SUBMISSION

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DISPUTE RESOLUTION FRAMEWORKS IN NSW

A submission by the Bar Association to the New South Wales Law Reform Commission regarding CP 16 Dispute Resolution: Frameworks in NSW

NEW SOUTH WALES
BAR ASSOCIATION

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Introduction

1. The New South Wales Bar Association ('the Association') welcomes the opportunity to comment on issues raised in the New South Wales Law Reform Commission's CP 16 *Dispute Resolution: Frameworks in NSW*.

2. The Association is a voluntary association representing the interests of over 2300 practising barristers in New South Wales. 114 members of the Association are mediators accredited by the Association under the National Mediator Accreditation System. The Association has been a Recognised Mediator Accreditation Body since 2008. 132 members are arbitrators approved by the Association under its BarADR scheme, and 51 are expert determiners under that scheme. The Bar's ADR practitioners also provide services in other ADR areas such as conciliation and neutral evaluation. Barristers practising in civil litigation generally have experience in representing parties in mediation, arbitration or other ADR processes. The Association provides legal aid for disputants requiring a mediator or a barrister to represent them in mediations through its Legal Assistance Referral Scheme ('LARS').

3. Barristers are required by Rule 38 of the NSW Barristers' Rules to 'inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the barrister believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions

about the client's best interests in relation to the litigation'.[1]

4. The Association has for a number of years taken a proactive role in educating its members about ADR, providing seminars for readers and more senior barristers and also providing masterclasses and workshops in specific ADR areas. Barristers involved in civil litigation generally have expertise to advise on appropriate ADR processes and the benefits or drawbacks of a specific ADR process in the circumstances of a particular dispute.

The Inquiry – Response to Terms of Reference Generally

5. The Association notes that the Commission's Terms of Reference for the Inquiry are very broad. The Commission is asked 'to review the statutory provisions providing for mediation and other forms of ADR with a view to updating those provisions and, where appropriate, recommending a consistent model or models for dispute resolution in statutory contexts, including court ordered mediation and alternative dispute resolution'.

6. The Association is of the view that 'a consistent model or models for dispute resolution in statutory contexts' is not appropriate.

7. There is a vast difference between the types of disputes that are the subject of ADR processes – these range from community or neighbourhood disputes, to small business and personal disputes, to sophisticated and complex commercial disputes. One of the most important benefits of ADR that distinguishes it from litigation is that is flexible, both in process and outcome.

8. The ADR process used can be adapted to the needs of the disputants and the type of dispute. The disputants can select the ADR practitioner they want, they can select the process they wish to use, they can modify the process to suit their needs and the type of dispute they are involved in, and they can design their own process. Disputants are also able to switch from one process to another, or to use a hybrid process. They can reach agreements with terms (such as apologies or renewed contracts) that are not available through the court. This flexibility empowers them to resolve their dispute in the way that they want to. Even with court-ordered mediations, the parties can determine whether the mediation is court-annexed or private. If they choose a private mediation, they are free to choose the mediator and to determine the form which the mediation takes.

9. The Association believes that over-prescription or over-regulation of ADR processes will inhibit their use and make them more costly. Further, the more prescribed ADR processes are, the more likely that satellite litigation will occur as courts deal with the interpretation of legislation and court rules. No change should be made to current legislation, regulation or court rules without substantial investigation of the consequences or effect of proposed changes, including the consequences of any such changes being limited to NSW.

10. In addition, there is a lack of reliable data concerning referral to, use of and outcomes of ADR processes. Although statistics concerning the use of ADR processes are kept by some individual courts and tribunals, this information is not easily comparable across jurisdictions or over time. Those statistics are generally based on data for court-annexed mediations only, and do not reflect use of private mediation or other ADR processes. As a consequence, there is no clear evidence base to support changes to civil legislation or regulations in respect of ADR in NSW (or elsewhere in Australia).

