Dispute resolution: frameworks in NSW

Legal Aid NSW submission

to the NSW Law Reform Commission

July 2014

Introduction

Legal Aid NSW welcomes the NSW Law Reform Commission's review of alternative dispute resolution (ADR) frameworks in New South Wales. Our comments are based on our experience in advising and assisting disadvantaged and vulnerable clients to resolve disputes and complaints in almost every New South Wales dispute resolution forum. Legal Aid NSW focuses on assisting clients to resolve their disputes at an early stage and to avoid litigation where appropriate.

Our work is focused on providing legal assistance, advice and representation to disadvantaged clients. Disadvantage manifests in physical or mental characteristics of disputants, their relative experience and education and in the relative resources available to disputants. In our experience, ADR can present significant benefits for vulnerable participants in a wide range of legal forums and disputes. ADR may avoid or diminish the cost, delay, stress and formality of litigation. These are difficulties that vulnerable people may be less able to manage or deal with when compared to other disputants. However, ADR can also present risks for vulnerable participants if bad faith participation and power imbalances are not carefully managed by skilled intermediaries. Failed ADR may increase the time, cost and stress of dispute resolution overall, and so further advantage parties who are better able bear those burdens. It is important that ADR processes in NSW are adequately resourced to ensure that disputes can be properly ventilated and supported by appropriately skilled mediators or conciliators, and that legal advice and representation is provided where necessary. Certainly, the public and binding nature of judicial decisions resulting from litigation can be particularly advantageous for vulnerable groups. However, alternative dispute resolution remains an important feature of the justice system in NSW.

While the Consultation Paper is concerned with statutory arrangements in NSW, our response draws on our experience of ADR in all contexts, including in family dispute resolution and employment law. We have not addressed every question set out in the Consultation Paper, but have outlined our views in relation to the following key issues which are most relevant to our work:

- the value of alternative dispute resolution and a consistent legislative model, including key considerations and principles in ADR;
- the effectiveness of external dispute resolution (EDR) processes and the possible application of this model, or aspects of it, to disputes between individuals and NSW Government agencies;
- the function and appropriateness of Part 3A of the *Legal Aid Commission Act 1979* (NSW);
- the importance and increased emphasis of alternative dispute resolution in the care and protection jurisdiction; and
- the appropriateness of safeguards contained in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

Alternative Dispute Resolution – key benefits

Alternative dispute resolution, even when it does not result in a settlement, provides parties with an opportunity:

- to identify and focus on the real issues between them;
- to explore more flexible and satisfying solutions to their problems than would be available to them in court and tribunal orders;
- to understand what might satisfy the opposing party as a solution;
- to inform the opposing party what kinds of solutions would be acceptable;
- to consider and reflect on the case that the opposing party might present in formal litigation;
- to identify weaknesses in their own cases that commend settlement as a better solution than an adversarial hearing;
- to ruminate for a productive period on all the issues, positions and solutions, and to adjust the parties' understanding of and approach to them;
- to seek legal and other expert advice on the possible solutions that were produced by the resolution discussions; and
- to limit as much as possible the expense of formal litigation and the services of lawyers.

There are a wide range of ADR processes operating in NSW courts and tribunals, as well as through private arrangements between parties. Some of those processes are highly effective, well resourced and likely to produce a resolution that will be more satisfactory to the parties than a judicial determination following a hearing. However, in our experience, some processes are rather perfunctory and unproductive and unlikely to avoid formal determination of the dispute. Below we outline conditions and principles that we consider underpin effective alternative dispute resolution processes.

An overarching alternative dispute resolution framework

In our view, an overarching statutory framework for alternative dispute resolution has considerable merit. This framework could address key principles or considerations such as those outlined below and outline matters specific to particular jurisdictions in separate schedules. The value of this approach would be to provide guidance to decision makers, including referring courts and disputants about appropriate conditions and procedures for ADR. It is also likely to improve the practical implementation of ADR in certain jurisdictions and generally give greater weight to ADR processes already contained in NSW statutory frameworks.

