THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Civil Litigation Committee

Submission to the New South Wales Law Reform Commission

Dispute resolution: frameworks in New South Wales

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About New South Wales Young Lawyers

NSW Young Lawyers (**NSWYL**) is a division of the Law Society of NSW and is made up of legal practitioners who are under the age of 36 or in their first 5 years of practice and law students. It is the largest body of newly practising lawyers and law students in Australia, with a membership comprising of some 15,000 members. NSWYL supports practitioners in their early career development in numerous ways, including by encouraging involvement in its 15 separate committees, each dedicated to a particular area of practice.

About the Civil Litigation Committee

The New South Wales Young Lawyers Civil Litigation Committee (**Committee**) is comprised of members from the NSWYL who practise or have an interest in civil litigation. The Committee promotes understanding of civil litigation and dispute resolution in the profession, offering a support base and information resource for its members. The Committee seeks to improve the administration of justice, with an emphasis on advocacy, evidence and procedure.

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1. Issues addressed in this submission

The Committee has had the opportunity to read and consider the terms of reference and Consultation Paper 16 released by the NSW Law Reform Commission (**Consultation Paper**).

In this submission, the Committee will respond generally to the Consultation Paper under the following headings (adopting the numbering of the Consultation Paper):

3. Existing statutory provisions – types of disputes and dispute resolution;
4. Existing statutory provisions – initiating and participating in ADR;
5. Existing statutory provisions – practice, procedures and enforcement;
6. Existing statutory provisions – ADR practitioners;
7. Existing statutory provisions – use of information; and
9. The regulatory framework.

The Committee's submissions in relation to the above questions and proposals are set out in detail below. Please note that the Committee has not addressed those issues arising in Chapter 8 of the Consultation Paper.

2. Existing statutory provisions – overview

As noted by the NSW Law Reform Commission at sections 2.1 – 2.5 of the Consultation Paper, the Statutory ADR provisions in NSW vary in detail and coverage and are often inconsistent. Such provisions range from simple provisions encouraging or mandating resort to ADR, to detailed regimes that prescribe procedures and obligations, and offer protections and safeguards for participants.

Due to this varied nature and coverage of Statutory ADR provisions, the Committee is of the view that there is a need for consistency and clarity in ADR provisions generally, so as to ensure that parties are aware and know what to expect from ADR processes. Further, the Committee is of the view that ADR provisions should facilitate the just, quick and cheap resolution of disputes.

In achieving these ends, the Committee submits that a comprehensive and standardised set of guidelines is desirable in order to promote consistency and transparency, and improve the way in which ADR is understood and utilised by parties and practitioners alike.

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

3.1. Types of disputes

The Committee is of the view that each type or category of dispute should have its own set of dispute resolution provisions.

In relation to civil disputes, the Committee supports the introduction of statutory scheme of mandatory pre-litigation requirements, similar to the Part 2A amendments to the *Civil Procedure Act 2005* (NSW), which were postponed in late 2011 and eventually repealed in early 2013.

In effect, those amendments (if fully implemented) would give rise to mandatory pre-litigation processes, whereby parties would be required to take genuine steps to resolve or reduce issues in dispute prior to the commencement of proceedings.

For completeness, the relevant text of the repealed provisions is set out in **Schedule 1** to this submission.

3.2. A need for standardised terminology or a broad umbrella term?

The Committee submits that a comprehensive and standardised set of guidelines, such as those proposed by the former **NADRAC**, is desirable in order to promote consistency and transparency, and improve the way in which ADR is understood and utilised by parties and practitioners alike.

3.3. Mediation

In the absence of clear definitions of processes and terms, the terminology discussed in questions 3.3-3.8 of the Consultation Paper will inevitably mean different things to different people.

The Committee submits that the standard definition of "*mediation*" set out at paragraph 3.40 of the Consultation Paper is preferable to the more expansive example definitions given at paragraphs 3.41 and 3.42. Although it is submitted that the standard definition ought to be an inclusive rather than an exhaustive definition. The phrase "*structured negotiation process*" is sufficiently broad to encompass a variety of processes. On the other hand, the broad definitions given at paragraphs 3.41 and 3.42 of the Consultation Paper arguably extend to processes beyond what is conventionally understood as "*mediation*", including "*the undertaking of any activity for the purpose of promoting the discussion in settlement of disputes*".[1]

Clarity and consistency in the definition of "*mediation*" has implications not just in terms of the protective provisions referred to in paragraph 3.43 of the Consultation Paper, but has more broad implications in terms of the way that both practitioners and members of the public understand and view the ADR process itself.

