NSW GOVERNMENT

New South Wales
Law Reform Commission

Consultation
paper
18

Dispute resolution:

Model provisions

December 2016
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Make a submission

We seek your responses to this consultation paper. To tell us your views you can send your submission by:

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It would assist us if you could provide an electronic version of your submission.

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About the NSW Law Reform Commission

The Law Reform Commission is an independent statutory body that provides advice to the NSW Government on law reform in response to terms of reference given to us by the Attorney General. We undertake research, consult broadly, and report to the Attorney General with recommendations.

For more information about us, and our processes, see our website:
www.lawlink.nsw.gov.au/lrc

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Terms of reference

Refer to the Law Reform Commission an inquiry, pursuant to section 10 of the *Law Reform Commission Act 1967*, aimed at improving legislative provisions dealing with alternative dispute resolution.

Specifically, the Commission is to review the statutory provisions that provide for mediation and other forms of alternative dispute resolution 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.

In undertaking this review the Commission should have regard to:

- the desirability of just, quick and cheap resolution of disputes through use of mediation and other forms of dispute resolution in appropriate contexts
- issues of referral powers (including timing of referrals), confidentiality, status of agreements reached, and proper protections required for the parties, mediators, and others involved in dispute resolution
- the proper role for legislation, contract and other legal frameworks in establishing frameworks for dispute resolution
- any related matters the Commission considers appropriate.

The Commission need not review dispute resolution under the *Commercial Arbitration Act 2010* or the *Industrial Relations Act 1996*.

[Received 01 March 2013]

Model provisions, proposals and options

2. Model provisions

Model provision 1: Definitions of accredited mediator and mediation (page 5)

"**Accredited mediator**" means a person who is accredited by a Recognised Mediator Accreditation Body in accordance with the National Mediator Accreditation System.

"**Mediation**" means a process in which the parties to a dispute, with the assistance of a third party dispute resolution practitioner (the mediator), come together in an endeavour to resolve their dispute. It includes a process that fits this description even when such a process is described as "conciliation" or "neutral evaluation".

Model Provision 2: Confidentiality and admissibility of mediation communications in evidence (page 7)

(1) **Definitions**

"**Mediation communication**" means

(a) anything said or done

(b) any document prepared, or

(c) any information provided,

for the purposes of mediation, in the course of mediation, or to follow up mediation including any invitation to mediate or any mediation agreement.

"**Tribunal**" means a tribunal established under statute and includes both administrative and arbitral tribunals.

(2) **Confidentiality of mediation communications**

(a) A person must not disclose a mediation communication except as provided for by Model Provision 2(2)(b) or (2)(c).

(b) A person may disclose a mediation communication if:

(i) all the parties to the mediation consent and, if the information relates to the mediator, the mediator agrees to the disclosure

(ii) the disclosed information is publicly available, but is not information that is only in the public domain due to an unauthorised disclosure by that person

(iii) the disclosure is made for the purpose of seeking legal advice

(iv) the disclosure is required for the purposes of carrying out or enforcing a settlement agreement

(v) the disclosure is required to bring a claim for mediator misconduct or to respond to such a claim

(vi) the disclosure is made for research, evaluation, or educational purposes and is made without revealing, or being likely to reveal, whether directly or indirectly, the identity of any party, mediator, or other person involved in the conduct of the mediation

(vii) the disclosure is required by law, or

(viii) the disclosure is required to protect the health or safety of any person.

(c) A person may disclose a mediation communication with leave of the court or tribunal under Model Provision 2(4).

(3) **Admissibility of mediation communications in evidence**

A court or tribunal may admit a mediation communication in evidence in any proceedings (including judicial, arbitral, administrative or disciplinary proceedings) only by leave under Model Provision 2(4).

(4) **Leave for disclosure or admission of evidence**

(a) A court or tribunal may, on application by any person, grant leave for a mediation communication to be disclosed under Model Provision 2(2)(c) or admitted in evidence under Model Provision 2(3).

(b) For the purposes of Model Provision 2(4)(a), the court or tribunal must take into account the following matters in deciding whether to grant leave:

(i) whether the mediation communication may be or has been disclosed under Model Provision 2(2)(b)

(ii) whether it is in the public interest or the interests of justice for the mediation communication to be disclosed or to be admitted in evidence, notwithstanding the general public interest in favour of preserving the confidentiality of mediation communications, and

(iii) any other circumstances or matters that the court or tribunal considers relevant.

(c) Where a person seeks disclosure of admission of the mediation communication in evidence:

(i) before a court, the application must be made to the court before which the proceedings are heard

(ii) before a tribunal, the application must be made to the tribunal before which proceedings are heard, and

(iii) in any other case, the application must be made to NSW Civil and Administrative Tribunal.

Model Provision 3: Mediator's immunity **(page 10)**

(1) No matter or thing done or omitted to be done by a mediator subjects the mediator to any personal action, liability, claim or demand if the matter or thing was done for the purposes of a mediation session under this Act.

(2) Model Provision 3(1) does not apply if the claimant can show an absence of good faith on the mediator's part.

(3) This section is not intended to alter the operation of s 33 of the *Civil Procedure Act 2005* (NSW) or cl 2 of sch 1 of the *Civil and Administrative Tribunal Regulation 2013* (NSW).

Model Provision 4: Termination of mediation **(page 12)**

(1) Where the question of whether a mediation has been terminated arises in any proceedings, the court or tribunal must determine whether the mediation has been terminated.

(2) Unless evidence to the contrary is adduced, the court or tribunal must presume a mediation has terminated if:

(a) the mediator purports to terminate a mediation

(b) a party purports to terminate a mediation

(c) a time limit for the mediation (and any extensions) agreed by the parties expires, or

(d) litigation commences or recommences.

Model Provision 5: Enforcement of mediated settlement agreements(page 14)

(1) "**Mediated settlement agreement**" means an agreement by some or all of the parties to mediation settling the whole, or part, of their dispute.

(2) If a party to a mediated settlement agreement fails to comply with its terms, another party wishing to enforce the agreement may, on notice to all other parties who signed the agreement, apply to the Court for orders to give effect to the agreement if:

(a) the agreement is reduced to writing and signed by the parties, and

(b) the mediation was conducted by an accredited mediator, and

(c) a party against whom the applicant seeks to enforce the settlement agreement has explicitly consented to such enforcement, whether by the terms of the agreement or other means.

(3) The mediator must draw the attention of the parties to the effect of Model Provision 5(2) before the mediated settlement agreement is signed.

(4) The Court may refuse to give orders under Model Provision 5(2) only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the Court proof that the agreement is void or voidable on grounds of incapacity, fraud, misrepresentation, duress, coercion, mistake or other invalidating cause, including that the agreement is void or voidable after a court has found it is unjust in the circumstances relating to the contract at the time it was made under the *Contracts Review Act 1980* (NSW), or

(b) if the Court finds that:

(i) any of the terms of the agreement cannot be enforced as an order of the Court, or

(ii) making the order would be contrary to public policy, or

(iii) the mediator failed to draw the parties' attention to the binding nature of the agreement before it was signed.

(5) Any undertaking by one or more of the parties to a mediated settlement agreement to pay the fees and expenses of the mediator is enforceable if:

(a) the amount of such fees, or

(b) the means for their calculation,

is specified in the agreement.