Examples of statutory regimes that include a broad and specific set of rules abound. The *Australian Consumer Law* proscribes misleading or deceptive conduct in well-known broad terms. It also sets out a list of practices, without restriction, that are considered misleading or deceptive. To take a procedural example, the *Civil Procedure Act 2005* (NSW) permits a court to give such directions as it thinks fit (whether or not inconsistent with the rules of court) for the speedy determination of the real issues in dispute between the parties to the proceedings.[1] Most of the time, the court and parties avail themselves of the guidance and predictability afforded by the hundreds of detailed provisions contained in the *Uniform Civil Procedure Rules* (NSW). Yet the flexibility afforded by the broader provision may at times prove invaluable and encourages appeal to the core procedural principles on appropriate occasions. This approach would facilitate flexible adaptation of procedure as the case demands. It may also allow for innovative approaches not yet articulated in the rules as set out.

Such a framework could also define key terms used to describe a range of ADR processes. Consistent use of terminology could ensure that the process and the role of the dispute resolution practitioner within these processes is clearly defined as facilitative, advisory or determinative, or encompassing more than one of these functions. Consistent definitions of key terminology and types of ADR would give the judges, magistrates and tribunal members a simple point of reference for describing the role of the ADR practitioner who will assist the parties in their settlement discussions. It might also enhance the participants' understanding of the process.

Principles and conditions essential to effective Alternative Dispute Resolution

1. The resources that are committed to an alternative dispute resolution process should be proportionate to what is at stake in the dispute

Where a very large sum of damages is claimed, or a person's right of residence in public housing is in issue, it is reasonable to assign up to a whole day or more for the dispute resolution. That is because a formal hearing of the issues will probably take up at least or more than the same amount of time. On the other hand, where only the price of a minor consumer article is at stake, with little circumstantial legal complexity, it may be reasonable to either dispense with alternative resolution altogether or allow only a short amount of time for resolution discussion.

[1] *Civil Procedure Act 2005* (NSW) s 61

For example, we consider that the NSW Civil and Administrative Tribunal should establish different 'streams' of conciliation which 'triage' matters according to their level of complexity and the possible consequences for a particular party. At present, one conciliator is responsible for approximately 6 conciliations occurring on the list day of the Consumer and Commercial Division at NCAT. We are concerned that matters which have potentially very serious consequences, such as applications to evict public housing tenants, are not being afforded sufficient resources. While it may be appropriate for two sophisticated parties to attend a short mediation prior to a hearing listed on the first mention of a matter, it is highly unlikely to be appropriate for matters involving a vulnerable party requiring legal advice and representation. More complex matters with serious consequences require a more experienced conciliator and more time for the mediation process. A 'one size fits all' model of dispute resolution is not appropriate. Appropriate statutory frameworks and court processes are required to ensure that there is a sufficient allocation of resources.

Appropriate resourcing also encapsulates the provision of legal assistance, particularly for vulnerable parties. For example, Legal Aid NSW has been involved in a pilot to provide a duty lawyer service one day a week to assist parties before the Consumer and Commercial list of NCAT.[2] In our view, legal assistance can provide invaluable support for the dispute resolution process by framing the expectations and attitudes of the parties, narrowing the issues in dispute, providing advice about the reasonableness of settlement offers and in some circumstances ensuring that parties, particularly weaker parties, are afforded sufficient time to get further legal advice or to prepare for a hearing.

2. **A mediator or supervisor of an alternative dispute resolution process should ensure that any imbalance of power between the opposing parties is minimised during the process. All parties should be able to participate without being overborne by another party, or being misled by any other party's assertions about the applicable law**

Where one party is represented or assisted by a lawyer, or has occupational familiarity with the particular type of legal dispute,[3] it becomes possible for that party to make assertions to the other party about probable findings of fact, the likely outcome of the proceedings and the effect of applicable law. That other party may be intimidated by the representative's experience and skill, and inclined to accept the representative's contestable or mistaken assertions. The unrepresented or inexperienced party may unnecessarily underrate the strength of their case and agree to an unfair and onerous settlement.

Mediators should be required to remain alert for any such imbalance and ensure that the more powerful party is not overbearing and does not misrepresent the applicable law. A mediator should be allowed to identify issues that appear to be controversial and to point out the need for appropriate proof, but without becoming an advocate for any party.

