Annexe 4 – Guidance to its members issued by the ALC on 1 July 2016 (as revised on 7 July 2016)

We have considered the document published by the Ministry of Justice (MoJ) 'Settlement Conferences: Guidance for Parties'. We have concerns in principle about this project, which is being piloted in certain family courts. Our advice to members currently is to consider very carefully whether it is possible for them to discharge their professional duty to their parent (and extended family) clients by taking part in such conferences. The role of separately represented children and the children's guardians is not mentioned in the guidance, and we are not clear how it is envisaged that children are to be independently represented, and their voices heard.

Our main concerns are as follows:

(1) The only published guidance on the pilot comes from the MoJ. It is not clear what legal authority the MoJ seeks to exercise in promoting this scheme, or how the judiciary who are to pilot it have been selected and trained.

(2) The settlement conferences pilot has begun with scant information about their scope, conduct and evaluation, and no notification to the legal or social work professions or the judiciary as a whole. There has as yet been no publication of the MoJ guidance for the judiciary, or of the training that judges are to receive in order to be equipped to conduct these conferences.

(3) We are unclear about the protection of the child's UNCRC rights to participate in the proceedings, and have their views heard by the court in this setting. Beyond a reference to the presence of 'all parties', there is no specific consideration given to the voice of the child in such a conference, their participation, and how their views are to be represented. If a child is competent, separately represented, and disagrees with professional views, is that child to attend the settlement conference, in order to be persuaded by the judge that s/he should take a different view of his/her future? We doubt that such a procedure could meet the child's right to a fair hearing.

(4) Care and adoption proceedings are a grave interference in family life by a public authority. They can have consequences for several generations. We believe the scheme may be in breach of the ECHR Article 6 and 8 rights of both parents and children. The right of individuals to communicate privately with their legal representatives is a cornerstone of access to justice. The right to professional advocacy is wholly undermined if lawyers are expected to remain silent. A child cannot have a fair hearing if his parents do not.

(5) The Issues Resolution Hearing (IRH) exists to narrow the issues and, if possible, to resolve the case. It is when this fails that the settlement conference is proposed and, we understand, conducted by a different judge (although in some areas it seems that the IRH judge also conducts the settlement conference). The essential difference between a conventional IRH and the settlement conference lies in the judge seeking directly to persuade the parties to agree with his or her view of the likely outcome, and expecting the parent or other parties to speak directly to the judge, without the protection of professional advocacy and legally privileged advice.

(6) The judge taking the settlement conference will not be the allocated judge, and therefore the scheme undermines judicial continuity, which has been a central aim of the family justice system for many years. The settlement conference judge will not have the depth of knowledge and nuance of the case and may therefore arrive at the wrong conclusion about the merits. Apart from the issue of further delay, there is a risk, particularly in the smaller court centres, that the judge who deemed the case suitable for a settlement conference will

communicate their disappointment to the trial judge if the conference fails to produce a settlement.

(7) Lawyers are to be present at settlement conferences, but they are discouraged from speaking, and therefore their presence provides only a semblance of legal representation and due process. The judge may ask a question directly of the lay client which the lawyer objects to, but the client may answer before the objection can be made. The judge may attempt to restrict the lawyer's interventions as an undermining of the process. The passive presence of lawyers will not best serve the parents' or child's interests, but will serve to make appeals from 'consent' decisions more difficult to launch. We believe it will be very difficult if not impossible for our members to discharge their overriding professional duty to promote the interests of their clients in such an environment.

(8) The parents in care cases are usually vulnerable and disadvantaged individuals, a disproportionate number of whom have learning disabilities and mental health problems. They find it difficult to articulate their experiences and present their views effectively in a court room setting. They are inevitably under considerable emotional stress when attending court about their children. Being directly addressed by the judge and expected to reply is likely to be experienced by the parent as a form of pressure to make concessions, no matter how tactful and skilled the judge may be. The scheme is intended to produce settlement by bypassing lawyers and using the using the judge's authority and personality to produce concessions. If it were not, it is difficult to see why the settlement conference should produce a better rate of settlement than a properly conducted IRH.

(9) The scheme will seriously undermine public confidence in the fairness and transparency of judicial decision-making in the family courts. Public confidence in the 'secret' family justice system is shaky. Final decisions for the permanent removal of children from their parents made 'by consent', without parents having the benefit of legal representation and privileged advice, will be highly suspect. This will further damage public trust in family justice.

(10) The scheme is clearly advanced by the MoJ in order to save court time and money. It is to be evaluated on the basis of court time saved by avoiding contested hearings. It is not focused on the quality of the decisions made, nor on the centrality of the child's welfare, including the benefit to the child and the parents of having had a fair hearing. There would appear to be no plan to follow up 'failed' settlement conferences, to see if the trial judge came to the same conclusion as the settlement conference judge had argued for.

(11) Trials are not simply a process which must be gone through in order to demonstrate fairness. The tenor of many care cases changes radically when oral evidence is heard and opinion evidence is tested in cross-examination. Expert opinion and social work evidence are often shown to be weak, and the professional views of the family too negative. Parents' explanations of events, which have previously been dismissed by professionals, may be found by the judge to be credible. The trial process must be preserved in order to ensure that the evidence against the parents is properly tested, and that the best possible decision is arrived at for the child.

(12) The guidance does not mention the fact that the local authority must prove, on a balance of probabilities, that the s 31 threshold criteria are met. It may be that only cases where the threshold criteria have been fully conceded are considered suitable for settlement conferences. However, if aspects of the threshold criteria remain to be proved, it cannot be a fair process for the judge directly to ask the parent to make damaging concessions on threshold issues, without lawyers having an opportunity to advise them in private and speak on their behalf.

(13) Judges are trained to consider cases impartially and to make decisions on the evidence. It is not in our view a proper exercise of the judicial function to come down off the bench (it seems literally as well as figuratively) and engage directly with the parent. It seems that judges are to be free to address any issues and ask any questions they choose. This seems to us to be an improper and uncontrolled use of judicial authority.