsibilities and rights as contained in the Children’s Act 38 of 2005, as it may be required of the parenting coordinator to allocate certain responsibilities associated with daily living to parties to ensure the well-being and best interests of a child.³⁰⁵

6.41 The view is also held that parental responsibilities include basic duties; e.g. transporting the children, taking the children to the doctor, assisting with homework and a host of other responsibilities. It is unclear to some respondents why in terms of subclause 47(2)(b)(ii) parenting coordinators may not deal with such matters. SAAM; Johan Venter and Lynette Roux submit that at best, the responsibilities should be divided into categories which parenting coordinators may attend to and that which they may not

³⁰³ Journé Le Roux, family mediator.

³⁰⁴ SAAM; Johan Venter and Lynette Roux.

³⁰⁵ Journé Le Roux, family mediator.

address. They further submit that the economic position of parents and other factors are vastly different from those in North America and Canada that these professions are based on. Courts are not as efficient and both the parents as well as the courts should not waste time to address some of these aspects through the courts.³⁰⁶

6.42 With regard to subclause 47(2)(b)(iv) the comment is made that it may be necessary, in the best interests of the child, the parties, and their ability to co-parent, for either or both parties to undergo psychological and or psychiatric treatment.³⁰⁷ Ms Le Roux explains that the difficulties at hand may vary but may range from anger management issues to diagnosed psychiatric conditions, which could in all probability impact on optimal parenting. She is of the view that denying the parenting coordinator such powers could place the child at risk.³⁰⁸ With regard to the same subclause SAAM; Johan Venter and Lynette Roux submit that the standard to be applied in such matters are based on attachment, and that child participation is necessary to inform the outcome and best interest of the child. In their view in cases where the reasons for less contact may have been caused by geographical challenges, work hours, etc. when the situation normalises, there is no clear reason why such matters cannot be addressed by the parenting coordinator.³⁰⁹ Regarding the prohibition against making a directive for psychological or psychiatric treatment found in subclause 47(2)(b)(vii) the submission is made that in many instances the facts are common cause between the parties in respect of their conduct, the difference is only as far as them regarding their conduct as wrong.³¹⁰ They state that prime examples hereof include anger management issues and parenting ability. For this reason, they are of the view that a parenting coordinator should be able to attend to such matters.³¹¹

6.43 SAAM; Johan Venter and Lynette Roux submit that subclause 47(2)(b)(v) detailing that directives may not be made in respect of the relocation of a child should be reworded. They explain that many relocations may be for example be forced by employment and promotion considerations, or remarriage. It may well be that the

³⁰⁶ SAAM; Johan Venter and Lynette Roux.

³⁰⁷ Journé Le Roux, family mediator.

³⁰⁸ Journé Le Roux, family mediator.

³⁰⁹ SAAM; Johan Venter and Lynette Roux.

³¹⁰ SAAM; Johan Venter and Lynette Roux

³¹¹ SAAM; Johan Venter and Lynette Roux

geographical relocation is to a neighbouring town. The suggestion is made that a definition of “child relocation” may be considered to facilitate a more practical approach and to define relocation within and outside of South Africa's borders. The comment is made that with increasing regularity parenting coordinators are requested by the parties to assist in guiding and determining the contact when one parent relocates internationally. In their view, under these circumstances, the parenting coordinator should be empowered to deal with this.³¹²

6.44 A group of stakeholders from Cape Town³¹³ submit that clause 47 should read as follows (deletions are reflected in bold and square brackets and insertions are underlined):

Assistance from parenting coordinators

47.(1) A parenting coordinator may assist the parties by—

[(a) by building consensus between the parties by—

1. **(i) giving guidelines on how a parenting plan or court order will be implemented;**
 2. **(ii) giving guidelines for communication between the parties;**
 3. **(iii) identifying and creating strategies for resolving conflicts between the parties; and**
 4. **(iv) providing information about resources available to the parties for purposes of improving communication or parenting skills;**
(v) identifying disputed issues; and
(vi) developing methods of collaboration and parenting; and]
- (a) reducing harmful conflict and in promoting the best interests of the children
- (b) educating the parties by giving information
- i. about child development;
 - ii. separation/divorce research;
 - iii. the effects of conflict and impact of parties' behavior on the children;
 - iv. about parenting skills, communication, and conflict resolution skills.
- (c) providing information about resources available to the parties for purposes of improving communication or parenting skills
- (d) assisting the parties to resolve conflict
- (e) clarifying disputed issues
- (f) by issuing directives in accordance with subsection (2) with respect to—
- (i) parenting arrangements;
 - (ii) contact with a child.
- (2) For the purposes of subsection (1)(f), a parenting coordinator, in order to implement the terms of a parenting plan, —
- (a) may issue directives in respect of—
- (i) a child's daily routine, including the child's schedule in relation to parenting time or contact with the child;
 - (ii) the education of a child, including in relation to the child's special needs;
 - (iii) the participation of a child in extracurricular activities and special events;

³¹² SAAM; Johan Venter and Lynette Roux.

³¹³ Sunel Beeselaar, Esna Bruwer, Janet Bytheway, John Day, Elmarie du Plessis, Astrid Martalas, Craig Schneider and Adv Joy Wilkin endorsed by Craig Schneider Associates, Attorneys, mediators & conveyancers.

- [(iv) the temporary care of a child by a person other than—
(aa) the child's guardian; or
(bb) a person who has contact with the child in terms of an agreement
or order;]
- (iv) the provision of routine medical, dental or other health care to a child;
 - (v~~[i]~~) the discipline of a child;
 - (vi~~[i]~~) the transport and exchange of a child for purposes of exercising parenting time or contact with the child;
 - (vii~~[i]~~) parenting time or contact with a child during holidays and special occasions; and
 - ~~[(ix)viii]~~ any other matters, other than matters referred to in paragraph (a), that are agreed on by the parties and the parenting coordinator; and
- (b) may not make directives in respect of—
- (i) a change to the guardianship of a child;
 - (ii) a change to the allocation of parental responsibilities and rights;
 - (iii) the giving of parenting time or contact with a child to a person who is not entitled to parenting time or contact with the child;
 - (iv) a substantial change to the parenting time or contact with a child;
 - (v) the relocation of a child;
 - (vi) the need for supervised visitation by either parent; or
 - (vii) the need for psychological or psychiatric treatment for either parent.
- (c) A parenting coordinator may make non-binding recommendations or proposals in respect of any issue referred to in (b)(i)-(vii) as well as:
- i. Minor financial disputes
 - ii. Variations in care and contact
 - iii. Supervised contact and level of supervision
 - iv. An issue which would be deemed to be in the best interests of the child/children.