Proposal 1: Removal of statutory defamation privilege **(page 16)**

Provisions establishing a defence of absolute privilege to defamation proceedings arising from the conduct of mediations should be repealed.

3. Implementation options

Option 1: Application to mediation under an agreement **(page 19)**

This Act applies to any mediation conducted under an agreement to mediate entered into after the commencement of this Act if the mediator is an accredited mediator and:

(a) the mediation is wholly or partly conducted in NSW, or

(b) the agreement to mediate provides that the law of NSW is to apply to the mediation,

unless the parties exclude or have excluded the operation of the Act or any provision of the Act, by agreement.

Option 2: Application in existing and future statutes **(page 20)**

The model provisions should be:

(a) inserted in terms or by reference into each of the statutes that in our view would benefit from the provisions listed in **Appendix A**, and

(b) used as a template for future legislation providing for mediation,

unless the circumstances otherwise require.

1. Introduction

In brief

Alternative dispute resolution ("ADR") is generally regarded as providing many benefits for disputing parties, especially in reducing costs and delays as compared with litigation. Our terms of reference require us to consider improving or updating the legislative provisions dealing with ADR and to consider the possibility of recommending a consistent model or models for ADR.

Background

Terms of reference

1.1 On 1 March 2013, the Attorney General asked us to review statutory provisions for alternative dispute resolution ("ADR"). The terms of reference for the review are as follows:

> Refer to the Law Reform Commission an inquiry ... aimed at improving legislative provisions dealing with alternative dispute resolution.
>
> Specifically, the Commission is to review the statutory provisions that provide for mediation and other forms of alternative dispute resolution 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.
>
> In undertaking this review the Commission should have regard to:
>
> - the desirability of just, quick and cheap resolution of disputes through use of mediation and other forms of dispute resolution in appropriate contexts
> - issues of referral powers (including timing of referrals), confidentiality, status of agreements reached, and proper protections required for the parties, mediators, and others involved in dispute resolution
> - the proper role for legislation, contract and other legal frameworks in establishing frameworks for dispute resolution
> - any related matters the Commission considers appropriate.
>
> The Commission need not review dispute resolution under the *Commercial Arbitration Act 2010* or the *Industrial Relations Act 1996*.

Consultation so far

1.2 We released Consultation Paper 16 – *Dispute Resolution: Frameworks in New South Wales* ("CP 16") on 23 April 2014. It provided an overview of the statutory provisions for dispute resolution. It asks what provisions are appropriate in the variety of contexts that the existing provisions cover. We received 14 submissions. These are listed in Appendix C.

1.3 In the first half of 2014 we also conducted a survey of all NSW government agencies that had a role in administering the ADR provisions to get a picture of how broadly the provisions are used, and what issues the agencies encountered. We received 91 responses.

Our approach in this paper

1.4 ADR can provide many benefits for disputing parties. It can reduce the costs and delays associated with litigation and facilitate flexible outcomes. In the context of litigation, ADR can keep disputes private (instead of being exposed in public hearings) and can ensure cases are managed effectively, for example, by narrowing the issues in dispute. It can also assist the parties in preserving, repairing or improving ongoing relationships.

1.5 CP 16 sought submissions on a variety of ADR processes in NSW statutes. Mediation emerged from this as the focal point of stakeholder discussion. Mediation and quasi-mediation processes in NSW statutes vary in detail and coverage and are often inconsistent. This patchwork contributes to uncertainty among users. In particular, it is sometimes unclear exactly what types of dispute resolution are available and what safeguards apply in particular statutory contexts. Further, there are currently no provisions that protect parties during commercial/consensual mediation outside a judicial or statutory context.

1.6 Despite the patchwork nature of the statutory provisions in NSW, we are not persuaded that there would be significant benefit in attempting to rationalise these provisions into one or a small number of models. Rather we see a benefit in developing model provisions that would apply to mediations taking place outside any statutory or judicial context, unless their application was excluded. We explain why, below.[1]

1.7 In recent years, there have been substantial international developments regarding the provisions for mediation. Many jurisdictions have used the United Nations Commission on International Trade Law ("UNCITRAL") *Model Law on International Commercial Conciliation 2002* as a basis for relevant laws. The Canadian Province of Ontario, the Hong Kong Special Administrative Region of the PRC, and Singapore have all passed laws based on it, at least in part.[2] The European Union's *Mediation Directive*[3] has been implemented in UK law and in other European

1. [3.2]-[3.6].
2. See, eg, *Commercial Mediation Act 2010* (Ontario); *Mediation Ordinance 2012* (Hong Kong); *Arbitration Act Revised Edition 2002* (Singapore).
3. European Parliament and European Council, *Directive on Certain Aspects of Mediation in Civil and Commercial Matters* (Directive 2008/52/EC).

countries.[4] In the US, the National Conference of Commissioners on Uniform State Laws has proposed a Uniform Mediation Act. To date, 12 US states have implemented it.[5] On 7 November 2016, the Mediation Bill 2016 was introduced into the Parliament of Singapore. This reflects the global trend towards codification and increased protections and enforceability surrounding mediation and its outcomes. We can see this most clearly in the UNCITRAL Working Group on Mediation's current efforts to create a "mediation equivalent" to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (*New York Convention*) *1958*.[6]

1.8 Following the general pattern of these enactments, and mindful of the views expressed in submissions, we have developed model mediation provisions on a limited range of topics:

- definitions
- confidentiality and privilege
- mediators' immunity
- termination of mediation, and
- enforcement of the outcome of the mediation.

These are the areas identified in submissions as being most in need of consistency and clarity.

1.9 The majority of submissions did not support:

- provisions governing representation during mediation
- a requirement of good faith participation, or
- provisions governing the choice of mediation practitioners.

1.10 Stakeholders thought it would be difficult to achieve uniformity in these areas in light of the wide variety of contexts in which mediation takes place.

1.11 The provisions we have developed would apply equally to the related processes known as neutral evaluation and conciliation.

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4. Austria, Bulgaria, France, Germany, Greece, Italy, the Netherlands, Poland, Romania, Slovenia and the United Kingdom: G De Palo and others, "*Rebooting" the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU: Study* (European Parliament, Legal and Parliamentary Affairs, 2014).
5. District of Columbia, Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, Washington: www.uniformlaws.org/LegislativeFactSheet.aspx?title=Mediation%20Act.
6. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* 330 UNTS 3 (entered into force 7 June 1959). See United Nations Commission on International Trade Law, *Report of Working Group II (Dispute Settlement) on the Work of its Sixty-fifth Session (Vienna, 12–23 September 2016)*, UN Doc A/CN.9/896 (30 September 2016).

1.12 We set out our model provisions in **Chapter 2**. We set out options for implementing these model provisions in **Chapter 3**. Our model provisions are designed to apply to private mediations as well as to statutory ADR unless excluded explicitly or by necessary implication.

2. Model provisions

In brief

We propose model provisions that apply to mediations conducted by accredited mediators. The model provisions deal with the confidentiality and admissibility in evidence of mediation communications, grant immunity to mediators, identify when a mediation process has been terminated and provide for the enforcement of agreements. We also propose the removal of the statutory defamation privilege as unnecessary.