11. The Association's response generally as set out above informs the remainder of this submission. Rather than addressing each part of the Terms of Reference and answering every question raised in CP 16, the remainder of this submission focuses upon certain questions which are of particular relevance to barristers' practice in NSW or which raise matters of policy, and provides the Commission with the Bar's perspective on the issues raised (using the numbering and headings of the questions set out on ps vii-viii of CP 16). One significant matter of policy is whether court ordered mediations should be treated differently to other mediations, particularly in disputes which are the subject of litigation but the mediation is not the subject of a court order.

3. Existing statutory provisions - types of disputes and dispute resolution

12. The type or category of dispute should not determine which ADR provision should apply in a particular case. In general, it should be left to the parties, their legal advisers, and the relevant ADR practitioner to determine which ADR process is appropriate to a particular type of dispute. As noted above, Bar Rule 38 requires barristers representing parties to advise their clients about the alternatives to fully contested litigation. In disputes where the ADR practitioner is a barrister, the parties are generally represented by lawyers. The parties are therefore able to choose the ADR process fully informed about the issues in dispute and the ADR process that is appropriate to resolve those issues. Any proscription or prescription in relation the process that should be used in statutory provisions would be unhelpful and intrusive.

3.2 A need for standardised terminology or a broad umbrella term

13. Consistent and clear terminology is important, but it is also important not to constrain the flexibility and creativity that underlie the benefits of ADR. While the overlap between some ADR processes may give rise to confusion at times, there is no concrete evidence that problems have been caused a lack of standard ADR terminology and definitions. In legislation, however, where there is a need for some consistency, the Association is of the view that a small number of key terms should be defined, but not so narrowly that they do not permit flexibility in the process. There should be no assumption in those definitions that a particular type of ADR process is suitable for a particular type of dispute.

4. Existing statutory provisions – initiating and participating in ADR

14. The Association is of the view that, apart from statutory requirements for mediation in specific types of disputes, a referrer should have a general discretion to refer a matter to ADR in the specific circumstances of that matter. Legislation (and rules and regulations) should not set out conditions to be met before a referrer can refer a matter to ADR, nor should it set out the grounds upon which a referrer can dismiss an application for ADR.

4.4 Where an attempt at ADR is required before proceeding

15. Anecdotal information from the Association's members who practise in the Federal Court and the Federal Circuit Court, or mediate matters that would usually be litigated in those courts suggests that the requirements of the *Civil Dispute Resolution Act 2011* (Cth) have led to a number of disputes being successfully mediated before proceedings being commenced. That legislation does not require ADR before proceeding but merely requires the disputants to take 'genuine steps' to resolve the dispute before commencing or state why they have not been taken.

16. Although there are no statistics or other evidence in relation to the effect of the *Civil Dispute Resolution Act 2011*[2], the imposition on the parties is small (particularly since the relevant rules now restrict the genuine steps statements to two pages[3]) and the legislation has given rise to minimal satellite litigation.[4] This type of legislation appears useful but further investigation is required before any view can be formed.

5. Existing statutory provisions – practice, procedures and enforcement page

17. The Association is of the view that statutory provisions should not stipulate or deal with the following:

    (a) the practice and procedure for ADR sessions;

    (b) parties' representation in ADR sessions;

    (c) the presence of other people in ADR sessions;

    (d) the adjournment of ADR processes;

    (e) the parties' ability to terminate an ADR session;

    (f) an ADR practitioner's ability to terminate an ADR session;

    (g) the conclusion of ADR processes;

    (h) other impacts of agreements and other outcomes of ADR.

18. All these matters should be dealt with in the particular circumstances of each dispute by the parties, their legal advisers and the ADR practitioner.