[2] Legal Aid NSW recently commenced working with a consultant to review this project. We anticipate that an evaluation report will be available in approximately 6 months.
[3] For example, a real estate agent or Housing NSW advocate for a landlord; or is an employee of a corporation that is one of the parties.

As a general practice, parties should not be permitted to be represented by lawyers during an alternative dispute resolution process unless all parties can be represented or it is desirable to allow one party to be represented to balance the obvious command of facts and issues the other party has. For instance, one party or that party's non-legal representative may have a thorough occupational familiarity with the kind of dispute. That is not to exclude parties having ready access to their lawyers during the process.

3. **Parties whose command of English is so lacking that they cannot understand the nature of the factual and legal issues facing them, or effectively participate in the bargaining of dispute resolution, should be allowed or even provided access to interpreters**

A party with limited or no English will have particular difficulty in presenting a case at a hearing. In this situation, it is even more important to ensure that such a party has the best possible opportunity to settle the dispute and avoid the difficulties and formalities of a hearing. They should be entitled to have a friend or family member attend to interpret for them and if no such person is available, and the party can prove incapacity to pay, an interpreter should be provided at the expense of the State.

4. **Where the parties to the dispute resolution process are not legally represented, mediators should undertake to identify for parties the factual and legal issues that emerge from pleadings, applications and dispute resolution statements of the parties**

Unrepresented parties who are not familiar with the type of dispute are likely to have difficulty identifying the significant and relevant factual and legal issues arising from the litigation. By assisting them to identify those issues, a mediator can ensure that their decisions bear on the real dispute, and that they are not completely distracted by collateral issues. Identifying the relevant issues in dispute will prepare the parties to deal with them adequately and save some time if the matter must proceed to a formal hearing.

5. **Where appropriate, a conciliator should assist parties to make realistic assertions and have realistic expectations**

In some circumstances, dispute resolution which is managed by a conciliator, rather than an impartial mediator, is more likely to be more useful for the parties. A conciliator can take a more interventionist role in moving the dispute towards a resolution by assisting parties to form a realistic view of fact finding and the orders that the court or tribunal is likely to make after a hearing. Inexperienced parties will often have unrealistic expectations of what they can prove or the outcomes that they are likely to obtain from a formal hearing. A conciliator can assist them to reconsider their expectations or recommend that the party seek professional advice about a particular aspect of the matter before proceeding.

6. **Parties participating in alternative dispute resolution should not be forced into a hearing immediately after resolution discussions**

It is Legal Aid NSW's experience that some tribunals have had a practice of allowing parties to have conciliated discussions for a short time on the day appointed for hearing, but, then required the parties to proceed immediately to a hearing where the discussions failed to produce settlement. The problem with such an approach is that it deprives the parties, particularly unrepresented ones, with the opportunity to properly ruminate on the discussions and to obtain independent or professional advice.

The business of legal disputation is likely to be a completely unfamiliar and overwhelming process for many litigants. Even participating in an informal dispute resolution process is likely to be a very distressing experience. Most litigants in person will need time to recover and reflect on the dispute resolution conversation, and to refocus on acceptable and feasible solutions before proceeding to hearing. They may well then be in a position to renew the settlement negotiations, ideally avoiding a formal hearing. If that opportunity fails, they will at least need sufficient time to reconsider how they should present their cases logically, relevantly and in their best light.

7. **Parties participating in alternative dispute resolution should not be forced into a settlement of their dispute at the completion of resolution discussions**

Although it is known that some professional mediators, usually by prior agreement of the parties, will effectively force the parties to a settlement by almost refusing to allow them to finalise their dispute resolution process until they do so, it is usually inappropriate for mediators to press parties towards a settlement. The better outcome is to provide an opportunity to consider each party's point of view and identify acceptable solutions. It should then be left to the parties to consider separately how they can reach final settlement and what the terms of that settlement should be.

8. **A conciliator should have an appropriate knowledge of the law applicable to the dispute and of technical matters that might bear on findings of fact from an adversarial hearing**

Unless a conciliator is reasonably familiar with the principles of law applicable to the particular dispute, it will be difficult for the conciliator to prompt the parties to consider whether their expectations of outcomes are realistic. A party or parties may be ignorant of certain technical matters, and be radically mistaken about what is relevant to a factual dispute, or how likely it is that a court will make a particular factual finding.