Definitions of accredited mediator and mediation

Model Provision 1: Definitions of accredited mediator and mediation

"**Accredited mediator**" means a person who is accredited by a Recognised Mediator Accreditation Body in accordance with the National Mediator Accreditation System.

"**Mediation**" means a process in which the parties to a dispute, with the assistance of a third party dispute resolution practitioner (the mediator), come together in an endeavour to resolve their dispute. It includes a process that fits this description even when such a process is described as "conciliation" or "neutral evaluation".

"Accredited mediator"

2.1 We recommend a number of protections and immunities with respect to mediations in NSW. It is therefore important that we clearly identify the processes and participants to which these provisions would apply.

2.2 In our view the model provision should apply only to mediations conducted by mediators accredited in accordance with the National Mediator Accreditation System ("NMAS"). This system allows mediators to be voluntarily accredited by Recognised Mediator Accreditation Bodies. Accredited mediators must then comply with the System's Approval Standards and Practice Standards. This will support the

NMAS, as parties who wish to take advantage of the model provisions will need to select an accredited mediator. In turn, this may also raise standards in the field generally. This approach aligns with that of the ACT, where only mediators who are registered and, therefore, subject to competency standards, enjoy immunity.[1]

"Mediation"

2.3 We think legislative definitions of mediation should be standardised to distinguish mediation from other alternative dispute resolution ("ADR") processes. The absence of a standard definition of mediation causes confusion, which Professor Hilary Astor submits "creates a risk of injustice and/or harm".[2] The National Alternative Dispute Resolution Advisory Council ("NADRAC") has said that inconsistent terminology may lead to:

- some participants having unrealistic expectations of certain processes;
- some disputes being inappropriately referred, and
- meaningful research and evaluation being impeded.[3]

2.4 This risk is particularly acute where provisions use the term but without any definition.[4] Similarly, as the terms "conciliation" and "mediation" are used to describe substantively the same process, references to "conciliation" in existing legislation should be removed and replaced, where appropriate, with "mediation".[5]

2.5 We propose that the model provisions also apply to the process known as "neutral evaluation". In neutral evaluations, just as in mediations, the neutral evaluator is a third party who assists the parties in dispute to reach an agreement. The key difference is that the neutral evaluator offers non-binding advice to the parties. Any ultimate agreement remains one the parties themselves reach.

2.6 The Bar Association notes that there is no concrete evidence of problems resulting from ambiguous definitions.[6] The Anti-Discrimination Board suggests that simply explaining the relevant processes could minimise the problems caused by any definitional ambiguity.[7] However, submissions on balance support adopting such a

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1. *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 35; *Court Procedures Act 2004* (ACT) pt 5A.
2. H Astor, *Submission DR4,* 3.
3. National Alternative Dispute Resolution Advisory Council, *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (2009) [3.57]–[3.58].
4. See, eg, *Aboriginal Land Rights Act 1983* (NSW); *Architects Act 2003* (NSW); *Residential (Land Lease) Communities Act 2013* (NSW); *Small Business Commissioner Act 2013* (NSW); *Dust Diseases Tribunal Regulation 2013* (NSW); *Legal Profession Uniform Law* (NSW); *Local Government Act 1993* (NSW); *National Parks and Wildlife Act 1974* (NSW).
5. See, eg, *Aboriginal Land Rights Act 1983* (NSW); *Anti-Discrimination Act 1977* (NSW); *Apprenticeship and Traineeship Act 2001* (NSW); *Building Professionals Act 2005* (NSW); *Children and Young Persons (Care and Protection) Act 1998* (NSW); *Community Land Management Act 1989* (NSW); *Employment Protection Act 1982* (NSW); *Government Information (Information Commissioner) Act 2009* (NSW); *Health Records and Information Privacy Act 2002* (NSW); *Privacy and Personal Information Protection Act 1998* (NSW); *Professional Standards Act 1994* (NSW); *Strata Schemes Management Act 1996* (NSW); *Work Health and Safety Act 2011* (NSW).
6. NSW Bar Association, *Submission DR12* [13].
7. Anti-Discrimination Board of NSW, *Submission DR5,* 6.

default definition provided there is scope for departure when appropriate. In any event, a definition would be necessary for the operation of a general statute on mediation.[8]

2.7 Our model definition is adapted from NADRAC's definition of mediation[9] and aligns with the definition in the UNCITRAL *Model Law on International Commercial Conciliation 2002* ("UNCITRAL *Model Law*").[10] Our aim is to distinguish mediation from negotiation, arbitration and other forms of dispute resolution, while ensuring that the definition is broad enough to encompass the variety of mediation processes parties may undertake.

2.8 The expression "mediation" is used in so many and varied circumstances that formulating a definition of mediation that is concise, accurate and applies consistently may not be possible. Therefore, our proposed model provisions for mediation under statutes should apply only if those statutes have expressly adopted the defined term.

Confidentiality and admissibility of mediation communications in evidence

Model Provision 2: Confidentiality and admissibility of mediation communications in evidence

(1) **Definitions**

"**Mediation communication**" means

(a) anything said or done

(b) any document prepared, or

(c) any information provided,

for the purposes of mediation, in the course of mediation, or to follow up mediation including any invitation to mediate or any mediation agreement.

"**Tribunal**" means a tribunal established under statute and includes both administrative and arbitral tribunals.

(2) **Confidentiality of mediation communications**

(a) A person must not disclose a mediation communication except as provided for by Model Provision 2(2)(b) or (2)(c).

(b) A person may disclose a mediation communication if:

(i) all the parties to the mediation consent and, if the information relates to the mediator, the mediator agrees to the disclosure

8. See [3.2]–[3.6].
9. National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution* (2003) 9.
10. *Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law,* GA Res 57/18, UN Doc A/Res/57/18 (24 January 2003) annex, art 1(3).

(ii) the disclosed information is publicly available, but is not information that is only in the public domain due to an unauthorised disclosure by that person

(iii) the disclosure is made for the purpose of seeking legal advice

(iv) the disclosure is required for the purposes of carrying out or enforcing a settlement agreement

(v) the disclosure is required to bring a claim for mediator misconduct or to respond to such a claim

(vi) the disclosure is made for research, evaluation, or educational purposes and is made without revealing, or being likely to reveal, whether directly or indirectly, the identity of any party, mediator, or other person involved in the conduct of the mediation

(vii) the disclosure is required by law, or

(viii) the disclosure is required to protect the health or safety of any person.

(c) A person may disclose a mediation communication with leave of the court or tribunal under Model Provision 2(4).

(3) **Admissibility of mediation communications in evidence**

A court or tribunal may admit a mediation communication in evidence in any proceedings (including judicial, arbitral, administrative or disciplinary proceedings) only by leave under Model Provision 2(4).

(4) **Leave for disclosure or admission of evidence**

(a) A court or tribunal may, on application by any person, grant leave for a mediation communication to be disclosed under Model Provision 2(2)(c) or admitted in evidence under Model Provision 2(3).

(b) For the purposes of Model Provision 2(4)(a), the court or tribunal must take into account the following matters in deciding whether to grant leave:

(i) whether the mediation communication may be or has been disclosed under Model Provision 2(2)(b)

(ii) whether it is in the public interest or the interests of justice for the mediation communication to be disclosed or to be admitted in evidence, notwithstanding the general public interest in favour of preserving the confidentiality of mediation communications, and

(iii) any other circumstances or matters that the court or tribunal considers relevant.

