

Dispute resolution: Model provisions

Legal Aid NSW submission to the
NSW Law Reform Commission

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 32 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW advises and assists clients to resolve disputes and complaints through a wide range of alternative dispute resolution processes. The Legal Aid NSW Family Dispute Resolution Service also organises Family Dispute Resolution conferences for

family law matters, and mediations for some care and adoption matters. Our submission focuses on the Law Reform Commission's suggestion to reform Part 3A of the *Legal Aid Commission Act 1979* (NSW) in line with the Model Provisions put forward in the Consultation Paper.

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Part 3A of the *Legal Aid Commission Act 1979*

The Consultation Paper states that the Model Provisions could feasibly be applied to Part 3A of the *Legal Aid Commission Act 1979* (NSW) (**Legal Aid Commission Act**). Part 3A of the *Legal Aid Commission Act* was inserted in 1996.¹ According to the Second Reading Speech for the relevant Bill, the purpose of Part 3A is to “enable the commission to refer matters for alternative dispute resolution including conferencing and to include appropriate confidentiality provisions to protect the parties involved”.²

There is an argument that Part 3A enables Legal Aid NSW to coordinate and facilitate alternative dispute resolution (**ADR**) processes associated with both state and federal courts and legislation. However, Legal Aid NSW has conducted ADR in family law matters since approximately 1993, before the introduction of Part 3A.

When conducting family dispute resolution for family law matters, Legal Aid NSW is also now bound by the *Family Law Act 1975* (Cth) (**Family Law Act**). Part II of this Act deals with non-court based family services, including family dispute resolution conferences. We take the view that Part 3A applies to family dispute resolution conferences alongside the *Family Law Act*, but the *Family Law Act* would prevail to the extent of any inconsistency.

Part 3A also facilitates and regulates other ADR processes conducted by Legal Aid NSW that are not dealt with in other legislation, or are only partly dealt with in other legislation. At present, these processes are:

- Mediations of adoption matters. Legal Aid NSW has organised the mediation of two matters under the *Adoption Act 2000* (NSW) in the past year. It is possible that these numbers will rise as a result of amendments to the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (**the Care Act**), which were intended to increase the rate of adoption in NSW.
- Mediations of contact arrangements in care and protection matters: Legal Aid NSW organises the mediation of contact arrangements, including variations of contact arrangements, in care matters post final orders. Section 86 of the *Care Act* refers to ADR processes for these matters, which can be internal (conducted by Children’s Registrars) or external (presently conducted by Legal Aid NSW but our role is not dealt with in the Act). Sections 244A and 244B of the *Care Act* deal with the admissibility and confidentiality of ADR communications respectively.

However other ADR models may be developed and used by Legal Aid NSW in the future.

There is also scope for Legal Aid NSW to facilitate and conduct ADR for other aspects of care proceedings, through a referral by the court under section 65A of the *Care Act*. Legal

¹ See the *Legal Aid Commission Amendment Bill 1996* (NSW).

² The Hon. J. W. Shaw (Attorney General, and Minister for Industrial Relations), Second Reading Speech for the *Legal Aid Commission Amendment Bill 1996* (NSW), Hansard, 17 September 1996.

Aid NSW has conducted external ADR for care matters under this provision under a pilot in the past.³ However there have been no referrals in recent years.

We make our comments on the suitability of the Model Provisions with this context in mind, focusing on the suitability of the provisions for the ADR processes conducted by Legal Aid NSW.

Definitions

Accredited mediator

The definition of “accredited mediator” in the Model Provisions is tied to the National Mediator Accreditation System. This definition does not include Family Dispute Resolution Practitioners (**FDRPs**), who have a different accreditation process under the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth). Within a family law context and under the Family Law Act, mediations are undertaken by FDRPs. FDRPs also conduct mediations for adoptions and contact arrangements in care and protection matters at Legal Aid NSW. While some FDRPs used by Legal Aid NSW are also nationally accredited mediators, not all are.

FDRP accreditation has developed in parallel to national mediator accreditation. It is just as robust as national mediator accreditation in terms of qualifications, standards and training; it is just tailored to a different context. We would argue that FDRP accreditation and training is appropriate for the mediation of relational disputes such as child protection, estates, and possibly elder law. In particular, the training for FDRPs has an emphasis on dealing appropriately with disputes where family violence is or may be present. We therefore recommend that, for the Legal Aid Commission Act at least, the NSW Law Reform Commission consider including FDRPs within the definition of “Accredited Mediator”. This would cover mediators that have a current FDRP accreditation but may not have obtained or maintained National Mediator Accreditation.