6.45 With regard to the last point the stakeholders suggest that the recommendations set out in the Idaho rules could be used as a guideline or basis for the best interests of children.³¹⁴

After considering the comment received on this clause the SALRC has amended the clause to accommodate the guidance received from the group of stakeholders from Cape Town. It has considered the comment requesting a rewording of subclause 47(2)(b)(v) of the draft Bill of the discussion paper but is of the view that a parenting coordinator does not have the power to make directives with respect to relocation as this would be usurping the power of the court. A parenting coordinator may however assist the parents when a decision has been made regarding the relocation of a child. This is not precluded. The comment regarding reference to “guardianship” in subclause 47(2)(b)(i) has been noted and corrected to reflect “parental responsibilities and rights”. The suggested proviso to subclause 47(2)(b)(iii) is welcomed and has been included in the revised

³¹⁴ Sunel Beeselaar, Esna Bruwer, Janet Bytheway, John Day, Elmarie du Plessis, Astrid Martalas, Craig Schneider and Adv Joy Wilkin endorsed by Craig Schneider Associates, Attorneys, mediators & conveyancers.

clause 58 of the draft Bill in this report. The inclusion of a reference to mental healthcare has been considered. The SALRC is of the view that as parenting coordinators are often required to make decisions on whether a child should go for therapy or not, the words “mental health care” should be added to clause 58(2)(a)(v) as this clause speaks to general matters of health care. Finally, the rewording regarding the child’s schedule as opposed to the “child’s daily routine” has been actioned.

Directives by parenting coordinators

6.46 In respect of clause 48(1)(b) of the draft Bill contained in the discussion paper some respondents pose the question of why, if the very nature of parenting coordination work is a combination of mediation with a discretion to exercise directives, simple matters should be excluded, especially if the parties agree and then need to go to mediation to achieve the same outcome.³¹⁵ The same respondents suggest that this legislation or the Children’s Act needs to provide better guidance on what is age appropriate to comply with clause 48(1)(d). It is their view that in practice legal representatives, on arbitrary grounds, do not comply with child participation based on their own biased views that the child is not old enough in instances where children were already 5 or 6 years old.³¹⁶ They explain that when one considers that Interactional Evaluations provide a wealth of information regarding the parent’s parenting skills, and attachment, as well as the nature of the relationship between the parent and child, the “voice” or opinions of the child can be obtained from a very young age. However, the requirement of obtaining the child’s voice will also be defined by the issue at hand, for example, what high school to go to.³¹⁷ They suggest that this clause needs to be worded allowing and defining for all these scenarios.³¹⁸ A group of stakeholders from Cape Town recommend that the words “in terms of section 10 of the Children’s Act” should be added to clause 48(1)(d).³¹⁹

6.47 Ms Le Roux³²⁰ suggests that in respect of clause 48(1)(e) it may be prudent to define “minor...departures” as this may differ subjectively. It may furthermore at times, given the period of appointment as stipulated in clause 45(2), be required to effect more

³¹⁵ SAAM; Johan Venter and Lynette Roux.

³¹⁶ SAAM; Johan Venter and Lynette Roux.

³¹⁷ SAAM; Johan Venter and Lynette Roux.

³¹⁸ SAAM; Johan Venter and Lynette Roux.

³¹⁹ Sunel Beeselaar, Esna Bruwer, Janet Bytheway, John Day, Elmarie du Plessis, Astrid Martalas, Craig Schneider and Adv Joy Wilkin

³²⁰ Journé Le Roux, family mediator.

substantial adjustments, as indicated above.³²¹ Ms Le Roux confirms her view that the powers of a parenting coordinator should not relate to responsibilities and powers relating to guardianship and residency and care. However, from her vantage point the specific manner in which shared residency and contact are exercised, frequently constitutes the crux of a dispute between parties, as does maintenance. She believes that the value of the parenting coordinator, in such instances, can among others be found in the ability to effect immediate observations concerning the feasibility of arrangements and to adjust the same accordingly in the best interests of the child. Her view is that if the parenting coordinator is deprived of such powers, this would cause a delay in addressing urgent issues and be the cause of further conflict. Furthermore, any concerns regarding the ability of the parenting coordinator to deal with maintenance could be remedied by implementing appropriate provisions regarding competency and training. She reiterates that it may be required, based on the relationship between the child and a parent as well as the level of security experienced by the child in this regard, to curtail, phase in, or extend contact. Ms Le Roux states that to deny the parenting coordinator powers in this regard, may to an extent disregard the need for such a professional in the first place.³²² Ms Le Roux further acknowledges that the supervision of contact ought only to be implemented in exceptional circumstances, especially where unsupervised contact has been exercised in the past. She believes that should such circumstances arise, it may not necessarily be logistically viable to approach a competent court on an urgent basis, possibly to the detriment of the child. She suggests that providing the parenting coordinator with powers in this regard, even if limited, maybe a valuable measure to safeguard the best interests of the child.³²³ A group of stakeholders from Cape Town suggested that the words “or interim” should be added after the word “temporary”.

6.48 Some respondents are of the view that the wording of clause 48(2) of the draft Bill in the discussion paper is neither realistic nor practical as the child’s best interest may be infringed on by the parent’s work commitments etc.³²⁴ Although it is in the child’s best interest that his parents attend his practices and sports events, work circumstances

³²¹ Journé Le Roux, family mediator.

³²² Journé Le Roux, family mediator.

³²³ Journé Le Roux, family mediator.

³²⁴ SAAM; Johan Venter and Lynette Roux.

may not allow it. Working hours, the nomadic nature of employment etc. cannot be ignored either.³²⁵

6.49 The Black Lawyers Association, of Limpopo submits in respect of clause 48(5) of the draft Bill in the discussion paper that the time frame to reduce the directive to writing must be specific. It is of the view that leaving this open might lead to problems when one of the parents wants to challenge the directive. It must be considered that the objection to a directive must be filed with the court within 10 days in terms of section 49(1). A period of 3 days might therefore be reasonable.³²⁶

6.50 SAAM; Johan Venter and Lynette Roux submit that the words “if filed with the court” in clause 48(6)(b) should be defined. As it is currently worded the questions arise as to whether it refers to something similar to registering the order with the family advocate and whether it then has the same power as a court order if the parenting coordinator were appointed by the parties and not the court. The Chief Family Advocate in turn submits that all final directives issued by the parenting coordinator must be properly filed; must provide confirmation that it included child participation; must state that it is properly understood by both parties and when relevant the child; and upon request by the Office of the Family Advocate be made available after the consent of a party.³²⁷

6.51 A group of stakeholders from Cape Town suggest that an additional sub-clause (6) should be included in this clause, namely that “A parenting coordinator must make a directive available to both parties simultaneously.”³²⁸ They further recommend that the current subclause (6) should become subclause (7), without amendment.