(c) Where a person seeks disclosure of admission of the mediation communication in evidence:

(i) before a court, the application must be made to the court before which the proceedings are heard

(ii) before a tribunal, the application must be made to the tribunal before which proceedings are heard, and

(iii) in any other case, the application must be made to the NSW Civil and Administrative Tribunal.

2.9 Submissions support a uniform approach to confidentiality and admissibility of mediation information in evidence. This approach should apply unless the context dictates otherwise.[11] A strong regime in this area is essential to allay parties' concerns that information disclosed during mediation might be used in subsequent litigation or disclosed to the public if the mediation proves unsuccessful.[12] Although the common law provides some degree of protection,[13] a legislative regime would provide additional certainty, allowing courts to protect information appropriately and quickly. For example, in accordance with the *Mediation Ordinance 2012* (Hong Kong), the High Court of the Hong Kong Special Administrative Region struck out a defence and passages of affidavits that were based on information obtained in mediation.[14]

2.10 The model provisions draw upon aspects of the Mediation Bill 2016 (Singapore), the *Mediation Ordinance 2012* (Hong Kong) and the *Commercial Mediation Act 2010* (Ontario). Submissions identified these as appropriate models. The provisions also align with provisions in the UNCITRAL *Model Law*,[15] and with the exceptions to confidentiality and inadmissibility recently expounded by the UK Supreme Court.[16] NADRAC has recommended a similar general rule about confidentiality and privilege subject to specified exceptions.[17]

2.11 We propose that confidentiality and admissibility be dealt with together, with courts and the NSW Civil and Administrative Tribunal ("NCAT") placed in a supervisory role under Model Provision 2(4). This reduces procedural complexity and clarifies the relationship between confidentiality and "without prejudice" privilege by integrating both protections into the one regime. The provisions encourage regularity by imposing a default position against admissibility, subject to the aggrieved party being able to justify why the default position should not apply under Model Provision 2(4)(a).

2.12 The factors in Model Provision 2(4)(b) that the courts or NCAT must consider are broadly similar to those imposed by s 138 of the *Evidence Act 1995* (NSW) with respect to the admission of illegally or improperly obtained evidence. A number of submissions supported introducing a provision like Model Provision 2(4)(b)(ii), which relates to the public interest.[18] An example of the other circumstances or matters referred to in Model Provision 2(4)(b)(iii) is where there is no concluded settlement

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11. NSW Bar Association, *Submission DR12* [28]; S Lancken, *Submission DR8,* 3; Children's Court of NSW, *Submission DR6,* 1; NSW Young Lawyers Civil Litigation Committee, *Submission DR13* [7.1.1], [9.1.2]; Law Society of NSW, *Submission DR7,* 3; Legal Aid NSW, *Submission DR14,* 7, 13; H Astor, *Submission DR4,* 1.
12. *Sharjade Pty Ltd v RAAF (Landings) Ex-Servicemen Charitable Fund Pty Ltd* [2008] NSWSC 1347 [34].
13. See R G Toulson and C M Phipps, *Confidentiality* (Sweet & Maxwell, 3rd ed, 2012) [17-008]–[17-012].
14. See, eg*, Lincoln Air Conditioning & Engineering Co Ltd v Chan Ping Fai Ricky* [2013] HKCFI 91.
15. *Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law,* GA Res 57/18, UN Doc A/Res/57/18 (24 January 2003) annex, art 9, art 10.
16. *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44; [2011] 1 AC 662 [30].
17. National Alternative Dispute Resolution Advisory Council, *Maintaining and Enhancing the Integrity of ADR Processes: from Principles to Practice through People* (Report to the Commonwealth Attorney-General, 2011) [4.6.1]–[4.6.2].
18. NSW Bar Association, *Submission DR12* [28]; The Dispute Group, *Submission DR11*, 6; Legal Aid NSW, *Submission DR14*, 7; Law Society of NSW, *Submission DR7,* 8.

but one party to the negotiations has made a clear statement, intending the other party to act on it and the other party has in fact acted, giving rise to an estoppel.[19]

2.13 The exceptions to confidentiality in the recommended provision are broadly consistent with those provided by s 131 of the *Evidence Act 1995* (NSW) that exclude evidence of settlement negotiations. Section 131 prevents evidence from being introduced if it concerns communications between disputing parties. This applies in the context of legal proceedings[20] and is not likely to operate where formal legal proceedings have not yet been instituted. The model provisions would expressly extend this protection beyond the litigation context. This supports the role of mediation as a dispute resolution option in its own right.

Immunity

Model Provision 3: Mediator's immunity

(1) No matter or thing done or omitted to be done by a mediator subjects the mediator to any personal action, liability, claim or demand if the matter or thing was done for the purposes of a mediation session under this Act.

(2) Model Provision 3(1) does not apply if the claimant can show an absence of good faith on the mediator's part.

(3) This section is not intended to alter the operation of s 33 of the *Civil Procedure Act 2005* (NSW) or cl 2 of sch 1 of the *Civil and Administrative Tribunal Regulation 2013* (NSW).

2.14 Stakeholder views are mixed on the subject of mediators' immunity. The Law Society of NSW submits that there is no reason to provide mediators with immunity.[21] In contrast, the Dispute Group contends that, regardless of whether the process is court ordered, all mediators should enjoy the absolute immunity currently available in court and tribunal-based mediation processes under the *Civil Procedure Act 2005* (NSW) and the *Civil and Administrative Tribunal Regulation 2013* (NSW).[22] The Bar Association submits that absolute immunity should extend to mediation of all disputes before courts but not necessarily those that are not yet before the courts.[23]

2.15 The Supreme Court strongly supports retaining absolute immunity for court-administered mediation.[24] NADRAC commented that the "immunity is strongly justified in relation to court-ordered or court-annexed ADR" because in such circumstances a mediator plays a "quasi-judicial function". The result is that

19. This was recognised as an exception in *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44; [2011] 1 AC 662 [30].
20. *Evidence Act 1995* (NSW) s 131(5)(a) defines "dispute" for the purposes of s 131 to mean one for which relief may be given in an Australian or overseas civil proceeding.
21. Law Society of NSW, *Submission DR7,* 7.
22. The Dispute Group, *Submission DR11,* 6; *Civil Procedure Act 2005* (NSW) s 33; *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 2.
23. NSW Bar Association, *Submission DR12* [20]–[23].
24. Supreme Court of NSW, *Submission DR2,* 6–7; *Civil Procedure Act 2005* (NSW) s 33, s 55; *Retail Leases Act 1994* (NSW) s 66(3); *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 2.

determinations and orders by a mediator enjoying absolute immunity cannot be the subject of civil proceedings even in cases of gross error or if the mediator is motivated by "envy, hatred and malice".[25]

2.16 Provisions governing ADR proceedings in some contexts protect practitioners from liability, action, claim or demand for matters, things done or things omitted to be done in good faith.[26] However, the provisions are not uniform. For example, some extend immunity only to acts done and not to omissions.[27] The *Residential (Land Lease) Communities Act 2013* (NSW) provides for immunity without limiting it to matters or things done or omitted for the purposes of a particular act, part, provision or form of ADR. Other immunity provisions are limited to acts and omissions undertaken for the purpose of mediation. The Children's Court of NSW submits that greater uniformity will increase certainty and improve understanding of ADR processes.[28]

2.17 The proposed model establishes good faith immunity for acts and omissions done for the purpose of mediation. We propose that this formulation be applied to mediation under existing legislation unless there are good reasons not to apply it. Good faith immunity generally occurs in the case law surrounding statutory defences to allegations of misconduct of government officials. It is a well-understood and clear concept. The presumption of good faith reflects a presumption of regularity. It is also in line with the general rule that those alleging civil wrongs must prove their allegations.[29] As a matter of policy, it would be counterproductive if each individual mediation outcome were too readily liable to attack because the mediator was required to prove their good faith.