9. **The venue of any dispute resolution process should be neutral for the parties and appropriate for the activities that are likely to occur during it**

It is important that a party to a dispute resolution process should not feel intimidated or disadvantaged by the location of the resolution discussions. Engendering a feeling of neutrality will assist in removing any sense of disadvantage in the encounter, and make each party more willing to be expansive and open to suggestions.

Particularly where a dispute resolution discussion is likely to be appropriately lengthy, or where a party is likely to need to seek advice during the course of the discussion, it is desirable that the venue have several separate and confidential rooms, so that they parties can come together without intimidation, but also separate to have completely open discussions with their advisors and the mediator as needed. Having facilities for separating the parties also assists their rumination on the issues and proposals and tends to promote settlement.

10. Appropriate legal privileges should be extended to parties participating in alternative dispute resolution discussions. Their discussions should be protected by confidentiality so far as is reasonable

It is important that parties to a dispute resolution are able to speak as freely as possible and without any fear of their words being used against them outside the resolution discussions. Without those conditions, a proper exploration of issues and solutions is unlikely to occur, and accordingly settlement itself will become less likely.

Legal Aid NSW supports the extension to all alternative dispute resolutions discussions of the privilege with respect to defamation that is provided by section 30 of the *Civil Procedure Act 2005*; and of the imposition of confidentiality imposed on mediators by section. 31 of that Act.

The provisions of section 131 of the *Evidence Act 1995* should be drawn to the attention of parties participating in alternative dispute resolution as applicable to their settlement discussions.

External Dispute Resolution – an effective model

The types of dispute resolution that are outlined in Chapter 3 of the consultation paper do not exhaust the possibilities suggested by that definition. In recent years, a form of dispute resolution called ‘early dispute resolution’ (EDR), often referring to an 'ombudsman' has developed as an important process by which impartial persons assist those in a dispute to resolve the issues between them. The EDR model has been used to resolve disputes between industry and individuals in the financial, telecommunications and credit industries through the Financial Ombudsman Service (FOS), the Telecommunications Industry Ombudsman (TIO) and the Credit Ombudsman Service (COSL). We consider that this model, or aspects of it, may have wider application, particularly in relation to the role of the NSW Ombudsman.

The closest comparator with conventional ADR processes is arbitration – in both processes, the disputants agree to subject their dispute to the decision of a neutral third party. The difference lies in the degree of responsibility taken by the decision maker. Arbitration is conventionally understood as a means by which parties run their case without the burden of compliance with much of the law of procedure and evidence applicable in the courts, but the process remains essentially adversarial.

By contrast, early dispute resolution is characterised by an active inquisitor who makes decisions about issues between the parties. In the established forms of EDR now operating an inquisitor collects up documents (at his or her own initiative) and formulates a decision based on expert knowledge of the applicable law and the relevant context.

It is said that there has been an 'ADR Revolution'[4], but the essential feature of conventional litigation remains: in practice, if not necessarily by definition, the disputants are responsible for the carriage of their case or stance in the dispute resolution proceedings. In our view, the just, quick and cheap resolution of disputes can, in many cases, be best achieved when a third party takes responsibility for the conduct of inquiries. This may especially be the case in situations where more conventional forms of ADR are inappropriate.

Potential application to the NSW Ombudsman

We consider that there is scope for the role of the NSW Ombudsman to expand to conduct independent investigations and make findings in relation to complaints. The NSW Ombudsman could be tasked with conducting initial assessments of matters and, where a decision is capable of being made, making findings and ordering damages up to a set amount. Where a decision is unable to be reached due to issues such as liability or credibility, the NSW Ombudsman could provide parties with early neutral evaluation. Early neutral evaluation could assist parties by giving the less powerful party to the dispute a guide about how to prepare their matter and could assist to narrow issues in dispute.

For example, in a police complaint or police tort matter, the police and complainant could provide submissions to be considered by the NSW Ombudsman. If there was irrefutable evidence, such as CCTV footage to substantiate the complaint, a finding could be made and damages awarded. Where it is not possible to make a finding in a matter, the NSW Ombudsman could identify the issues in dispute and the nature of the material required to make a finding and refer the matter to early neutral evaluation.