The SALRC has considered the comment received and consequently added the words “in terms of section 10 of the Children’s Act” clause 59(1)(d) of the draft Bill, and the

³²⁵ SAAM; Johan Venter and Lynette Roux.

³²⁶ Black Lawyers Association Limpopo.

³²⁷ Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape.

³²⁸ Sunel Beeselaar, Esna Bruwer, Janet Bytheway, John Day, Elmarie du Plessis, Astrid Martalas, Craig Schneider and Adv Joy Wilkin.

words “or interim” have been added to clause 59(1)(e) as suggested. It agrees that a time frame should be applied to the writing of a directive and is of the view that a period of 24 hours after the oral directive has been issued is appropriate given the time sensitive response required in such situations. As the manner of filing with the court is best allocated to regulations, it is recommended that it not be formalised in this Bill. It however supports the guidance given by the Office of the Family Advocate that all final directives must be properly filed. This will allow for the amendment of such procedures as may become necessary. The SALRC agrees to the insertion of an additional clause to provide that a directive must be made available to both parties simultaneously.

Changing or setting aside directives

6.52 The recommendation is made that clause 49(1) of the draft Bill in the discussion paper should include “and subject to the court rules and practise directives launch an application for condonation for late submission”.³²⁹

6.53 The comment is made that clause 49(6) should read as follows; “If the court confirms a directive, it may make any order to enforce compliance with the directive.”.³³⁰ A group of stakeholders from Cape Town suggested that subclause 49(3) should have a paragraph (c) included and that it should read as follows:

; or
(c) on any other reasonable grounds for review.³³¹

The SALRC welcomes the comment received on this clause and has incorporated it into clause 60 of the draft Bill attached to this report.

Parenting coordination process

6.54 Dr Roux submits that in respect of subclause 50(c) of the draft Bill in the discussion paper consideration should be given to the fact that often in high conflict matters there is a protection order against at least one party.³³² Further that it may also be the case that while there may not be a protection order in place one party is very intimidated by the other party. Additionally, most often the parties are not able to hold

³²⁹ SAAM; Johan Venter and Lynette Roux.

³³⁰ SAAM; Johan Venter and Lynette Roux.

³³¹ Sunel Beeselaar, Esna Bruwer, Janet Bytheway, John Day, Elmarie du Plessis, Astrid Martalas, Craig Schneider and Adv Joy Wilkin

³³² Dr Lynette M. Roux.

productive, respectful, non-aggressive conversations. She is of the opinion that to expect these two people to sit in one room and, at least respectfully, sit and consider and discuss their issues, objections, etc. with regard to an aspect of co-parenting is unrealistic.³³³ Moreover, it can, and often is, abusive towards the other parent.³³⁴ Dr Roux comments that while both parties should have an opportunity to voice their opinions and to rebut the other party's allegations or views, this does not have to be done in a 'face-to-face' manner. She suggests that in an endeavour to de-escalate conflict the parenting coordinator should be empowered to decide as to whether to hold separate or joint consultations.³³⁵ She further cautions that one party may consistently or legitimately state that they are not available, often when joint consultations are requested, which delays the speedy resolution to the dispute.³³⁶ SAAM; Johan Venter and Lynette Roux submit that in practice parenting coordination consultations often happen by way of emails between the parties and not necessarily in person. They propose that the information provided at individual meetings and via email should be provided by the parenting coordinator in some form to the other parent to obtain their views in this regard. Furthermore, as parenting coordinators are often appointed in high-conflict matters, it is often more productive and reduces the animosity if consultations are held individually.³³⁷

6.55 A group of stakeholders from Cape Town suggest that clause 50(c) to (e) of the draft Bill in the discussion paper should be reworded as follows (deletions are reflected in bold and in square brackets and insertions are underlined):

- (c) an opportunity for each party to state his or her case **[in the presence of the other party]**;
- (d) an opportunity for **[each party]** the parenting coordinator to challenge or question **[the other]** a party's statements or views and ask for proof or supporting information; and
- (e) a transparent process; and
- (f) the opportunity of the PC to obtain information from collateral sources and third parties.³³⁸

³³³ Dr Lynette M. Roux.

³³⁴ Dr Lynette M. Roux.

³³⁵ Dr Lynette M. Roux; endorsed by Journé Le Roux, family mediator; SAAM; Johan Venter and Lynette Roux.

³³⁶ Dr Lynette M. Roux.

³³⁷ SAAM; Johan Venter and Lynette Roux.

³³⁸ Sunel Beeselaar, Esna Bruwer, Janet Bytheway, John Day, Elmarie du Plessis, Astrid Martalas, Craig Schneider and Adv Joy Wilkin

6.56 Craig Schneider submits that provision should be made for the inclusion of consultation with collaterals and third parties must be included in clause 50 as this is imperative to assist the parenting coordinator to implement the terms of the agreement, by making directives or recommendations.³³⁹

6.57 A number of respondents point out that clause 50(e) contains a grammatical error in that the word “the” should be deleted.³⁴⁰

The SALRC supports the inclusion of the proposed amendments and has given effect thereto in clause 61 of the draft Bill in this report.

Information sharing for parenting coordination

6.58 Journé Le Roux submits that although complete confidentiality would be improper, it may be required in certain extreme instances, such as in the case of allegations of abuse, to delay open communication until such allegations have been investigated to some extent.³⁴¹ SAAM; Johan Venter and Lynette Roux support this view particularly where it relates to the safety of the children. They submit that such information may require further investigation before the other parent is alerted; e.g. allegations of sexual abuse. Often children voice issues about one parent either directly or through the other parent. In their experience, this needs to be investigated before the other parent is informed as often the accused parent “retaliates”, or tries to influence the child. In their view, this is not in the child’s best interests as they recant, or change their version for fear of the threats made or the manipulation they have been subjected to.³⁴²

6.59 The group of stakeholders from Cape Town suggested that clause 51(2) should be substituted as follows (deletions are reflected in bold and in square brackets and insertions with underlining):

³³⁹ Craig Schneider Associates, Attorneys, mediators & conveyancers.

³⁴⁰ Sandra Ferreira, UNISA; SAAM; Johan Venter and Lynette Roux.

³⁴¹ Journé Le Roux, family mediator.

³⁴² SAAM; Johan Venter and Lynette Roux.

(2) **[No communication between the parties and the parenting coordinator may be confidential.]** No information may be taken into consideration by the parenting coordinator unless made available to both parties.³⁴³

The SALRC is of the view that the addition to this clause clarifies the position and that it would be advisable to retain the proposed deleted part of this clause. It is reflected as such in the revised clause 62(2) of the draft Bill. . .