2.18 We propose that this protection should only be available for mediations conducted by mediators accredited in accordance with the NMAS, for the reasons stated above.[30]

2.19 Model Provision 3(3) nevertheless retains absolute judicial immunity for court-administered mediation in line with the Supreme Court's submission.[31] It is appropriate and necessary in a judicial context, but not outside that context. The current "two-tier" system of mediation privilege will continue under these proposals.

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25. *Sirros v Moore* [1975] QB 118, 132 (Lord Denning). See also *Scanlon v Director-General, Department of the Arts, Sport and Recreation* [2007] NSWCA 204; 70 NSWLR 1 [52]–[56].
26. *Aboriginal Land Rights Act 1983* (NSW) s 242(2)(d); *Civil and Administrative Tribunal Regulation 2013 (NSW)* sch 1 cl 2; *Community Justice Centres Act 1983* (NSW) s 27; *Community Land Management Act 1989* (NSW) s 70A; *Farm Debt Mediation Act 1994* (NSW) s 18; *Health Care Complaints Act 1993* (NSW) s 96(1); *Legal Aid Commission Act 1979* (NSW) s 60G; *Mining Act 1992* (NSW) s 154; *Petroleum (Onshore) Act 1991* (NSW) s 69Q; *Residential (Land Lease) Communities Act 2013* (NSW) s 155; *Retail Leases Act 1994* (NSW) s 66(3); *Strata Schemes Management Act 2015* (NSW) s 225; *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 318G.
27. See, eg, *Community Justice Centres Act 1983* (NSW) s 27(1*); Community Land Management Act 1989* (NSW) s 70A*; Residential (Land Lease) Communities Act 2013* (NSW) s 155; *Mining Act 1992* (NSW) s 154. There are differing views as to whether the omission of "omit" is significant in such cases: *New South Wales v West* [2008] ACTCA 14; 2 ACTLR 255 [99], [155].
28. Children's Court of NSW, *Submission DR6,* 1.
29. *Cook's Construction Pty Ltd v SFS 007.298.633 Pty Ltd* [2009] QCA 75 [43]. See also *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44; [2002] 2 AC 773 [13].
30. See [2.2].
31. Supreme Court of NSW, *Submission DR2,* 6–7.

Termination of mediation

Model Provision 4: Termination of mediation

(1) Where the question of whether a mediation has been terminated arises in any proceedings, the court or tribunal must determine whether the mediation has been terminated.

(2) Unless evidence to the contrary is adduced, the court or tribunal must presume a mediation has terminated if:

(a) the mediator purports to terminate a mediation

(b) a party purports to terminate a mediation

(c) a time limit for the mediation (and any extensions) agreed by the parties expires, or

(d) litigation commences or recommences.

2.20 It is necessary to know when a mediation has been terminated so that, for example, all parties know when communications between the parties are no longer confidential or privileged. Such certainty would also be required if rules were to be adopted about the expiration of limitation periods.[32]

2.21 Presently, the *Strata Schemes Management Regulation 2016* (NSW) and the *Community Land Management Regulation 2007* (NSW) grant the mediator a general discretion to terminate mediation proceedings.[33] The *Health Care Complaints Act 1993* (NSW) does likewise where the mediator forms the view that it is "unlikely that the parties will reach agreement" or that a "significant issue of public health or safety has been raised".[34] The Law Reform Commission of Ireland has recommended that legislation empower the mediator to terminate the mediation where further efforts are "no longer justified".[35] This reflects the UNCITRAL *Model Law,* which permits the mediator to terminate the proceedings after consulting with the parties.[36] Model Provision 4(a) adopts this approach.

2.22 Some current legislation provides that the parties can withdraw from[37] or terminate the mediation.[38] Model mediation agreement clauses issued by the Australian Centre for International Commercial Arbitration ("ACICA"), UNCITRAL and the NSW Bar Association provide that mediation proceedings may be terminated by written

32. See [2.37]–[2.41] below where we conclude on balance *not* to propose a Model Provision regarding the expiration of limitation periods.
33. *Strata Schemes Management Regulation 2016* (NSW) cl 61(1); *Community Land Management Regulation 2007* (NSW) cl 12(1).
34. *Health Care Complaints Act 1993* (NSW) s 52(3).
35. Ireland, Law Reform Commission, *Alternative Dispute Resolution: Mediation and Conciliation*, Report 98 (2010) [4.79]–[4.80], [4.83].
36. Australian Centre for International Commercial Arbitration, *ACICA Mediation Rules* (2007) r 16; *Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law,* GA Res 57/18, UN Doc A/Res/57/18 (24 January 2003) annex, art 11.
37. *Community Justice Centres Act 1983* (NSW) s 23(2); *Ombudsman Act 1974* (NSW) s 13A(3).
38. See, eg, *Strata Schemes Management Regulation 2016* (NSW) cl 61(2); *Community Land Management Regulation 2007* (NSW) cl 12(2).

declaration of the party (or parties) addressed to the mediator and each other party.[39] Model Provision 4(b) follows this approach.

2.23 The *Dust Diseases Tribunal Regulation 2013* (NSW) imposes limits on the duration of mediations.[40] A review in 2006 found that stakeholders were frustrated by the rigidity of the timetable and the lack of opportunity to tailor the timetable to the needs of the specific case.[41] We do not propose adopting a similar approach given the need to maintain flexibility for the parties and mediators.

2.24 The ACICA and NSW Bar Association model clauses provide that mediation proceedings are terminated when the time period for mediation agreed by the parties expires.[42] Model Provision 4(c) supports this flexibility.

2.25 Model Provision 4 treats the question of whether mediation has been terminated as a question of fact for the court or tribunal to determine. The Swedish *Mediation Act*, introduced in 2011 to implement the European Union's *Mediation Directive* ("EU *Directive*"),[43] takes this approach. The Swedish Act suggests that it can be "reasonable to assume" mediation is terminated if:

- a party informs the mediator that it no longer wishes to participate
- the mediator has concluded that there are no longer reasons to continue mediation and (preferably) informs the parties, or
- a time limit set for mediation expires.[44]

The Model Provision adopts this approach to ensure certainty while also protecting against abuse.

2.26 The *Uniform Civil Procedure Rules* (NSW) ("UCPR") provide that a mediator must advise the Court of the time and date the final mediation session concluded.[45] In our view, a similar approach is inappropriate in the Model Provisions as we intend that they should also apply to disputes that are not before a court or tribunal. The UCPR rule will, of course, continue to apply in relevant cases.