Currently, the NSW Ombudsman has responsibility to scrutinise and review the delivery of services by NSW Government agencies and has a complaint handling function. The NSW Ombudsman is required to 'oversee the way the police complaint system works'[5] and 'work with police to make sure the complaints system appropriately identifies criminal and serious misconduct and is accessible, credible, flexible and responsive'.[6] The NSW Ombudsman has capacity to refer a matter for investigation by police and police are required to send a copy of the report to the Ombudsman. However, it is not resourced or empowered to engage directly with complaints or disputes.

There are clear limitations in having serious investigations of police conduct investigated internally. In our experience, the internal complaint handling process facilitated by Police often concludes that there was no wrongdoing and that police acted reasonably. It is not uncommon for complaints to be upheld and costs awarded following civil litigation in matters where police determined there was no wrongdoing by police.

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[4] NSW Law Reform Commission, *Dispute resolution: frameworks in New South Wales – consultation paper 16,* p.2

[5] NSW Ombudsman website: https://www.ombo.nsw.gov.au/what-we-do/our-work/police/complaints

[6] NSW Ombudsman website: https://www.ombo.nsw.gov.au/what-we-do/our-work/police

An inquisitorial process conducted by the NSW Ombudsman is likely to offer significant cost savings for government. Police torts, for example can be very expensive to litigate and usually involve the Crown Solicitors Office. In this area in particular, we find that matters have a high settlement rate following mediation. The proposed process could enable settlement to be arrived at without a matter needing to be filed in court and all of the costs associated with this for both individuals and taxpayers.

While civil litigation can be an important mechanism to 'provide a proactive, legal accountability tool that is largely independent of police organisations'[7] it can also be a very costly, and inaccessible process for many parties. In our view there is a significant gap between the internal dispute resolution process managed by Police and the option of civil litigation. There is a need for an independent complaint and investigation process for police complaints that provides an accessible alternative to civil litigation in appropriate cases.

Certainly, a statutory framework would be required to enforce this function and empower the NSW Ombudsman to carry out these expanded functions. Sufficient resourcing would be essential to ensure the effectiveness of this role.

Part 3A of the *Legal Aid Commission Act 1979* – Alternative Dispute Resolution

The provisions contained in Part 3A of the *Legal Aid Commission Act 1979* enable Legal Aid NSW to coordinate and facilitate a number of dispute resolution processes associated with both state and federal courts and legislation. We deliver Family Dispute Resolution (FDR) services in connection with the family law jurisdiction and External Alternative Dispute Resolution (EADR) services in connection with the care and protection jurisdiction in NSW. In our view, the existing provisions contained in Part 3A of the *Legal Aid Commission Act 1979* do not require any amendment.

Legal Aid NSW has conducted alternative dispute resolution in Family Law Matters under the *Legal Aid Commission Act 1979* (NSW) Part 3A since approximately 1993. The process is a combination of legally assisted mediation and conciliation, known as the Legal Aid Family Conferencing Model. Assessment and intake processes are conducted by conferencing organisers who are employees of Legal Aid NSW. The conferences are chaired by a person chosen from an external panel of mediators.

Legal Aid NSW was recently involved in a trial of alternative dispute resolution initiatives in the care and protection jurisdiction of the NSW Children's Court. The initiative trialed two new models – the Dispute Resolution Conference (DRC) and the Legal Aid Pilot. Both models are now available to parties involved in the care and protection system and Legal Aid NSW is now funded to provide a state-wide External Alternative Dispute Resolution service. We expand on the value and importance of this process in the care and protection jurisdiction more broadly below.

[7] Ransley, Anderson and Prenzler,'Civil Litigation Against Police in Australia: Exploring Its Extent, Nature and Implications for Accountability', The Australian and New Zealand Journal of Criminology Vol 40 (2) (2007), p.143

We have previously provided the NSW Law Reform Commission with data about FDR and care and protection conferences. This data indicates the scope of the dispute resolution services delivered by Legal Aid NSW under Part 3A of *Legal Aid Commission Act 1979*.

ADR in the care and protection jurisdiction

In our experience, alternative dispute resolution processes are an important and valuable part of the care and protection system in NSW and we support the increased emphasis being given to dispute resolution following the Wood Special Commission of Inquiry into Child Protection Services in NSW.