Removal of parenting coordinator

6.61 The Black Lawyers Association, Limpopo notes that clause 52 of the draft Bill in the discussion paper is silent on what should happen if one of the parties does not approve of a parenting co-ordinator for whatever reason. The suggestion is made that the aggrieved party should be able to approach the court for the removal of such a coordinator.

6.62 With regard to clause 52(1) it is questioned whether it is inferred that parenting coordination directives issued after appointment by the parties without a court order carry the same weight as court ordered appointments. Specific reference is made to clause 48(6) which seeks to regulate the binding nature of directives.³⁴⁴

6.63 The group of stakeholders from Cape Town suggest that clause 52(2) should be amended as follows (deletions are reflected in bold and square brackets and insertions with underlining):

(2) If the appointment of the parenting coordinator was made by the court with or without the consent of the parties, the court may remove the parenting coordinator **[at the request and with the consent of both parties.]** on application of one party and on good cause.³⁴⁵

The SALRC supports the rewording of this clause and has given effect thereto in clause 63 of the draft Bill attached to this report.

³⁴³ Sunel Beeselaar, Esna Bruwer, Janet Bytheway, John Day, Elmarie du Plessis, Astrid Martalas, Craig Schneider and Adv Joy Wilkin.

³⁴⁴ SAAM; Johan Venter and Lynette Roux.

³⁴⁵ Sunel Beeselaar, Esna Bruwer, Janet Bytheway, John Day, Elmarie du Plessis, Astrid Martalas, Craig Schneider and Adv Joy Wilkin.

Fees

6.64 SAAM; Johan Venter and Lynette Roux propose that the punctuation and capitalisation of the word “Provided” after the words “child support guidelines” in clause 53(3) should be revisited. They further request clarity on the meaning of this subclause, i.e. whether means that the court must make an order of the fees between the parties upon a finding of good cause set out in the parenting coordinator's report or can the parenting coordinator do so himself.³⁴⁶

6.65 The group of stakeholders from Cape Town propose the following changes:

Add subclause 53(2) “The state may not assume any financial responsibility for payment of fees to the parenting coordinator, except that, in cases of hardship, the court may appoint, if it is feasible, a parenting coordinator to serve on a voluntary or a reduced fee basis.”³⁴⁷

Add subclause 53(3) “The fees of the parenting coordinator must be shared between the parties proportionally and in accordance with **[child support guidelines] their means,** provided that the court may allocate the fees between the parties differently upon a finding **[of good cause]** by the court **[or on good cause set out in the parenting coordinator's report.]**³⁴⁸

They further suggest the insertion of a subclause (4) as follows: The fees of the PC may also be allocated in a different proportion in accordance with the provisions of the parenting coordination service agreement.³⁴⁹

6.66 Craig Schneider suggests that an additional subclause should be added to provide that the parenting coordinator has the discretion to direct a party to pay more than their pro-rata share.³⁵⁰

³⁴⁶ SAAM; Johan Venter and Lynette Roux.

³⁴⁷ Sunel Beeselaar, Esna Bruwer, Janet Bytheway, John Day, Elmarie du Plessis, Astrid Martalas, Craig Schneider and Adv Joy Wilkin.

³⁴⁸ Sunel Beeselaar, Esna Bruwer, Janet Bytheway, John Day, Elmarie du Plessis, Astrid Martalas, Craig Schneider and Adv Joy Wilkin.

³⁴⁹ Sunel Beeselaar, Esna Bruwer, Janet Bytheway, John Day, Elmarie du Plessis, Astrid Martalas, Craig Schneider and Adv Joy Wilkin.

³⁵⁰ Craig Schneider Associates, Attorneys, mediators & conveyancers.

6.67 The Chief Family Advocate submits that parties should understand that if they agree on parenting coordination, as part of a court order, in order to prevent “forum shopping” the parties must be aware that parenting coordination will be to the exclusion of other ADR avenues provided by state-funded organs such as the Office of the Family Advocate and the Department of Social Development unless a final directive is given by the parenting coordinator and a parent wants it to be interrogated by the Office of the Family Advocate or the Department of Social Development. This must be explained to the parties.³⁵¹

The SALRC has considered the comment received on this clause and where appropriate re-worded this clause to provide clarity. It has also added that a proportional allocation of fees may be allocated. The revised clause is found in clause 64 of the draft Bill in this report.

D Recommendations

6.68 The SALRC recommends the enactment of the following clauses to give effect to parenting coordination:

| CHAPTER 7 | |
|-------------------------------|---|
| PARENTING COORDINATION | |
| Parenting coordinator | |
| 53. | A person meeting the requirements set out in section 54 who assists parents in resolving family law disputes pursuant to section 55 may act as a parenting coordinator. |
| Requirements | |
| 54.(1) | The requirements for appointment as a parenting coordinator must be prescribed by regulation. |
| (2) | The minimum requirements for a person to be appointed as a parenting |

³⁵¹ Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for RSA: International Child Abduction, Department of Justice and Constitutional Development; Office of the Family Advocate Western Cape.

coordinator include that such person must —

- (a) be a mental-health care professional or legal practitioner or suitably qualified person as determined by the regulations from time to time;
- (b) who has a minimum of five years' experience in working with children and families in the context of disputed residence and contact; and
- (c) has training and experience in family mediation and be a certified mediator; and
- (d) Has completed a parenting coordination training course.

(3) The parenting coordinator is not appointed as a psychotherapist, counsellor or attorney for the child or the parents. No psychotherapist- patient, or attorney- client relationship is created by this appointment or otherwise exists between the parenting coordinator and any of the parents, nor will the parenting coordinator be considered to be engaging in the unauthorised practice of law.

(4) A person serving as a parenting coordinator with respect to a family dispute in terms of this Act may not create a professional conflict by serving in sequential or multiple roles with respect to the same parties.

When parenting coordinators may assist

55.(1) A parenting coordinator may assist parties in resolving a family dispute where a child is involved

- (a) in accordance with a parenting coordination agreement based on informed consent and where it is in the best interests of the child; or
 - (b) in terms of a court order on a finding that there is conflict between the parties and that the appointment of a parenting coordinator is in the best interests of the child; and
 - (c) if there is a parenting plan, a settlement agreement or court order in place with respect to parenting arrangements, contact with a child or other prescribed matters for the purpose of implementing the parenting plan, settlement agreement or the court order; or
 - (d) if a short-term, emerging and time-sensitive situation or dispute arises or there is a need to phase in contact and care.
- (2) A parenting coordination agreement may be entered into in anticipation of, or as a result of, the need to appoint a parenting coordinator.
- (3) If a parenting coordinator is appointed upon agreement between the parties, and the parties cannot agree on a specific parenting coordinator, an organisation recognised in terms of section 16(1) or the Office of the Family Advocate will be empowered to appoint a parenting coordinator for the parties.
- (4) If a parenting coordinator is appointed in terms of a court order, a specific parenting coordinator must be nominated by the court and provisions for the replacement or change of the said parenting coordinator and their powers must be made part of the court order.

