

2 May 2017

NSW Law Reform Commission
GPO Box 31
SYDNEY NSW 2001

By Mail and Email
nsw_lrc@justice.nsw.gov.au

Dear Sir/Madam,

**OPINION OF ADRA RE NSW LAW REFORM COMMISSION
CONSULTATION PAPER 18**

We refer to the New South Wales Law Reform Commission Consultation Paper 18, “Dispute Resolution: Model Provisions”, dated December 2016 (**Consultation Paper**). We are writing to express the collective view of the Board Members of Australian Dispute Resolution Association (**ADRA**).

ADRA has been a national organisation in the dispute resolution industry for over 30 years. The Board appreciates this opportunity to provide submissions in response to the Consultation Paper. The Board has met on several occasions to consider matters that are raised in the Consultation Paper. We are concerned about the ramifications of implementing the Proposed Model Provisions as currently formulated.

ADRA supports the submissions of the NSW Bar Association (**Bar Association’s Submissions**) dated 28 March 2017. In particular, we support paragraph 3 of the Executive Summary which suggests that Model Provision 5 of the Consultation Paper should be deleted entirely and developed as per the paragraphs 20 to 36 of the Bar Association’s Submissions.

We particularly wish to comment in relation to the definition of “Accredited Mediator” and agree with the Bar Association’s Submissions in paragraphs 6 and 7 that the definition of “Accredited Mediator” should be deleted. We confirm that NMAS is not within the control of NSW Parliament and is a voluntary industry scheme for mediator accreditation which to date has no auditing or review mechanism in place to ensure quality accreditation processes. ADRA recommends the removal of the requirement of that definition.

ADRA does not agree with the Bar Association's Submissions in paragraph 11 that the definition of "mediation" should read:

"Mediation" means a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute by agreement. It includes a process that fits this description even when such a process is described as "conciliation".

We confirm that ADRA does not agree with the proposed definition of mediation in the model provisions. To adopt the proposed definition of "mediation" in the Model Provisions which includes "conciliation" and "neutral evaluation" would create uncertainty and confusion. ADRA supports uniformity in the definitions for ADR processes and suggests the adoption of the definitions found in NADRAC's Definitions Paper: National Alternative Dispute Resolution Advisory Council, *"Dispute Resolution Terms"*, September 2003. Mediation is described in the form of the facilitative mediation model as "a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted." Under this model "Mediation" may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.

In relation to Model Provision 3: Mediator's Immunity, ADRA agrees with the Bar Association's Submissions in paragraphs 12 to 16 that, in its present form, Model Provision 3(1) creates a serious risk that mediator who fails to comply with Model Provision 5(3) will not be granted immunity. ADRA therefore agrees that the Model Provision 5(3) should be deleted, or if kept, that Model Provision 3(1) should be expanded in order to achieve its purpose. That is, good faith immunity should be available to all mediators conducting "mediation" as defined in the Model Provisions.

In particular, ADRA agrees with paragraph 19 of the Bar Association's Submissions that parties to a mediation should be free to grant immunity to their mediator except for fraud. That is by agreement, they could give their mediator a higher level of immunity than that granted by Model Provision 3.

ADRA also strongly supports the Bar Association's Submissions in paragraphs 34 to 36 where the conditions of drafting mediation agreements late at night are discussed and confirms that the drafting of mediation agreement sometimes is less than the paragons of precise drafting. ADRA agrees that Model Provision 5(4)(b)(i) fails to have regard to this reality and should be removed.



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by providing leadership, direction and growth*

ADRA submits that the Model Provisions referred to in the Consultation Paper should not be implemented in New South Wales or Australia. ADRA welcomes an opportunity to discuss the Proposed Model Provisions with the Law Reform Commission Working Group.

Thank you for considering our view of the Consultation Paper.

Yours sincerely,



Dr Katherine Johnson, PhD
President of ADRA