We refer you to the findings of the *Evaluation of alternative dispute resolution initiatives in the care and protection jurisdiction of the NSW Children's Court* (Evaluation Report) prepared by the Australian Institute of Criminology.[8] This Evaluation Report highlights some of the particular benefits of dispute resolution in this jurisdiction:[9]

> Using ADR to resolve child protection disputes before the Children's Court is appealing for a number of reasons. Court processes that are underpinned by adversarial principles are conflict-driven by nature, with parties competing against one another to 'win'. However, care and protection matters heard before the children's court routinely involve family members and child protection workers who must continue to work together to ensure the safety and wellbeing of the child well into the future. Given parties an opportunity to resolve child protection disputes outside of a hearing and where this is no possible, at least reducing the amount of time families and professionals have to spend in the courtroom, serves to minimise the potential detrimental impact of contested hearings on individuals and relationships. ADRT, and its focus on collaborative decision making, has the potential to encourage more positive working relationships between families and child protection workers. Providing an opportunity to discuss and consider the range of possible options available can lead to decisions that are better informed and more responsive to the needs of children and therefore more likely to be implemented.

As we indicated previously, there are two types of dispute resolution processes operating in the NSW Children's Court care jurisdiction - External Alternative Dispute Resolution (EADR) which is run by Legal Aid NSW and Dispute Resolution Conferences (DRC) which are run by Children's Registrars at the Children's Court. The Evaluation report makes a range of positive findings about the value of both dispute resolution processes in care and protection proceedings in the NSW Children's Court and concluded that:[10]

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[8] Australian Institute of Criminology, *Evaluation of alternative dispute resolution initiatives in the care and protection jurisdiction of the NSW Children's Court,* AIC Report – Research and Public Policy Services 118, online: http://www.aic.gov.au/media_library/publications/rpp/118/rpp118.pdf

[9] Australian Institute of Criminology, *Evaluation of alternative dispute resolution initiatives in the care and protection jurisdiction of the NSW Children's Court,* AIC Report – Research and Public Policy Services 118, online: http://www.aic.gov.au/media_library/publications/rpp/118/rpp118.pdf, p. v

[10] Australian Institute of Criminology, *Evaluation of alternative dispute resolution initiatives in the care and protection jurisdiction of the NSW Children's Court,* AIC Report – Research and Public Policy Services 118, online: http://www.aic.gov.au/media_library/publications/rpp/118/rpp118.pdf, p.vi

> The results from a quantitative and qualitative assessment of DRCs and the Legal Aid Pilot demonstrated that there has been a range of outcomes delivered by both programs and that both programs were relatively cost efficient in delivering important benefits to the parents and families involved in care proceedings. There appears to be a growing acceptance among stakeholders involved in the management and delivery of DRCs and the Legal Aid Pilot that ADR processes should and will continue to be an integral feature of care and protection proceedings within the NSW Children's Court.

We support the availability of the two models of dispute resolution but consider that there is insufficient understanding of or emphasis on the differences and inherent advantages of each of the two models. In our view, EADR is the most appropriate forum for more complex matters but it is being underutilised by the courts at present. There is provision for the court to refer a matter to external ADR under section 65A of the *Children and Young Persons (Care and Protection) Act 1998*, but this requires a party to apply for the court to refer to ADR and Practice Note 3, *Alternative Dispute Resolution Procedures in the Children's Court*, then requires the consent of the President of the Children's Court for this to happen. We are not aware of the Court referring any matters for ADR of its own initiative pursuant to section 65A(2)(a) and is aware of very few cases in which parties have requested a referral to ADR.

Consideration should be given to the most appropriate forum for dispute resolution based on the circumstances of each matter. For example, where one of the parties is in custody, the court based DRC model, with ready access to AVL is likely to be the most appropriate process. Where the parties prefer to participate in the process away from the court premises or where a matter is particularly complex and requires more time and a more fulsome discussion of the issues in dispute, EADR is likely to be more appropriate.

For example, Legal Aid NSW is involved in a matter which has been in court for almost 8 years. The matter involves 7 children, one of whom has been appointed a guardian due to their complex needs, and Legal Aid NSW is representing five of the children as an Independent Children's Representative. The matter was referred to DRC and no settlement was reached. In our view, if this matter was referred to ADR, it could have been 'set up to succeed' by allocating sufficient time to ventilate the issues relevant to each child and each party to the proceeding. A highly qualified mediator with extensive experience working with complex matters could also have been allocated to facilitate the ADR process in this matter.