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39. Australian Centre for International Commercial Arbitration, *ACICA Mediation Rules* (2007) r 16; *Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law,* GA Res 57/18, UN Doc A/Res/57/18 (24 January 2003) annex, art 11(d); NSW Bar Association, *Mediation Agreement,* cl 26(c).
40. *Dust Diseases Tribunal Regulation 2013* (NSW) cl 36, cl 41.
41. Attorney General's Department of NSW, *Review of the Dust Diseases Claims Resolution Process,* Issues Paper (2006) [3.4].
42. Australian Centre for International Commercial Arbitration, *Mediation Rules* (2007) cl 16(1)(d); NSW Bar Association, *Mediation Agreement,* cl 26(a).
43. European Parliament and European Council, *Directive on Certain Aspects of Mediation in Civil and Commercial Matters* (Directive 2008/52/EC).
44. See E Ficks, "Sweden" in G De Palo and M B Trevor (ed), *EU Mediation Law and Practice* (OUP, 2012) 341, 350.
45. *Uniform Civil Procedure Rules* (NSW) r 20.7.

Enforcement

Model Provision 5: Enforcement of mediated settlement agreements

(1) "**Mediated settlement agreement**" means an agreement by some or all of the parties to mediation settling the whole, or part, of their dispute.

(2) If a party to a mediated settlement agreement fails to comply with its terms, another party wishing to enforce the agreement may, on notice to all other parties who signed the agreement, apply to the Court for orders to give effect to the agreement if:

  (a) the agreement is reduced to writing and signed by the parties, and

  (b) the mediation was conducted by an accredited mediator, and

  (c) a party against whom the applicant seeks to enforce the settlement agreement has explicitly consented to such enforcement, whether by the terms of the agreement or other means.

(3) The mediator must draw the attention of the parties to the effect of Model Provision 5(2) before the mediated settlement agreement is signed.

(4) The Court may refuse to give orders under Model Provision 5(2) only:

  (a) at the request of the party against whom it is invoked, if that party furnishes to the Court proof that the agreement is void or voidable on grounds of incapacity, fraud, misrepresentation, duress, coercion, mistake or other invalidating cause, including that the agreement is void or voidable after a court has found it is unjust in the circumstances relating to the contract at the time it was made under the *Contracts Review Act 1980* (NSW), or

  (b) if the Court finds that:

    (i) any of the terms of the agreement cannot be enforced as an order of the Court, or

    (ii) making the order would be contrary to public policy, or

    (iii) the mediator failed to draw the parties' attention to the binding nature of the agreement before it was signed.

(5) Any undertaking by one or more of the parties to a mediated settlement agreement to pay the fees and expenses of the mediator is enforceable if:

  (a) the amount of such fees, or

  (b) the means for their calculation,

  is specified in the agreement.

2.27 Under the *Civil Procedure Act 2005* (NSW), if a court refers a matter to mediation,[46] and the parties reach an agreement or arrangement, the Court may make orders giving effect to the agreement.[47] Likewise, if NCAT refers a matter to mediation,[48] and the parties reach an agreement, the outcome may be formally noted to become

46. Under *Civil Procedure Act 2005* (NSW) s 26.
47. *Civil Procedure Act 2005* (NSW) s 29.
48. Under *NSW Civil and Administrative Tribunal Act 2013* (NSW) s 37.

an order of the Tribunal[49] and be binding on the parties as a tribunal decision. The Housing Industry Association supports these binding outcomes.[50] Similar provisions operate in relation to Aboriginal land rights and workers' compensation mediation.[51]

2.28 This model provision establishes a mechanism to enforce mediated agreements as orders where:

- the mediation was not ordered by a court or tribunal, and
- the mediation was under a statutory scheme that lacks such enforcement mechanisms.
- At present, such agreements are treated as ordinary contracts. Enforcement thus requires the plaintiff to bring a claim for breach and establish the grounds for specific performance. During this process, the onus of proof rests on the plaintiff. This procedure for contractual enforcement is onerous and time consuming and means that mediation may fail to reduce costs and delays for the parties and the community. Additionally, if the mediated settlement agreement is recorded as an order of the Court, any effort to enforce it in international jurisdictions will be assisted by treaties, like those with the UK and New Zealand, that provide for the recognition and enforcement of court judgments.[52]

2.29 Some submissions favour the introduction of overarching legislation that, in absence of other specific legislation, provides that agreements reached in ADR are enforceable.[53] Boulle notes that the lack of enforceability of Farm Debt Mediation agreements is an issue, as parties "are left to their own devices" in the event of non-compliance.[54] Singapore, Ontario, California and the UK (pursuant to the EU *Directive*) have adopted or proposed legislation to remedy such concerns.[55] The Model Provision is based on these Acts and s 36 of the *Commercial Arbitration Act 2010* (NSW). The Model Provision also aligns with UNCITRAL's current work on a framework for the enforceability of international commercial conciliated agreements.[56]

2.30 The Model Provision does not require the immediate registration of an agreement with the Court in the manner proposed in Singapore.[57] Rather, a party may approach the Court and seek registration later, when they are seeking compliance.

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49. *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 9.
50. Housing Industry Association, *Submission DR9* [2.1.25]–[2.1.27].
51. *Aboriginal Land Rights Act 1983* (NSW) s 240 applying *Commercial Arbitration Act 2010* (NSW) s 35, s 36; *Work Health and Safety Act 2011* (NSW) s 142, s 143. See also L Boulle, *Mediation: Principles, Process, Practice* (LexisNexis Butterworths, 3rd ed, 2011) 453.
52. See, eg, *Agreement between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, 1856 UNTS 85 (entered into force 1 September 1994)*; *Trans-Tasman Proceedings Regulations and Rules 2013* (NZ).
53. Law Society of NSW, *Submission DR7,* 3; S Lancken, *Submission DR8,* 3.
54. L Boulle, *Mediation: Principles, Process, Practice* (LexisNexis Butterworths, 3rd ed, 2011) 453.
55. Mediation Bill 2016 (Singapore) cl 12; *Arbitration Act Revised Edition 2002* (Singapore) s 46; *Commercial Mediation Act 2010* (Ontario) s 13; *California Code of Civil Procedure* §664.6; *Civil Procedure Rules 1998* (UK) r 78.24.
56. *Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law,* GA Res 57/18, UN Doc A/Res/57/18 (24 January 2003) annex, art 14.
57. Mediation Bill 2016 (Singapore) cl 12(2).

This reduces court workloads and complexity for parties by avoiding judicial involvement unless it is needed.

2.31 The model provision places the onus on the defendant to rebut the plaintiff's claim for enforcement on the grounds set out in Model Provision 5(4). By eliminating the equities around specific performance, it places weight in favour of the enforceability of the agreement.

2.32 We recommend that this mechanism only be available to mediations conducted by mediators accredited in accordance with the NMAS for the reasons outlined above.[58]

2.33 We also propose that the agreement not be enforceable in this way unless the mediator had drawn the parties' attention to the consequences before they enter into the settlement agreement. If the mediator fails to do so, the agreement can still operate as an agreement but will not be registrable as a court order.

Removal of statutory defamation privilege

Proposal 1: Removal of statutory defamation privilege

Provisions establishing a defence of absolute privilege to defamation proceedings arising from the conduct of mediations should be repealed.