Parenting coordination service agreement

56.(1) The parenting coordinator can only assume their duties once a parenting coordination service agreement has been signed.

(2) The parenting coordination service agreement must detail specific issues not contained in the agreement between the parties to appoint a parenting coordinator or the court order making provision for the appointment of a parenting coordinator, including

- (a) the procedures to be followed;
- (b) the fees of the parenting coordinator;
- (c) billing practices to be followed;
- (d) services to be provided; and
- (e) that professional peer consultation by the parenting coordinator will be permitted.

(3) A parenting coordinator's authority to act terminates two years after the first dispute meeting, unless the parenting coordination service agreement or a court order specifies that the parenting coordinator's authority must terminate at an earlier or later date or on the occurrence of a specified earlier event.

(4) Despite subsection (3), a parenting coordination service agreement may be extended for a further two years at a time by a further parenting coordination service agreement provided the parties and the parenting coordinator agree, or a court order.

(5) Despite subsection (3), a parenting coordination service agreement may be terminated at any time by—

- (a) agreement between the parties or by a court order made on application by either of the parties;
- (b) the parenting coordinator, on giving notice to the parties and, if the parenting coordinator has been appointed in terms of an order, to the court; provided that the parenting coordinator facilitated the appointment of a replacement parenting coordinator or the parties themselves have appointed a new parenting coordinator in compliance with the relevant requirements.

Exclusive jurisdiction of the court

57. The appointment of a parenting coordinator does not divest the court of its exclusive jurisdiction to determine fundamental issues of guardianship, care, contact and maintenance, and the authority to exercise management and control of the case.

Assistance from parenting coordinators

58.(1) A parenting coordinator may assist the parties by—

- (a) reducing harmful conflict and in promoting the best interests of the children;
- (b) educating the parties by giving information about
 - (i) child development;
 - (ii) separation or divorce research;
 - (iii) the effects of conflict and impact of parties' behaviour on the children;
 - (iv) parenting skills, communication, and conflict resolution skills;
- (c) providing information about resources available to the parties for purposes of improving communication or parenting skills;
- (d) assisting the parties to resolve conflict;
- (e) clarifying disputed issues;
- (f) by issuing directives in accordance with subsection (2) with respect to —
 - (i) parenting arrangements;
 - (ii) contact with a child.

(2) For the purposes of subsection (1)(f), a parenting coordinator, in order to implement the terms of a parenting plan, settlement agreement or court order—

- (a) may issue directives in respect of—
 - (i) The implementation of a child's schedule in respect of parenting time and contact with the child;
 - (ii) the education of a child, including in relation to the child's special needs;
 - (iii) the participation of a child in extracurricular activities and special events;
 - (iv) the temporary care of a child by a person other than -
 - (aa) the child's guardian; or

- (bb) a person who has contact with the child in terms of an agreement or order of court;
 - (v) the provision of routine medical, dental, mental health, or other health care to a child;
 - (vi) the discipline of a child;
 - (vii) the transport and exchange of a child for purposes of exercising parenting time or contact with the child;
 - (viii) parenting time or contact with a child during holidays and on special occasions; and
 - (ix) any other matters, other than matters referred to in paragraph (b), that are agreed on by the parties with the parenting coordinator or directed by the parenting coordinator; and
- (b) may not make directives in respect of—
- (i) a change to the guardianship of a child;
 - (ii) a change to the allocation of parental responsibilities and rights;
 - (iii) the giving of parenting time or contact with a child to a person who is not entitled to parenting time or contact with the child, unless-;
 - (aa) a rights and responsibilities agreement have been made an order of the court in respect of the person or was registered with the Office of the Family Advocate;
 - (bb) or a person have been specifically excluded in the parenting plan or rights and responsibilities agreement from having contact with the child;
 - (cc) or an allegation is made that the proposed person may pose a danger to the child;
 - (i) a substantial change to the parenting time or contact with a child;
 - (ii) the relocation of a child;
 - (iii) the need for supervised visitation by either parent; or
 - (iv) the need for psychological or psychiatric treatment for either parent.
- (c) A parenting coordinator may make non-binding recommendations or proposals in respect of any issue referred to in (b)(i)-(vii) as well as:

- (i) Minor financial disputes;
- (ii) Variations in care and contact;
- (iii) Supervised contact and level of supervision;
- (iv) Any issue which would be deemed to be in the best interests of the child.

Directives by parenting coordinators

59. (1)A parenting coordinator—

(a) may issue directives with respect to matters referred to in section 58 only, subject to any limitation or conditions set out in the regulations;

(b) may not issue a directive in respect of any matter excluded by the parenting coordination agreement or court order, even if the matter is included in section 58;

(c) may not issue a directive that would affect the division or possession of property, or the apportionment of debts;

(d) must consider the child's views as ascertained by an independent and suitably qualified child expert if the child has reached such an age and level of maturity and development as to be able to participate in terms of section 10 of the Children's Act; and

(e) may not modify the parenting plan or court order other than minor, temporary or interim departures from the parenting plan or court order.

(2) In issuing a directive with respect to parenting arrangements or contact with a child, a parenting coordinator must consider the best interests of the child only, as set out in section 7 of the Children's Act.

(3) A parenting coordinator may issue a directive at any time.

(4) A parenting coordinator must provide reasons in writing for the directive.

(5) A parenting coordinator may issue an oral directive, but must reduce the directive to writing and sign it as soon as practicable, but not later than 24 hours, after the oral directive was issued.

(6) A parenting coordinator must make a directive available to both parties simultaneously.

(7) Subject to section 60, a directive issued in accordance with the provisions of this Chapter—

(a) is binding on the parties, effective from the date the directive is issued or from such later date as may be specified by the parenting coordinator, and

(b) if filed with the court as prescribed, is enforceable under this Act as if it were an order of the court.

Changing or setting aside directives

60.(1) Any party to a directive issued by a parenting coordinator may, within 10 days after the parenting coordinator issued the directive or within such other period of time as the court may direct, file with the court, and serve on the parenting coordinator and all other parties, an objection to the parenting coordinator's directive and subject to the court rules and practise directives launch an application for condonation for late submission.

(2) Responses to the objections must be filed with the court and served on the parenting coordinator and all other parties within 10 days after the objection was served.

(3) The court must review any objections to the directive and any responses submitted to the objections to the directive and, after so reviewing the objections and responses, may amend or set aside the directive, if it is satisfied that the parenting coordinator—

- (a) acted outside of the ambit of their powers, or
- (b) committed an error of law or of an error of both law and fact; or
- (c) on any other reasonable grounds for review.