However, under the amending legislation which will commence on 29 October 2014, we understand that the Department of Family and Community Services, intends to refer applications for contact orders made after proceedings have finalised to EADR. Legal Aid NSW welcomes that initiative.

The current care and protection legislation also requires the Director-General of Family and Community Services to consider the appropriateness of using alternative dispute resolution services that are designed to ensure intervention so as to resolve problems at an early stage, to reduce the likelihood that a care application will need to be made under Chapter 5 and to reduce the incidence of breakdown in adolescent-parent relationships.[11] We are unable to comment in detail about the effectiveness of these 'pre-filing' ADR provisions because we are not involved in matters at this stage and there is rarely any evidence about whether parties have participated in ADR in the material filed with the application for a care order.

[11] *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 37(1)(a)-c)

Proposed Child Protection Legislation Amendment Bill 2014

Legal Aid NSW has been involved in consultations with the Department of Family and Community Services about the drafting of the *Child Protection Legislation Amendment Bill 2014.* The Bill includes additional provisions about the use of ADR to negotiate Parental Capacity Orders[12] and Contact Orders.[13] We support the introduction of EADR to resolve discrete issues such as parental capacity orders and contact orders as these processes work well to narrow the issues in dispute and progress matters towards settlement. We see an opportunity for more use of the external EADR model under the new legislation, in which there is more emphasis on the use of EADR in early intervention procedures. We consider that this will only happen with an increased awareness of the availability of EADR and the potential advantages of EADR and a change to the current requirement for the consent of the President of the Children's Court to be obtained before a matter can be referred to EADR.

We do however consider that the definition of 'alternative dispute resolution' in the proposed Bill needs to be made more specific. The proposed section 244A currently provides that *'alternative dispute resolution* means any process (other than a process involving a judicial determination) conducted under this Act in which an impartial person assists persons in dispute to resolve issues between them, and includes (without limitation) the following…' The reference to 'an impartial person' is too broad and needs to be amended to specifically refer to the qualifications of a dispute resolution practitioner. For example, we refer you to section 10G of the *Family Law Act 1975* which sets out the definition of a family dispute resolution practitioner in detail. In our view, Family Dispute Resolution Practitioners have the most appropriate skill set to work with families, and particularly with children and this qualification should be a requirement for any EADR or DRC practitioner in the care and protection system. Alternative dispute resolution practitioners on the Legal Aid NSW panel for FDR and EADR are all required to be accredited family dispute resolution practitioners and most are provided with additional training around working with children.

This proposed definition of alternative dispute resolution and Practice Note 3, *Alternative Dispute Resolution Procedures in the Children's Court*, should also provide more detail about the different approaches taken in DRC and EADR. The practice note could outline which model may be more appropriate for certain types of matters and relevant considerations in making this determination such as cultural sensitivities which may make a process outside of the court premises more appropriate. This will enable parties to be better informed about the differences between each model and to address the court on why an order for one form of ADR may be more appropriate than another in a particular matter.

Power imbalances in the care and protection system

In EADR and DRC, power imbalances are dealt with by screening and assessment. If the mediator or registrar is of the view that the matter is suitable for ADR, a decision is then made about the appropriate process. Often matters involve a shuttle mediation so that parties do not come into contact with each other. Phone and AVL are also used when there are risks or significant power imbalances. In the mediation or conciliation, the mediator or registrar will set ground rules early and clearly explain the consequences of non compliance with the ground rules. Private sessions can also be an elegant way of disabling attempts at control.

[12] *Child Protection Legislation Amendment Bill 2014* (NSW) s 91D
[13] *Child Protection Legislation Amendment Bill 2014* (NSW) s 86

When ADR sessions are facilitated by Legal Aid NSW at our head office, there are security personnel nearby and a distress alarm and cameras in the room. However, in regional areas, court accommodation, unsupported by Police or Sheriffs may not offer sufficient safety for parties in DRCs and consideration needs to be given to flexibility either by external ADR occurring or DRCs occurring in alternative accommodation. While we appreciate that there is significant emphasis on parties attending DRCs and ADR in person in the current procedures, we think there is scope to expand the use of AVL and telephone ADR in care and protection proceedings, based on our experience in FDR and given the remote locations in which some care and protection matters are initiated.