Mediation

The definition of mediation in the Model Provisions includes neutral evaluation. As neutral evaluation is an advisory process, we would not support it being included in the definition of mediation.

³ Australian Institute of Criminology, *Evaluation of alternative dispute resolution initiatives in the care and protection jurisdiction of the NSW Children’s Court* (2012), available online at: http://www.aic.gov.au/media_library/publications/rpp/118/rpp118.pdf

Confidentiality and admissibility of mediation communications

Mediation communication

We support the broad definition of mediation communication in the Model Provisions. However we suggest that in the interests of certainty and clarity, it may be appropriate to expressly confirm that the definition includes the following:

- communications with the parties for the purposes of intake assessment and arranging the mediation, whether this process is conducted by a mediator or another person organising the mediation.
- Preliminary or pre-mediation sessions conducted by the mediator.

Confidentiality of mediation communications

The Model Provisions impose confidentiality obligations on ‘a person’, whereas section 60F of the Legal Aid Commission Act only imposes confidentiality obligations on ‘the convenor of a conferencing session’. We would support amendment of the Legal Aid Commission Act to incorporate the broader approach of the Model Provisions to ADR processes organised or conducted by Legal Aid NSW.

We also generally support most of the circumstances in which disclosure is permitted under the Model Provisions. However, we submit that the following circumstances need to be added:

- The disclosure is required to make a complaint about a lawyer or to respond to such a complaint (as many mediations are legally assisted).
- The disclosure is to Legal Aid NSW staff or a committee in connection with the administration of legal aid (as expressed in section 60F(b) of the Legal Aid Commission Act).
- If the mediator has reasonable grounds to suspect that a child or young person is at risk of significant harm within the meaning of Part 2 of Chapter 3 of the Care Act.⁴
- The disclosure is to report the commission, or prevent the likely commission, of an offence involving violence or a threat of violence to a person.⁵

We also recommend that Model Provision 2(b)(vii) be modified to reflect the following formulation used in other legislation: “if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to a person or damage

⁴ This exception currently applies to ADR in care matters under section 244C(2)(c) of the Care Act.

⁵ This exception currently applies to family dispute resolution conferences under 10H(4)(c) of the FLA.

to property”.⁶ We prefer this formulation as it is more tightly drafted, and includes damage to property.

Admissibility of mediation communications

In our view, the Model Provisions governing leave for disclosure or admission of mediation communications are too broad. In deciding whether to grant leave, the Model Provisions state that a court or tribunal must take into account:

- whether the mediation communication may be or has been disclosed under Model Provision 2(3)
- whether it is in the public interest or the interests of justice for the mediation communication to be disclosed, notwithstanding the general public interest in favour of preserving the confidentiality of mediation communications, and
- any other circumstances or matters that the court or tribunal considers relevant.

The matters the court or tribunal must take into account do not appear to be very compelling, suggesting that the threshold for admitting mediation communications into evidence would not be very high.

This position contrasts with Part 3A of the Legal Aid Commission Act, which contains a prima facie statement that conference communications are not admissible. The only exceptions to this rule are where:

- all persons participating in the conference or identified in the relevant document consent, or
- in proceedings concerning disclosures under section 60F (Secrecy).

Almost identical provisions are contained in section 244B of the Care Act.

The Family Law Act is even more limited, as the admissibility of conference communications is limited to circumstances where there are admissions or disclosures that a child has been abused or is at risk of abuse.⁷

We are concerned that giving a court or tribunal such a broad discretion to admit mediation communications into evidence, and/or disclose mediation communications, will not provide participants with sufficient certainty about confidentiality. This will in turn inhibit the frankness and openness of mediations. As noted in our original submission, confidentiality in jurisdictions such as care and protection “offers a safe place for [our] client base to tell truths and make concessions they may never make without the safety net of the confidentiality provision”.⁸

⁶ See for instance the Legal Aid Commission Act, s60F(c) and the Care Act, 244C(2)(b).

⁷ Family Law Act, s10J(2). This applies unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources.

⁸ Legal Aid NSW, *Dispute Resolution: frameworks in NSW: Submission to the NSW Law Reform Commission* (July 2014), p13.

We note that the Consultation Paper indicates, in a footnote, that Legal Aid NSW was one of a number of submissions supporting the introduction of a provision like Model Provision 2(4)(b)(ii) (“whether it is in the public interest of the interests or justice for the mediation communication to be disclosed or to be admitted into evidence ...”). However, we believe this may be an error as we cannot find a statement to that effect in our 2014 submission.

