

The Children's Court of New South Wales

Practice Note No. 3

Alternative Dispute Resolution Procedures in the Children's Court

First issued 7 February 2011

Last Amended 11 November 2015

1. **Commencement**

- 1.1 This amended Practice Note commences on 13 November 2015.

2. **Preamble**

- 2.1 Section 65 of the *Children and Young Persons (Care and Protection) Act 1998* (the Care Act) provides for a Children's Registrar to arrange and conduct a dispute resolution conference (a DRC) between the parties.
- 2.2 Section 65A of the Care Act empowers the Children's Court to make an order that the parties to a care application participate in an alternative dispute resolution process (external ADR) in relation to the proceedings before the Court or any aspect of those proceedings.

Dispute Resolution Conferences conducted under s65

3. **Purposes and aims of a DRC**

- 3.1 The purpose of a DRC is to provide a secure and confidential environment that promotes frank and open discussion between the parties to a care application in a structured forum and to encourage them to agree on action that should be taken in the best interests of the child or young person concerned.
- 3.2 A DRC is intended to facilitate the early resolution of care applications through an informal and non-adversarial process designed to include the parties and others who may make a contribution to the resolution of the issues.
- 3.3 A DRC should aim to:
- identify the risks and safety concerns that have led to the intervention or involvement of Community Services;

- identify and clarify the strengths within the family, including any progress made by family members in addressing those concerns;
- hear from the children's legal representative/s of any views expressed by the child(ren);
- focus the parties' attention on the child's best interests;
- identify and clarify the issues in dispute;
- identify and clarify areas of agreement;
- develop options for ensuring the safety and welfare of the child or young person and consider alternatives to the outcome sought in the Care Application;
- enhance communication between the parties;
- reach agreement between the parties to avoid, or limit the scope of any hearing;
- formulate final or interim orders that may be made by consent.

4. Attendees

4.1 A DRC is to be attended in person by:

- the parties to the proceedings and, if represented, their legal representatives, including any child representative appointed by the Court;
- a guardian ad litem, if appointed by the Court;
- the relevant caseworker/s delegated by the Secretary;
- the legal representative for the Secretary;

4.2 A DRC may, upon request and at the discretion of the Children's Registrar, be attended by:

- a support person;
- a member of a relevant kinship group;
- An interpreter and/or a non-legal advocate where a party requires such assistance to communicate effectively;
- a person who is, is proposed to be or wishes to be considered as a carer for a child or young person;
- any non-party upon whom an order might have a significant impact;
- in appropriate cases and if available, the authorised clinician of the Children's Court Clinic where the clinician has carried out an assessment prior to the DRC;
- an expert witness, other than an authorised clinician, where the expert witness has carried out an assessment prior to the DRC;
- A representative of a non-government organisation (NGO) authorised by the Secretary to case manage the placement of the child/young person;
- any other person with the consent of all parties

4.3 If a party or their legal representative wishes a person specified in 4.2 to attend the DRC the party must give reasonable notice to the Children's Registrar and to the other parties.

4.4 Paragraphs 4.1,4.2 and 4.3 apply subject to paragraphs 6.2 and 6.3 of Practice Note 10 (Parent Capacity Orders) in so far as it relates to the attendance of persons at a DRC conducted under s 91D of the Care Act.

5. Personal Attendance

5.1 With the exception of an authorised clinician or other expert witness, attendance is to be in person. Attendance by telephone or audiovisual link can only occur in exceptional circumstances at the discretion of the Children's Registrar.

5.2 A party or legal representative seeking to appear by telephone must give the Registrar reasonable notice.

6. Attendance of child/young person at the DRC

6.1 Personal attendance of a child or young person is not required. However, the child or young person may attend, if the child or young person so wishes, with advance notice to the Children's Registrar and the parties, so that any concerns about the appropriateness of the child or young person's attendance can be addressed.

7. Responsibilities of all attendees at a DRC

7.1 All persons attending a DRC are required to:

- actively participate to promote the aims of the DRC as set out at 3.1 to 3.3;
- act in good faith and to be open and frank in all aspects of their participation in the DRC;
- conduct themselves in a courteous and considerate manner and
- act in a non-adversarial manner.

8. Responsibilities of all legal representatives at a DRC

8.1 All legal representatives at a DRC are required to:

- meet with their client and obtain updated instructions **before** the DRC;
- comply with all filing directions **before** the DRC;
- read and be familiar with all of the material filed in proceedings and any relevant subpoenaed material;
- actively participate and encourage their client to actively participate in discussion and decision making during the DRC;
- fully instruct any agent including providing them with authority to settle the matter;

- ensure arrangements have been made for the Authorised Clinician to attend (if applicable see PN 5);

9. Responsibilities of parties at a DRC

9.1 All parties at a DRC are required to:

- meet with their legal representative and confirm or update their instructions **before** the DRC;
- comply with any filing instructions **before** the DRC;
- read and be familiar with all material filed in the proceedings including any relevant subpoenaed material;
- actively participate in the DRC as best they can;
- state their point of view as best they can;
- listen to and discuss the views of others;
- genuinely consider all options for resolving the care and protection concerns including the arrangements that are in the best interests of the child.