6. Existing statutory provisions - ADR practitioners

19. The Association is of the view that statutory provisions should not stipulate or deal with the appointment and accreditation of different types of ADR practitioners, or the control and independence of different types of ADR practitioners. They should not set the powers and obligations of different types of ADR practitioners. With respect to mediators, the voluntary system under the National Mediator Accreditation System ('NMAS') appears to work well, with appropriate training requirements and practice standards (apart from the qualification referred to in response to Q 8.2 below). The Association has been a Recognised Mediator Accreditation Body under the NMAS since 2008 and has accredited and re-accredited barristers as mediators annually since then. Before that, the Association's mediators were accredited by LEADR, IAMA or another ADR organisation.

6.4 Immunity of ADR practitioners

20. Under ss 33 and 55 of the *Civil Procedure Act 2005* (NSW), mediators and arbitrators to whom the court refers proceedings have the same protection and immunity as a judicial officer. A mediator or arbitrator whom the parties have appointed without a court order does not have the same protection and immunity. While mediators in non-court ordered mediations may include a term relating to their immunity in their mediation agreements, it is an anomaly that statutory protection is available in mediation or arbitration of a proceeding that is before the court only when the court has referred the proceeding to such a process – particularly as the court order for referral is, in most cases, made upon the application of both parties.

21. It is also an anomaly that the only ADR processes where this protection is available are mediation and arbitration. The statutory provisions should be extended to other processes.

22. The Association believes that, as a matter of policy, it is desirable for the same approach to be taken in relation to ADR of disputes before the court, irrespective of whether the court has made an order referring the dispute to ADR and irrespective of the type of ADR process being undertaken.

23. Whether such protection should extend to ADR processes in disputes that are not the subject of court proceedings is a more difficult question and requires further investigation.

7. Existing statutory provisions – Use of information and inadmissibilty

24. CP 16 notes a large number of statutes which deal with use of and non-disclosure of information obtained in ADR processes, primarily mediation. Many of the statutes deal with specific statutory schemes for mediation or other specific circumstances such as those involving suspicion of harm to children. The Association believes that it would be difficult to draft a blanket provision which covered all such schemes and circumstances, although more uniformity would be helpful.

25. The Association notes the reference in paragraph 7.5 of CP 16 to cl 19(6) of the C*hildren and Young Persons (Care and Protection) Regulation 2012* (NSW) which permits disclosure of information reasonably required to refer an ADR practitioner or a lawyer representing a party to an appropriate body for any unprofessional conduct or professional misconduct in the ADR process. Section 30 *Civil Procedure Act 2005* (NSW) may not permit such disclosure (this has not been tested in the courts) and even if it does, it would apply to court-ordered mediations. The Association believes that the insertion of a provision similar to cl 19(6) into the *Legal Profession Act 2004* or regulations thereto would be of assistance and provide certainty in that regard.

26. With respect to inadmissibility, an important issue is that information obtained in court-ordered mediations is treated differently to that obtained in mediations that are not court-ordered. The Association believes that, as a matter of policy, the same approach should be applied to mediation of disputes the subject of court proceedings, irrespective of whether the court had ordered the dispute to mediation.

27. Section 30 of the *Civil Procedure Act 2005* (NSW) is concerned with court-ordered mediations only. The

Association has noted above that, except in statutory mediation schemes, the majority of orders by the courts referring matters to mediations are made by consent on the application of the parties. There is no apparent reason why information in a mediation of a dispute that is being litigated but the mediation is not ordered by the court should be treated differently. However, parties in such a meditation have recourse to the protection afforded to 'without prejudice' communications under the common law or under the *Evidence Act 1995*.[5] In the joint Uniform Evidence Act report, the Australian, NSW and VLRC concluded that s 131 applies to communications in mediations other than court-ordered mediations.[6] Section 31 provides a significantly greater number of exceptions to inadmissibility than s 30 of the *Civil Procedure Act 2005* (NSW).