(4) The directive of the parenting coordinator must remain in effect until the court gives an order.

(5) If the court sets aside a directive, it may make any order to resolve a dispute between the parties in relation to the subject matter of the directive.

(6) If the court confirms a directive, it may issue any order to enforce compliance with the directive.

Parenting coordination process and procedure

61. The prescribed parenting co-ordination process and procedures, must include the following:

- (a) An impartial parenting coordinator;
- (b) meetings between the parenting coordinator and the parties, which need not follow any specific procedure and may be informal;
- (c) an opportunity for each party to state their case;
- (d) an opportunity for the parenting coordinator to challenge or question a party's statements or views and ask for proof or supporting information; and
- (e) a transparent process and

- (f) the opportunity for the parenting coordinator to obtain information from collateral sources and third parties.

Information sharing in parenting coordination

62.(1) A party must, for purposes of facilitating parenting coordination, provide the parenting coordinator with—

- (a) such relevant information as the parenting coordinator may request in accordance with section 5, and
 - (b) authorisation to request and receive information in respect of a child or a party from a person who is not a party.
- (2) Communication between the parties and the parenting coordinator may not be confidential. No information may be taken into consideration by the parenting coordinator unless made available to both parties.

Removal of parenting coordinator

63.(1) Where the appointment of the parenting coordinator was made in accordance with an agreement to appoint a parenting coordinator which has not been made an order of court, the parties may agree to remove the parenting coordinator.

(2) Where the appointment of the parenting coordinator was made by the court with or without the consent of the parties, the court may remove the parenting coordinator on application by either of the parties and on good cause.

Fees

64.(1) No parenting coordinator may be appointed unless the court is satisfied that the parties have the means to pay the fees of the parenting coordinator.

(2) The state is barred from assuming any financial responsibility for payment of fees to the parenting coordinator, except that, in cases of hardship, the court may appoint, if it is feasible, a parenting coordinator to serve on a voluntary or a reduced fee basis.

(3) The fees of the parenting coordinator must be shared between the parties proportionally in accordance with their means, provided that the court may allocate the fees between the parties differently.

(4) The fees of the parenting coordinator may also be allocated in a different proportion in accordance with the provisions of the parenting coordination service agreement.

6.69 As no comment was received on Chapter 8 regarding the general provisions, the provisions have not been amended other than to reflect the revised numbering. The provisions and schedule to the Bill provide as follows:

**CHAPTER 8
GENERAL PROVISIONS**

Regulations

65.(1) The Minister may make any regulations necessary for the proper implementation and administration of this Act.

(2) Before making any regulations, the Minister must consult such organisations recognised in terms of section 16 and any other persons deemed appropriate.

Amendment of laws

66. The laws referred to in the first and second columns of the Schedule to this Act are amended to the extent indicated in the third column of the Schedule.

Short title and commencement

67. This Act is called the Family Dispute Resolution Act, 20xx, and comes into operation on a date fixed by the President by proclamation in the Gazette.

SCHEDULE

**LAWS AMENDED BY SECTION
66**

| No. and year | Short title | Extent of repeal or amendment |
|----------------|-----------------|--|
| Act 42 of 1965 | Arbitration Act | <p>The following section is hereby substituted for section 2 of the Act:</p> <p><u>Matters not subject to arbitration</u></p> <p><u>2. (1) Arbitration is not permissible in terms of this Act in respect of any family dispute affecting the rights or interests of a child, or any matter incidental to any such dispute.</u></p> <p><u>(2) Any dispute which the parties have agreed to submit to arbitration under an</u></p> |

| | | | |
|--|------------------------------|--|---|
| | | | <p><u>arbitration agreement and which relates to a matter the parties are entitled to dispose of by agreement may be determined by arbitration unless—</u></p> <p><u>(a) such a dispute is not capable of determination by arbitration under any other law of the Republic; or</u></p> <p><u>(b) the arbitration agreement is contrary to public policy of the Republic.</u></p> <p><u>Arbitration may not be excluded solely on the ground that an enactment confers jurisdiction on a court or other tribunal to determine a matter falling within the terms of an arbitration agreement.</u></p> <p><u>For the purposes of this section—</u> <u>“family law dispute” means a dispute, or alleged dispute, in which one party maintains a particular point of view or claim or contention regarding the parties’ respective responsibilities, interests and rights towards, or with respect to, any member of the family to which both parties belong, and the other party maintains a contrary or different view.</u></p> |
| | <p><u>Act 24 of 1987</u></p> | <p><u>Mediation in Certain Divorce Matters</u></p> | <p>The following new subsection (c) must be inserted in section 4(1) and 4(2):</p> <p>(c) after the referral of a family law dispute, which deals with the care or guardianship of, or contact with, a child, to arbitration in terms of relevant legislation;</p> <p>Note: the intention is to make section 4(1) and (2) of the Mediation in Certain Divorce Matter Act applicable to a family law arbitration which deals with the care or guardianship of, or contact with, a child.</p> |

| | | | |
|--|----------------|--------------|---|
| | Act 68 of 1969 | Prescription | <p>The following heading is hereby substituted for section 13 of the Act</p> <p><u>13. Suspension of prescription in certain circumstances</u></p> <p>The following sub-section is hereby substituted for section 13(1) of the Act</p> <p>(1) <u>[If]</u> <u>The period of prescription shall be suspended if—</u></p> <p>(a) the creditor is a minor or is <u>[insane]</u> <u>a person with a mental or intellectual disability, disorder or incapacity</u> or is a person under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15(1); or</p> <p>(b) the debtor is outside the Republic; or</p> <p>(c) the creditor and debtor are married to each other; or</p> <p>(d) the creditor and debtor are partners and the debt is a debt which arose out of the partnership relationship; or</p> <p>(e) the creditor is a juristic person and the debtor is a member of the governing body of such juristic person; or</p> <p><u>(f) the debt is the object of a dispute</u></p> |
|--|----------------|--------------|---|

| | | | |
|--|--|--|--|
| | | | <u>[subjected] referred to an Ombud with jurisdiction or arbitration or mediation or other process providing for the alternative resolution of a dispute other than negotiation; or</u> |
|--|--|--|--|

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Rules Regulating the Conduct of Proceedings of the Magistrates’ Courts of South Africa Government Notice No R. 183 of 18 March 2014

Rules for Short Process Courts and Mediation Proceedings 1992 Government Notice R. 2196 of 31 July 1992

Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991 Superior Courts Act 10 of 2013

LIST OF CASES

BMGS v MSB and others High Court of South Africa, Gauteng Division, Pretoria Case No:26675/2022, judgment delivered on 8 January 2024 (unreported)