In any event, we do not support the Model Provisions governing leave for disclosure or admissibility being incorporated into the Legal Aid Commission Act in their current form. We prefer the current admissibility provisions in the Legal Aid Commission Act, or, alternatively, a formulation which gives greater weight to the public interest in favour of preserving the confidentiality of mediation communications.

Mediator’s immunity

Model Provision 3 appears substantially the same as section 60G of the Legal Aid Commission Act. We support a presumption of good faith.

Termination of mediation

A provision governing termination of mediation is not currently included in Part 3A of the Legal Aid Commission Act. Termination of mediation is not likely to be an issue in most of our ADR processes, as it is usually clear when a conference or mediation has terminated. However, we can see the potential for dispute when a broad definition of mediation communication is adopted (as proposed by the Model Provisions), which includes communications ‘to follow up mediation’.

If a dispute did arise, we would be comfortable with a court or tribunal determining the issue as a question of fact, as proposed by Model Provision 4(1). We are also generally comfortable with the circumstances where termination is presumed (Model Provision 4(2)). However, we would seek confirmation that Model Provision 4(2)(d) can accommodate mediations that are conducted mid-litigation, or legislative clarification if necessary.

Enforcement of mediated settlement agreements

The Model Provisions on enforcement seem reasonable but it is not clear how they would apply to, or interact with, existing processes for registration and enforcement of mediation outcomes in family law, care or adoption matters. The addition of such a provision may cause confusion.

Removing the statutory defamation privilege

Section 60D of the Legal Aid Commission Act extends the privilege to defamation to conferencing sessions, and associated conference documents. Under Proposal 1 in the Consultation Paper, this provision would be removed.

We acknowledge the arguments for the removal of the defence of absolute privilege to defamation proceedings arising from mediations. However, we note that these arguments are largely based on the inadmissibility and confidentiality of mediation communications. If there is much greater scope to disclose and admit mediation communications into evidence, in line with Model Provision 2, these arguments may become weaker.

Powers of Commission in respect of ADR

The Model Provisions, being general in nature, do not deal with the powers of Legal Aid NSW in respect of ADR. We therefore submit that the provisions in section 60C need to be retained in any amendment of the Legal Aid Commission Act.

Conclusion

If the Model Provisions were to be incorporated into Part 3A of the Legal Aid Commission Act, Legal Aid NSW would make the following recommendations:

- The definition of mediator should include FDRPs, accredited under the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth).
- The definition of mediation communication should include:
 - communications with the parties for the purposes of intake assessment and arranging the mediation, whether this process is conducted by a mediator or another person organising the mediation, and
 - preliminary or pre-mediation sessions conducted by the mediator.
- Disclosure of mediation communications should be permitted in the following additional circumstances:
 - The disclosure is required to make a complaint about a lawyer or to respond to such a complaint.
 - The disclosure is to Legal Aid NSW staff or a committee in connection with the administration of legal aid (as expressed in section 60F(b) of the Legal Aid Commission Act).
 - If the mediator has reasonable grounds to suspect that a child or young person is at risk of significant harm within the meaning of Part 2 of Chapter 3 of the Care Act.
 - The disclosure is to report the commission, or prevent the likely commission, of an offence involving violence or a threat of violence to a person.⁹

⁹ This exception currently applies to family dispute resolution conferences under 10H(4)(c) of the FLA.

- Model Provision 2(b)(vii) should be reworded to state: “if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to a person or damage to property”.
- The current admissibility provisions in Part 3A of the Legal Aid Commission Act should be retained. Alternatively, the discretion to grant leave should give greater weight to the public interest in favour of preserving the confidentiality of mediation communications.
- There should be confirmation, through legislative amendment if necessary, that Model Provision 4(2)(d) can accommodate mediations which occur mid-litigation.
- The current powers of Legal Aid NSW in respect of ADR, as set out in section 60C of the Legal Aid Commission Act, should be retained.

The other Model Provisions or other aspects of the Model Provisions appear reasonable and we agree that they could ‘feasibly be applied’ to Part 3A of the Legal Aid Commission Act.

We note that the Consultation Paper did not consider the application of the Model provisions to the Legal Aid Commission Act in any detail. We would recommend that there be specific consideration of, and consultation on, this issue before amendments to the Legal Aid Commission Act are progressed.