28. The Association believes that preferable course is that taken in Hong Kong[7] and Singapore[8] and recommended by the former National Alternative Dispute Resolution Advisory Council (NADRAC)[9]: that legislation provide for ADR communications to be inadmissible as the general rule, subject to leave being granted by a court in the public interest. In deciding whether leave should be given, a court or tribunal should be required to take into account: (a) the general public interest in favour of preserving the confidentiality of ADR communications, and (b) whether leave is being sought to advance a party's interests or rights with respect to a matter falling within an exception to confidentiality.

8.2 Applying practice and accreditation standards

29. Practice and accreditation standards for ADR practitioners should not be the subject of statutory provisions but should be left to industry and professional bodies. Professional organisations such as law societies and bar associations have complex and sophisticated accreditation and professional standards governed by legal profession legislation. A number of those bodies, including the Association, currently accredit or approve ADR practitioners in arbitration and mediation. Competencies are assessed and initial training and continuing professional development are criteria used for accreditation or approval purposes. Anomalies have arisen under the system of national accreditation of mediators, but only because legal professionals and non-professionals are compared and accredited under the same criteria. Professional bodies with their own assessment and accreditation processes alone should accredit their own members.

8.3 Enforcing practice standards

30. ADR practice standards should not be enforced by statutory provisions. Nor should there be provisions aimed at (a) ensuring independence and impartiality of ADR practitioners or (b) identifying and managing power imbalances between participants in ADR sessions. This would be unnecessarily prescriptive and there is no evidence to support intervention in this respect.

8.6 Suspending limitation and prescription periods

31. Suspension of the limitation periods while ADR is attempted before commencement of proceedings currently occurs by agreement between the parties, and is sometimes provided for in the mediation agreement. The mediation rules of some ADR organisations, which apply by agreement between the parties, provide for such a suspension.[10] A statutory provision to that effect inserted into the *Limitation Act 1969* (NSW) may be useful in order to ensure that a potential defendant does not use mediation to delay the commencement of proceedings to its own advantage. An example is s 11 of the *Limitations Act* 2002 (Ontario), which provides:

> 11. (1) If a person with a claim and a person against whom the claim is made have agreed to have an independent third party resolve the claim or assist them in resolving it, the limitation periods established by sections 4 and 15 do not run from the date the agreement is made until,
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> (a) the date the claim is resolved;
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> (b) the date the attempted resolution process is terminated; or
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> (c) the date a party terminates or withdraws from the agreement.

Conclusion

32. The Association considers that this Inquiry is extremely important to the community, ADR practitioners, lawyers and the courts. It wishes to provide the utmost assistance to the Commission in the course of its work and will be happy to provide a more detailed response to any issues.

Endnotes

1. Rule 38, NSW Barristers' Rules, 8 August 2011; see also NSW Law Society Advocacy Rule 17A.
2. The operation of the Act was the subject of an evaluation by the Attorney-General's Department in 2013 but the result of that evaluation has not yet been released.
3. See, for example, FCR 2011 Regs 5.03, 8.02.
4. See S*uperior IP International Pty Ltd v Ahearn Fox Patent and Trade Mark Attorneys* [2012] FCA 282; *Superior IP International Pty Ltd v Ahearn Fox Patent and Trade Mark Attorneys (No 2)* [2012] FCA 977; *Hookway v MID Pty Ltd* [2012] FCA 1456
5. See *Pihiga Pty Ltd v Roche* (2011) 278 ALR 209; [2011] FCA 240 per Lander J
6. Australian Law Reform Commission, *Uniform Evidence Law: Report*, Report 102, ALRC, NSWLRC and VLRC,
7. (2005), para. 15.173–15.175
8. Mediation Ordinance (Hong Kong) ss 8–10, which became operative on 1 January 2013
9. Evidence Act (Chapter 97), s 23 (1 August 2012)
10. NADRAC, Maintaining and Enhancing the Integrity of ADR Processes: From Principles to Practice through People (28 February 2011), p 67 [4.6.2].
11. IAMA Rules for Mediation of Commercial Disputes, Rule 10 Extension Of Limitation Period