In the care jurisdiction, violence between parties does not mean that ADR cannot or should not occur. The care and protection jurisdiction deals with domestic relationships that are particularly complex and 'alternative interventions' can be of great assistance to families, provided they are managed appropriately.

In our experience, the power imbalances are usually most pronounced between the Department of Family and Community Services delegation involved in a conference (which usually includes an NGO caseworker, a FACS manager and a FACS lawyer) and the parents. This issue was alluded to in the AIC Evaluation Report:[14]

> While parents have been happy about the chance to talk and be heard during the conference, there seems to be much less satisfaction with the position of Community Services and perceived unwillingness to negotiate with families , and this is likely to have an impact on how parents feel towards Community Services. Community Services need to be encouraged to explain the reasons for their position on key issues in dispute, as this can help parents to understand the Department's position and the reasons for the application initiating care proceedings.

We consider that there should be a legislative requirement for the Department of Family and Community Services to make genuine attempts negotiate during an EADR or DRC process.

Confidentiality

The *Child Protection Legislation Amendment Bill 2014* includes section 244C which outlines the confidentiality of information disclosed in ADR, except in certain circumstances: where consent was obtained, where there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to any person or property or the person conducting the ADR has reasonable grounds to suspect that a child or young person is at risk of significant harm. We consider that this provision is appropriate and that these exceptions provide an important safeguard. The care and protection jurisdiction is a unique forum for dispute resolution where confidentiality is particularly important for the client group. Many clients have criminal histories, are facing current criminal proceedings and have anti-social behaviors, some involving the abuse of illicit substances. Compliance with confidentiality provisions offers a safe place for this client base to tell truths and make concessions they may never make without the safety net or the confidentiality provision. Care and protection jurisdictions are not intended to be punitive but rather child focused and best interests driven. In this context, confidentiality is an important aspect of ADR.

[14]Australian Institute of Criminology, *Evaluation of alternative dispute resolution initiatives in the care and protection jurisdiction of the NSW Children's Court,* AIC Report – Research and Public Policy Services 118, online: http://www.aic.gov.au/media_library/publications/rpp/118/rpp118.pdf, p. xvii

Apprehended Personal Violence

We consider that the discretion afforded to magistrates and the considerations outlined in section 21 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) are appropriate. The considerations listed in section 21(2) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) provide an important safeguard to ensure that any history of violence or harassment is considered before referring a matter to mediation.

Legal Aid NSW coordinates the Women's Domestic Violence Court Advocacy Service (WDVCAS) across NSW. In our experience, personal violence matters can sometimes involve complex factual scenarios which require particular caution and may not be appropriate for mediation. For example, some personal violence matters could involve a situation where a person is being stalked, although they have never been involved in a 'domestic relationship' with the defendant. It could also involve circumstances where a violent ex-partner's friends or associates engage in intimidating, threatening or harassing behavior towards a victim of domestic violence. Where necessary, WDVCAS will assist victims in this situation at court. It is important for courts to be alive for the potential for domestic violence related issues to intersect with personal violence matters and enliven the discretion not to refer to mediation where appropriate.

Conclusion

The dispute resolution frameworks that Legal currently in place across various jurisdictions in NSW are broadly appropriate. In this submission, we detail a number of relatively minor reforms which we consider would enhance the operation of ADR processes in the care and protection jurisdiction. Significantly, we also confirm that no reform is required to Part 3A of the *Legal Aid Commission Act 1979* (NSW), which enables us to facilitate FDR and EADR in the family and care and protection jurisdictions.

We support the introduction of an overarching legislative framework for ADR processes in NSW which could give greater emphasis to ADR in the NSW justice system, improve the practical implementation of ADR in particular forums and outline key principles and conditions of ADR.

We also propose an expanded role for the NSW Ombudsman to encompass an external dispute resolution or early neutral evaluation function.

Thank you for the opportunity to make these submissions. If you would like further information, please contact Dara Read on [redacted] or at [redacted]