Children's Court of New South Wales

26 June 2014

Mr Paul McKnight
Executive Director
New South Wales Law Reform Commission
GPO Box 5199
Sydney NSW 2001
Australia

Dear Mr McKnight,

Re: Consultation of Dispute Resolution Frameworks in New South Wales

Thank you for providing the Children's Court of New South Wales with the opportunity to comment on the Dispute Resolution Consultation Paper (the Consultation Paper).

The Children's Court does not intend to address each of the questions in the Consultation Paper separately but we wish to make some general observations regarding the operation of ADR as it relates to the Children's Court.

Firstly, we draw your attention to the fact that a number of the legislative provisions under the *Children and Young Persons (Care and Protection) Act 1998* that are referred to in the Consultation Paper will be amended by the *Child Protection Legislation Amendment Act 2014* when the amendment Act commences later in the year.

Generally speaking the Court supports a consistent legislative approach to ADR in so far as it relates to the definition of terms including the terms mediation, conciliation, arbitration and neutral evaluation. The Court also supports some consistency of approach in relation to confidentiality, the inadmissibility of evidence and immunity of the facilitator. Greater uniformity in relation to these aspects across jurisdictions or contexts would provide the parties and legal practitioners with greater certainty and would facilitate an improved understanding of the fundamental differences between court determined dispute resolution and alternative dispute resolution.

However, the value of uniformity and consistency must be balanced against the value of flexibility in the resolution of disputes. The Children's Court cautions against the use of overly prescriptive legislative provisions, particularly in relation to the referral process and the conduct of the ADR process itself. Where necessary these issues can properly be dealt with by way of guidelines or Practice Notes.

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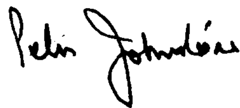
More specifically in response to Question 2.1(2) – *What areas require ADR provisions where none are currently provided?,* the Children's Court submits that specific provisions should allow for the referral of appropriate domestic violence cases to ADR. Under the *Crimes (Domestic and Personal Violence) Act 2007* mediation is considered to be the default position for personal violence cases unless the Court is satisfied that there is good reason not to refer a case to mediation (s 21). However, whilst the legislation does not specifically exclude the possibility of ADR in domestic violence cases the absence of any reference to the possibility of referral to mediation implies that ADR is not appropriate in these cases.

Whilst the Children's Court is sensitive to the issues surrounding domestic violence we note that the nature of domestic violence cases and the dynamics between the parties in the Children's Court is often quite different from the more typical domestic relationships that the legislation was originally intended to target. In the Children's Court the typical domestic violence case involves a child and their parent and or siblings. In these cases there is great utility in identifying the underlying issues, providing the parties with the skills to manage the conflict and ultimately preserving the relationship. Such an approach to alternative interventions is recognised under the Children's Court's Practice Note 8.

Please do not hesitate to contact the Court should you have any questions regarding this response.

Yours faithfully



Judge Peter Johnstone
President of the Children's Court of NSW