Centre for Child Law v T S and Others [2023] ZACC 22

Churchill v Merthyr Tydfil County Borough Council Appeal No: CA-2022-001778 dated 29 November 2023 Judiciary of England and Wales

Denver Wesley Damons v Ivana Laurielle Lee and Herschel Girls School heard in the High Court of South Africa, Western Cape Division, Cape Town on 20 August 2024 (Case No:16939/2024)

SDL v SJ before the High Court of South Africa Gauteng Division, Johannesburg dated 2 August 2024

Van Jaarsveld v Van Jaarsveld and Another (258/2023)[2024] ZASCA 92 (11 June 2024)

INTERNATIONAL DOCUMENTS, CONVENTIONS AND TREATIES

The United Nations Convention on the Rights of the Child (1989)

European Convention on Human Rights (ECHR) (formally the Convention for the Protection of Human Rights and Fundamental Freedoms); date of entry into force on 3 September 1953

European Mediation Directive issued by the European Parliament and the Council of Europe on 21 May 2008

Universal Declaration of Human Rights proclaimed by the United Nations General Assembly on 10 December 1948

African Charter on Human and Peoples' Rights (also known as the "Banjul Charter") adopted by the OAU in Assembly in June 1981

International Covenant on Civil and Political Rights adopted by the United Nations General Assembly on 16 December 1966 and in force from 23 March 1976

American Convention on Human Rights (also known as the "Pact of San Jose"), date of entry into force on 18 July 1978, adopted by the United Nations General Assembly on 19 December 1966 and entered in force on 23 March 1976

ANNEXURE A: LIST OF RESPONDENTS

LIST OF RESPONDENTS TO ISSUE PAPER 31

1. Association of Parental Rights and Responsibilities Assessment Advisory Group (ASPARAGUS)
2. Barratt, Prof. Amanda – University of Cape Town
3. Boezaart, Prof. CJ – University of Pretoria
4. Boniface, Prof. Amanda – University of Johannesburg
5. Botha, Ms Karen – attorney, Benita Ardenbaum Attorneys
6. Child Welfare South Africa (Ms Julie Todd, National Head of Advocacy)
7. Commission for Gender Equality
8. Department of Justice and Constitutional Development (Mr Lawrence Bassett: Deputy Chief State Law Adviser)
9. Department of Social Development (Directorate: Families, Children’s Act and Comprehensive Social Security)
10. Department of Social Development, Gauteng Province
11. Durr-Fitschen, Dr Elzabe (1) – clinical social worker in private practice
12. Durr-Fitschen, Dr Elzabe (2) – clinical social worker in private practice
13. Durr-Fitschen, Dr Elzabe (3) – clinical social worker in private practice
14. Family Mediators’ Association of the Cape (FAMAC)
15. Familyzone (Dr Ronel Duchon & Ms Irma Schutte)
16. Gauteng Services to People with Disabilities (SPD)
17. Leppan, Ms Danilia – presiding officer, Children’s Court, Wynberg
18. Martalas, Dr Astrid – psychologist
19. Mendelow, Mr Charles – attorney and mediator, Charles Mendelow & Associates Inc.
20. Ministry for Social Development, Western Cape
21. Nicholson, Prof. Caroline – University of the Free State
22. O’Leary, Mr John – attorney and mediator
23. Office of the Family Advocate
24. Paleker, Prof. Mohamed – University of Cape Town
25. Pro-Bono.Org – NGO
26. Roux, Dr Lynette – clinical psychologist
27. Rubain, Ms Suzette & Horn, Ms Johanna – attorney, Athlone Justice Centre, and clinical psychologist, respectively

28. Schneider, Mr Craig – attorney and mediator, Craig Schneider Associates
29. Scrazzolo, Ms Louise (1) – interested party
30. Scrazzolo, Ms Louise (2) – parent litigator
31. Task Force on the Practice of Parenting Coordination in South Africa
32. Tawonezvi, Ms Pasca – interested party
33. Terezakis, Mr Harry - parent litigator
34. The Cape Law Society (Ms Zenobia du Toit)
35. The Cape Law Society (Ms Sandra van Staden)
36. The Cape Law Society (Mr Craig Schneider)
37. The Justice and Reconciliation Centre (Mr Errol Goetsch)
38. The Law Society of South Africa (LSSA)
39. Wessel, Ms Jakkie – Regional Court President: Limpopo Regional Division
40. Wessels, Ms Marion – interested party
41. Women’s Legal Centre

LIST OF RESPONDENTS TO DISCUSSION PAPER 148

1. Dr Karen J Spurrier, Dr Karen Spurrier Counselling & Mediation Practice;
2. Zenobia du Toit, Miller du Toit Cloete Inc.;
3. Dr Razia Nordien-Lagardien, Nelson Mandela University;
4. Legal Practice Council, Kwa-Zulu Natal;
5. Commission for Gender Equality;
6. Dr Lynette M. Roux, Clinical Psychologist
7. Johan Venter & Lynette Roux;
8. Dr Suzette Moss, Social Work Policy Manager: Families, Department of Social Development;
9. Pat Mkhize, Mandulo Foundation;
10. Dr Astrid Martalas, Psychologist;
11. Office of the Family Advocate, Western Cape;
12. Craig Schneider, Craig Schneider Associates;
13. Cape Town stakeholder joint submission (Sunel Beeselaar; Esna Bruwer; Janet Bytheway; John Day; Elmarie du Plessis; Astrid Martalas; Craig Schneider; Adv Joy Wilkin);
14. Journé Le Roux, family mediator;
15. Black Lawyers Association, Limpopo;
16. Legal Aid South Africa;

17. Wimpie Bartheil, The Fathers Rights Movement;
18. Adell-Mari Wolmarans, South African Association of Mediators (SAAM);
19. Adv Petunia Seabi-Mathope, Chief Family Advocate & Central Authority for the R.S.A.: International Child Abduction, DoJ&CD;
20. Lourens Grové, Faculty of Law, University of Pretoria Law Clinic;
21. Lesley Blake Attorneys;
22. Laurie Greyvenstein, Social Justice Foundation;
23. Dr George Fordam Wara Post-doctoral fellow, University of the Free State, Free State Centre for Human Rights;
24. Sandra Ferreira, UNISA;
25. Natalie Ruiters, La Poppie Mediations;
26. Islamic Forum Azaadville;
27. Adv Kushmiri Garach, Family Counsellor, Office of the Family Advocate: Durban-KwaZulu-Natal;
28. Sunni Ulama Council Gauteng.

ANNEXURE B: WORKSHOPS

In-person workshops, facilitated by the Secretariat of the Commission and the Advisory Committee of experts, were conducted on the Family Dispute Resolution Bill in Cape Town (18 February 2020), Port Elizabeth (20 February 2020), Nkandla (25 February 2020) and Durban (26 February 2020); Polokwane/Ga-Molepo (5 March 2020) and Phokeng/Rustenburg (6 March 2020).