2.34 A defence of absolute privilege to defamation proceedings arising from mediations was first introduced by the Community Justice Centres pilot project in 1980.[59] The co-ordinating committee thought it likely that mediations might involve "a heated exchange of views, accusations and abuse" and considered it desirable to protect the parties to a mediation from possible suits for defamation.[60] Along with subsequent provisions based upon it,[61] this privilege has never been tested. Similarly, there is no known evidence to support the claim made when justifying its insertion into the *Land and Environment Court Act 1979* (NSW) in 2007[62] that "without the protection afforded by [defamation privilege], parties involved in a [mediation] might be less frank and less willing to make concessions to settle a dispute".[63]

2.35 However, given that mediation communications are inadmissible, purportedly defamatory statements made in the course of mediation will be inadmissible in any attempt to prosecute a defamation claim, unless one of the proposed exceptions applies. Likewise, as mediation communications are confidential and thus cannot

58. See [2.2].
59. *Community Justice Centres (Pilot Project) Act 1980* (NSW) s 28(2).
60. J Schwartzkoff and J Morgan, *Community Justice Centres: A Report on the New South Wales Pilot Project, 1979–81* (Law Foundation of NSW, 1982) 27.
61. *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 10; *Civil Procedure Act 2005* (NSW) s 30; *Community Justice Centres Act 1983* (NSW) s 28; *Community Land Management Act 1989* (NSW) s 69; *Dust Diseases Tribunal Regulation 2013* (NSW) cl 49; *Strata Schemes Management Act 2015* (NSW) s 222; *Land and Environment Court Act 1979* (NSW) s 34(10A), s 34(10B); *Legal Aid Commission Act 1979* (NSW) s 60D.
62. *Courts and Other Legislation Amendment Act 2007* (NSW) sch 2.
63. NSW, *Parliamentary Debates*, Legislative Assembly, 30 November 2007, 4787.

"leave the room", the risk of damage from any purportedly defamatory statement is limited. The good faith immunity provided to mediators also protects them against liability for defamation.

2.36 An express statutory privilege against defamation is, therefore, superfluous. The absence of defamation privilege in any international mediation legislation supports this conclusion. We therefore propose that NSW repeal provisions that establish a defence of absolute privilege to defamation claims. Such a privilege should not be included in any generally applicable statute on mediation.

Suspension of limitation periods

2.37 In CP16 we asked about the need for provisions to suspend any limitation and prescription periods while mediation is attempted.[64]

2.38 The suspension of limitation periods appears to be possible at common law and in equity. If one party represents that they will extend the limitation period, and the other party enters into mediation in reliance on this, a departure from the agreement and an attempt to enforce the limitation would give rise to an equity in favour of the other party.[65] However, as with all equitable remedies, the availability of specific performance to enforce the parties' agreement is at the court's discretion and subject to equitable "defences".

2.39 The parties' ability to extend the limitation period, in effect, by agreement, has been legislated in Western Australia,[66] Ontario,[67] and in the UK[68] (pursuant to the EU *Directive*). As the Law Reform Commission of Western Australia noted, codification of these extensions increases certainty for the parties.[69] In particular this would support an argument for equitable estoppel. It also encourages parties to attempt to settle their disputes by ensuring that they are not "forced" to litigate to preserve their rights. Courts have also shown a willingness to grant extensions of time to commence proceedings where protracted mediation has contributed to the expiry of the limitation period.[70] A legislative suspension of the running of time for limitation purposes during mediation accords with general principles of fairness and ensures that attempts to mediate do not prejudice parties' legal rights. The NSW Bar Association submits that a provision dealing with limitation periods during mediation "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".[71]

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64. NSW Law Reform Commission, *Dispute Resolution: Frameworks in New South Wales*, Consultation Paper 16 (2014) [8.28]–[8.32].
65. See *Commonwealth v Verwayen* (1990) 170 CLR 394.
66. *Limitation Act 2005* (WA) s 45.
67. *Limitations Act 2002* (Ontario) s 11(1).
68. *Limitation Act 1980* (UK) s 33A.
69. Law Reform Commission of Western Australia, *Limitation and Notice of Actions,* Project No 36 Part II, Report (1997) [18.3].
70. See, eg, *Rundle v Salvation Army (South Australia Property Trust)* [2007] NSWSC 443 [42]–[45].
71. NSW Bar Association, *Submission DR12* [31].

2.40 In light of these benefits, we considered proposing a model provision that draws on the UNCITRAL *Model Law*, and legislation in Ontario and Western Australia[72] by providing expressly for the suspension of limitation periods while mediation is ongoing:

> (1) When mediation proceedings commence, the running of any limitation period under the *Limitation Act 1969* (NSW) regarding the claim that is the subject matter of the mediation is suspended unless the parties agree otherwise.
>
> (2) Where the mediation proceedings have been terminated under Model Provision 4, the limitation period applicable under the *Limitation Act 1969* (NSW) resumes running from the time the mediation ended unless the parties have agreed otherwise.

2.41 In our view, on balance, such a provision is not warranted. Such a provision may create more difficulties than it resolves, particularly in terms of attempts to mediate and questions about bona fide engagement. However, we recognise the arguments in favour of such a provision and welcome submissions on this question.

72. *Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law,* GA Res 57/18, UN Doc A/Res/57/18 (24 January 2003) annex, art 10; *Limitations Act 2002* (Ontario) s 11(1); *Limitation Act 2005* (WA) s 45.

3. Implementation options

In brief

We consider two options for implementing our model provisions:

- implementing them in overarching legislation, and
- reforming some existing statutory provisions and introducing future statutory provisions in line with the model provisions.

3.1 Our terms of reference require us to consider improving or updating the existing legislative provisions and to consider the possibility of recommending a consistent model/approach. In this Chapter we consider the options of:

- implementing the model provisions in overarching legislation, and
- reforming some existing statutory provisions and introducing future statutory provisions in line with the model provisions.

Implementation in overarching legislation

Option 1: Application to mediation under an agreement

This Act applies to any mediation conducted under an agreement to mediate entered into after the commencement of this Act if the mediator is an accredited mediator and:

(a) the mediation is wholly or partly conducted in NSW, or

(b) the agreement to mediate provides that the law of NSW is to apply to the mediation,

unless the parties exclude or have excluded the operation of the Act or any provision of the Act, by agreement.

3.2 The model provisions could be implemented as a "Mediation Act". This would be particularly valuable for commercial/private parties dealing with disputes outside the context of any other legislation. This could encourage parties to use mediation instead of more costly and time-consuming court or arbitral processes. It would also have wider benefits, preventing groups from falling through the cracks of current legislation.

3.3 We did not directly raise such an approach in CP16. We now seek submissions on its desirability and usefulness.

3.4 Reasons for legislating the model provisions include to:

- overcome the parties' inability to agree by contract to have enforceable rules around their communications, or

- have any agreement reached through mediation enforceable as a court order.

3.5 Given that submissions uniformly emphasise the importance of maintaining flexibility in ADR, we propose that parties be free to contract out of all or part of the legislation. For example, the parties may agree to the immunity and confidentiality provisions, but not agree that any settlement qualifies for enforceability as if it were a court order. The provisions would thus operate in a manner similar to the replaceable rules of the *Corporations Act 2001* (Cth).[1]

3.6 An alternative to allowing the parties to opt out, could be for the provisions to apply only where the parties expressly agree. However, this approach has not been adopted in any jurisdiction or in the UNCITRAL *Model Law on International Commercial Conciliation*. Having the provisions by default unless excluded would ensure that their protections are most widely available.