10. Role of support persons

10.1 A member of the extended family or kinship group may act as a support to the child or family. In appropriate situations they may also provide a constructive and impartial contribution to the resolution of the care and protection concerns relating to the child or young person. A member of the extended family or kinship group is not to act as an advocate for one party against another.

10.2 Support persons, other than a member of the extended family or kinship group, will not take an active role in the DRC.

11. Timing of DRC

11.1 A DRC should as far as practicable be held as early as possible in the proceedings in order to facilitate the early resolution of a care application.

11.2 Once a care application has been filed in the Children's Court, the Magistrate or Children's Registrar responsible for the management of the case will, in consultation with the parties, determine if and when a DRC should take place.

11.3 If appropriate, more than one DRC may be held at different stages of the proceedings.

12. Listing of DRCs and hearing dates

12.1 In the usual course DRCs will be listed by the Magistrate or Children's Registrar during a mention of a matter in Court in accordance with the

arrangements established by the Magistrate for that location and the Senior Children's Registrar. In locations where this is not practicable, arrangements will be made by the Senior Children's Registrar to allocate a conference date as soon as practicable.

- 12.2 Hearing dates will ordinarily only be allocated after the DRC has failed to settle the matter.

13. Duration and location of DRC

- 13.1 A DRC can be expected to run for two to three hours and should take place in courthouse accommodation.

14. Pre-DRC preparation

- 14.1 Prior to a DRC, a Children's Registrar will make contact with the parties or their legal representatives to establish who will be in attendance, to consider any issues that may affect the manner in which the conference is conducted and to resolve issues and answer any questions relating to the conference process.

15. DRC process

- 15.1 DRCs are to be conducted by using a conciliation model of alternative dispute resolution (ADR). As a conciliator the Children's Registrar has an advisory role, but not a determinative one.
- 15.2 The Children's Registrar is responsible for managing the dispute resolution process, including setting the ground rules, managing any apparent power imbalances between the participants and ensuring the participants conduct themselves appropriately.
- 15.3 In the ordinary course a DRC will be conducted in the following format;
- opening by the Children's Registrar
 - parties' opening comments
 - reflection and summary by the Children's Registrar
 - identification of the relevant issues
 - exploration of the relevant issues
 - private sessions involving the Children's Registrar, a party and the party's legal representative
 - negotiation
 - further private sessions where appropriate
 - agreement and closure
- 15.4 At the conclusion of a DRC a Children's Registrar may make directions for the further case management of the matter.

15.5 At the conclusion of a DRC the Children's Registrar will provide a report to the Court indicating whether or not an agreement has been reached by all the parties and, if an agreement has not been reached, the Children's Registrar will, with the consent of the parties, identify the issues remaining in dispute to allow the Court to allocate hearing time.

16. Conference outcomes

16.1 Where an agreement has been reached by all the parties, proposed consent orders will be prepared by one of the parties and presented at the next mention date of the matter before the Children's Court.

17. Alternative Dispute Resolution referred by the Court under s65A

17.1 Approval is to be obtained from the President of the Children's Court before an order is made for the parties to attend external mediation unless the order is to be made under s 86 (1D)(b) of the Care Act.

17.2. Where the Court makes an order that the parties to a care application attend external ADR under s 65A of the Care Act, the Court expects that all attendees at that service will comply with the responsibilities and obligations that apply in a DRC as required by this Practice Note.

17.3. Wherever possible, an external ADR must be organised between two to four weeks following referral. All parties and their legal representatives should ensure that they are available to attend the external ADR conference.

17.4 At the conclusion of an external ADR conference, the convenor will provide a report to the Court stating whether or not an agreement has been reached by the parties and, if an agreement has not been reached, the convenor will, with the consent of the parties, identify the issues remaining in dispute.

18. Confidentiality

18.1 The confidentiality and admissibility of information disclosed in DRCs and external ADR conducted under s 65A of the Care Act is protected under Chapter 15A of the Care Act.

18.2 The fact that agreement could or could not be reached at a DRC or external ADR is not subject to confidentiality.

18.3 Directions made by a Children's Registrar after the conclusion of a DRC, are not subject to confidentiality.

Peter Johnstone
President of the Children's Court of NSW
Date: 11 November 2015