**WORKSHOP (ALL STAKEHOLDERS)
VIRTUAL STAKEHOLDER CONSULTATION
1 JUNE 2022: MS TEAMS**

| | NAME | ORGANISATION/ DESIGNATION |
|----|--------------------------------------|---|
| | Advisory Committee of experts | SA Law Reform Commission |
| 1 | Professor W Domingo | Project Leader and Commissioner |
| 2 | Professor L de Jong | Advisory Committee member |
| 3 | Professor M Paleker | Advisory Committee member |
| 4 | Ms Dellene Clark (Adv) | Researcher SALRC Secretariat |
| | Delegates | |
| 1 | Professor Mildred Bekink | UNISA, Department of Mercantile Law, College of Law |
| 2 | Ms Shamain Dadabhai | Conflict Dynamics |
| 3 | Ms Talita Filmer | Department of Social Development Social Worker & SAAM Member |
| 4 | Ms Leago Hlabane | Office of the Family Advocate, Mpumalanga Province |
| 5 | Ms Teresa Horne | Senior Magistrate, SAJEI Judicial Educator, Office of the Chief Justice |
| 6 | Dr Claribel Lancaster | Tshwane University of Technology, Faculty Humanities, Department of Law |
| 7 | Ms Bev Loubser | Bev Loubser Attorneys |
| 8 | Ms Nalini Maharaj | Nadel |
| 9 | Ms Pat Moodley | Regional Head, Court Services KZN, DoJ&CD |
| 10 | Mr Emmanuel Nemataheni | Manager, Court Services, DoJ&CD |
| 11 | Ms Emily Nkinana | Senior Legal Admin Officer: Eastern Cape Department of Justice and Constitutional Development |
| 12 | Mr Bismarck Olivier | Bouwer and Olivier Attorneys |

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|----|---------------------------|---|
| 13 | Advocate Veerash Srikison | Fairpractice |
| 14 | Mr George Wara | University of the Free State |
| 15 | Mr Andrew Witbooi | Director Legal Administration and Advocacy: Eastern Cape Department of Justice and Constitutional Development |
| 16 | Dr Monique Woodborne | SAAM |

WORKSHOP (ALL STAKEHOLDERS)
VIRTUAL STAKEHOLDER CONSULTATION
8 JUNE 2022: MS TEAMS

| | NAME | ORGANISATION/ DESIGNATION |
|----|--|---|
| | Advisory Committee of experts | SA Law Reform Commission |
| 1 | Professor W Domingo | Project Leader and Commissioner |
| 2 | Professor L de Jong | Advisory Committee member |
| 3 | Professor M Paleker | Advisory Committee member |
| 4 | Ms K Ozah | Advisory Committee member |
| 5 | Ms Dellene Clark (Adv) | Secretariat |
| | Delegates | |
| 1 | Ms Alet Beyl | UJ Law Clinic |
| 2 | Ms Lesley Blake | Blake Attorneys |
| 3 | Dr Ingrid Dennill | |
| 4 | Dr Ronel Duchon | Counselling Psychologist |
| 5 | Ms Alta Du Toit | Mediation Network Foundation NPO |
| 6 | Ms Zenobia du Toit | Miller du Toit Inc |
| 7 | Ms Sandra Ferreira | UNISA |
| 8 | Mr Barry Greyvenstein | Mediation Academy South Africa (Pty) Ltd |
| 9 | Mr Laurie Greyvenstein | Social Justice Foundation NPO |
| 10 | Advocate Tshilidzi Knowles Khangala | Tshwane University of Technology |
| 11 | Dr Izette Knoetze-le Roux | Legal-Aid SA |
| 12 | Professor Hanneretha Kruger | UNISA, Department of Private Law |
| 13 | Ms Gillian Lowndes | Lowndes Dlamini Inc. |
| 14 | Ms Magwayi Mabena | Court Annexed Mediator |
| 15 | Ms M Masekoameng | Office of the Chief Justice |
| 16 | Ms Pulane Mthembu | Social Worker, Delani Professional Consultancy |
| 17 | Dr Shaheda Omar | Teddy Bear Clinic |
| 18 | Mr Perino Pama | Director, Commercial and Litigation, Mosdell, Pama and Cox Attorneys |
| 19 | Advocate Mosima Rasesemola | |
| 20 | Ms Nina Raw | Embrace Mediation |
| 21 | Dr Lynette Roux | Clinical Psychologist |
| 22 | Ms Irma Schutte | Social Worker |

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| 23 | Mr Luthando Sihamba | Registrar, Court Services |
| 24 | Advocate Mabel Slabbert | |
| 25 | Advocate Elsabe Steenhuisen | ProBono.org |
| 26 | Peter Streng | Mediation Assist SA |
| 27 | Advocate M.E.van Aswegen | |
| 28 | Mr George Wara | University of the Free State |
| 29 | Ms Jakkie Wessels | Regional Court President, Limpopo Regional Division |
| 30 | Ms Adel-Mari Wolmarans | Partners-on-Panorama |

STAKEHOLDER MEETINGS/ENGAGEMENTS POST DISCUSSION PAPER

| | Event | Date |
|----|--|-----------------------|
| 1 | Presentation by the researcher to the Miller du Toit Conference in Cape Town. | 11-13 March 2020 |
| 2 | Virtual meeting of the NCCPF, hosted by the Department of Social Development. | 24 - 25 November 2020 |
| 3 | Meeting of the Advisory Committee with the Family Law Committee of the South Gauteng Judges to present the recommendations contained in Issue Paper 31 and Discussion Paper 148. | 30 April 2021 |
| 4 | Presentation by the researcher on family arbitration at the Miller du Toit Conference. | 14 May 2021 |
| 5 | A webinar on Discussion Paper 148 was hosted by the Advisory Committee with the Office of the Family Advocate. | 18 May 2021 |
| 6 | Webinar by the Social Justice Group on creating a reflective practice group. | 18 November 2021 |
| 7 | Webinar by Social Justice on South Africa in Dialogue | 7 & 14 December 2021 |
| 8 | Virtual attendance of the Miller, du Toit Family Law Conference | 6 & 20 May 2022 |
| 9 | Social Justice Conference | 18 & 19 November 2022 |
| 10 | SALRC meeting with international expert, Ms Nicole Kopping-Pavers to discuss her submission on the draft Bill and to engage on developments in Canada and internationally | 15 March 2023 |

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| | regarding mediation. | mandatory | |
| 11 | Family Colloquium 2023 at University of Johannesburg | | 7 & 8 August 2023 |
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