Model for existing and future statutory provisions

Option 2: Application in existing and future statutes

The model provisions should be:

(a) inserted in terms or by reference into each of the statutes that in our view would benefit from the provisions listed in **Appendix A**, and

(b) used as a template for future legislation providing for mediation,

unless the circumstances otherwise require.

3.7 An alternative to Option 1 is to use the model provisions as a template for reforming existing statutory mediation schemes that do not currently have provisions in the same or similar terms to the model provisions. Submissions generally support having a greater degree of uniformity.[2] We have highlighted the gaps in existing provisions in Chapter 2 of this paper. Given the diversity in current provisions, this would need to be done on a case-by-case basis to avoid unintended results.

3.8 In our view, the model provisions could feasibly be applied in the statutes listed in Appendix A. We do not think they are appropriate for application to those statutes listed in Appendix B. Accordingly we propose that the statutes listed in Appendix B be excluded from the scheme. Appendix B includes statutes that apply to judicially-ordered or supervised mediations, and those statutes that already cover the same or substantially the same matters as the model provisions. Those statutes could in due course be amended (to the extent appropriate) to bring them into line with the model provisions.

3.9 The proposal to exclude the model provisions from a range of "mediations" under statute reflects the fact that the expression "mediation" has been used in widely varying circumstances and contexts that cannot be treated uniformly. Some of the

1. See, eg, *Corporations Act 2001* (Cth) pt 2B.4.
2. H Astor, *Submission DR4,* 2–3; Children's Court of NSW, *Submission DR6,* 1; Law Society of NSW, *Submission DR7,* 2–4; S Lancken, *Submission DR8,* 3; NSW Department of Family and Community Services, *Submission DR10,* 1; NSW Bar Association, *Submission DR12* [13]; NSW Young Lawyers Civil Litigation Committee, *Submission DR13,* [9.2.1]–[9.2.2]; Legal Aid NSW, *Submission DR14,* 3.

processes listed form part of administrative schemes and, in one case, a disciplinary scheme. Others govern the sensitive area of labour relations or are inherently specialist, such as ombudsman schemes or other complaint resolution processes. Still others involve the use of experts as the third party dispute resolution practitioners.

3.10 The reason for excluding such processes is that they are not classically mediations, in the sense of an independent third party assisting contending parties who are on the same footing, to reach an agreement. Further, the person performing the role of "mediator" in such cases is unlikely to be accredited as they would be involved in the "mediation" process as part of their employment. The listed processes also align broadly with the excluded processes specified in schedule 1 of the *Mediation Ordinance 2012* (Hong Kong). The Ordinance carves out those mediations that take place in relation to ombudsman schemes, apprenticeship, labour relations, minor employment claims and discrimination complaints.

Appendix A:
Existing NSW statutory provisions for amendment

Act or Regulation	ADR provisions
Building Professionals Act 2005	s 24
Farm Debt Mediation Act 1994	
Legal Aid Commission Act 1979	pt 3A
National Parks and Wildlife Act 1974	s 71K
Occupational Associations (Complaints and Discipline) Code (*Professional Standards Act 1994* sch 1)	cl 6, cl 9
Retail Leases Act 1994	pt 8 div 2
Residential (Land Lease) Communities Act 2013	s 69, pt 12, div 1 and 2
Small Business Commissioner Act 2013	s 17-19
Water Management Act 2000	s 62, s 93
Work Health and Safety Act 2011	s 142(2)

Appendix B:
Excluded existing NSW statutory provisions

Act or Regulation	ADR provisions
Aboriginal Land Rights Act 1983	s 239A, s 239
Anti-Discrimination Act 1977	pt 9 div 2 subdiv 3
Apprenticeship and Traineeship Act 2001	s 40, s 50
Architects Act 2003	s 40
Associations Incorporation Regulation 2010	sch 1 cl 10
Children and Young Persons (Care and Protection) Act 1998	s 37, s 65, s 65A, s 114
Children's Court Rule 2000	cl 25
Civil and Administrative Tribunal Act 2013 *Civil and Administrative Tribunal Regulation 2013*	s 37, s 59 sch 1
Civil Procedure Act 2005 *Uniform Civil Procedure Rules 2005*	pt 4,pt 5 pt 20
Community Justice Centres Act 1983	pt 4, pt 5
Community Land Management Act 1989 *Community Land Management Regulation 2007*	pt 4 div 2, s 64 pt 3
Conveyancers Licensing Act 2003	s 44
Co-operatives National Law	s 584(1)
Crimes (Domestic and Personal Violence) Act 2007	s 21
Criminal Procedure Act 1986	s 203
Dust Diseases Tribunal Regulation 2013	pt 4 div 4
Employment Protection Act 1982	s 13
Entertainment Industry Act 2013	s 20
Government Information (Information Commissioner) Act 2009	s 19
Health Care Complaints Act 1993	pt 2 div 8, pt 2 div 9
Health Record and Information Privacy Act 2002	s 46
Land and Environment Court Act 1979 *Land and Environment Court Rules 2007*	s 34, s 34AA pt 6.2
Legal Profession Uniform Law	s 288
Local Court Act 2007 *Local Court Rules 2009*	s 36 r 2.5, r 4.3

Act or Regulation	ADR provisions
Local Government Act 1993	s 440I
Mining Act 1992	pt 8 div 2
Ombudsman Act 1974	pt 3
Mining and Petroleum Legislation Amendment (Land Access Arbitration) Act 2015	whole Act
Police Act 1990	s 176
Privacy and Personal Information Protection Act 1998	s 49
Real Property Act 1900	s 135
Retirement Villages Act 1999	pt 8 div 2
Strata Schemes Management Act 2015 *Strata Schemes Management Regulations 2010* *Strata Schemes Development Act 2015*	s 217–225 pt 8 s 181
Succession Act 2006	s 98
Thoroughbred Racing Act 1996	s 29G
Veterinary Practice Act 2003	s 43(3)
Workplace Injury Management and Workers Compensation Act 1998 *Workers Compensation Commission Rules 2011*	ch 7 Pt 6 div 4, s 355 r 17.9–17.12

Appendix C: Submissions to CP 16

DR1 NSW Information Commissioner, 13 June 2014
DR2 Supreme Court of NSW, 18 June 2014
DR3 NSW Privacy Commissioner, 18 June 2014
DR4 Emeritus Professor Hilary Astor, 19 June 2014
DR5 Anti-Discrimination Board of NSW, 20 June 2014
DR6 Children's Court of NSW, 26 June 2014
DR7 Law Society of NSW, 27 June 2014
DR8 Steve Lancken, 27 June 2014
DR9 Housing Industry Association, 27 June 2014
DR10 Department of Family and Community Services, 1 July 2014
DR11 The Dispute Group, 1 July 2014
DR12 NSW Bar Association, 2 July 2014
DR13 NSW Young Lawyers Civil Litigation Committee, 14 July 2014
DR14 Legal Aid NSW, 1 August 2014

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