The Committee submits that a comprehensive and standardised set of guidelines, such as those proposed by NADRAC, is desirable in order to promote consistency and transparency, and improve the way in which ADR is understood and utilised by parties and practitioners alike. In addition to clearly defining terms, the guidelines should also clearly address the function of the mediator and the mediator's duties.

[1] *Community Justice Centres Act 1983* (NSW).

It is interesting to note that NADRAC's proposed description of mediation provides that "*the mediator has no advisory or determinative role*".[2] On the other hand, NADRAC's proposed definition of conciliation provides that "*the conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role*."

As a practical matter, the Committee is doubtful that this distinction is well understood by practitioners. It is also noted by the Committee that experience has shown that some mediators do in fact comment on the perceived merits or otherwise of the matter.

3.4. Conciliation

By reference to the comments at paragraph 3.51 of the Consultation Paper regarding the lack of practical differences between the processes of mediation and conciliation, it is submitted that the term "*conciliation*" may be unnecessary and is generally no longer necessary in most contexts.

3.5. Neutral evaluation

Having regard to the commentary at paragraphs 3.52 to 3.54 of the Consultation Paper, it is submitted that the term "*neutral evaluation*" is unnecessary and superfluous, and is no longer necessary in any context. Indeed, what is described at paragraph 3.54 of the Consultation Paper could fall within the scope of the definition of "*arbitration*", as discussed in the Consultation Paper commentary at question 3.6.

If the process contemplates evaluation at an early stage, there is no reason why this evaluation cannot be described as "*arbitration*". Similarly, if the idea is for a third party to make a determination on the key issues in dispute, without determining the facts of the dispute, there is no reason why the scope of the arbitration could not be limited in this way. That said, it is difficult to envisage how it might be possible for the third party to resolve the key issues in dispute without determining the facts of the dispute.

It is unclear whether, as defined, "*early neutral evaluation*" contemplates the making of a binding determination by a third party, or merely the recommendation of the most effective means of resolving the dispute.

3.6. Arbitration

It is not clear to the Committee why the terms of reference exclude arbitration under the *Industrial Relations Act 1996* (NSW) and the *Commercial Arbitration Act 2010* (NSW).

Again, the Committee submits that the primary objective of a review into statutory provisions dealing with ADR should be consistency and clarity of definitions.

The absence of clarity in relation to the meaning of the term "*arbitration*" in the statutes cited at paragraph 3.56 of the Consultation Paper is problematic, and should be rectified. One such way to rectify this matter would be the introduction of the proposed NADRAC guidelines.

3.7. Expert determination

The Committee suggests that the concept of "*expert determination*" could in fact be encompassed within the concept of arbitration. It is unclear from the commentary in the Consultation Paper in relation to questions 3.6 and 3.7 that there is any material difference between the two concepts, other than the fact that

[2] National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms: The use of terms in (alternative) dispute resolution* (2003) 9.

a third party in “*expert determination*” is an expert. Presumably, this point of distinction could be addressed within the concept of an expert arbitrator, as commonly occurs in practice.

That said, the concept of an expert determination is widely known and understood within the jurisdiction of the Technology and Construction List of the Equity Division of the Supreme Court of NSW. Although once again, consolidating and clarifying the different forms of ADR is likely to result in greater consistency and utilisation of such processes, and mutual understanding between legal practitioners and the parties.

3.8. Negotiation

It is submitted that the term "*negotiation*" is in fact understood in practice as exclusively referring to those processes of ADR which do not involve a neutral third party.

4. Existing statutory provisions – initiating and participating in ADR

4.1. Compulsory referral

The Committee is of the view that referrers should be empowered to refer matters to ADR in most (if not all) circumstances. The Committee supports the view that ADR is a means of achieving a just, quick and cheap resolution of disputes. Additionally, ADR processes, even if ultimately unsuccessful, may assist the parties to narrow the issues in dispute between them.

With regard to the provisions referred to at paragraphs 4.7 and 4.8 of the Consultation Paper, the Committee is of the view that the preconditions for compulsory ADR referral will depend upon statutory context in question, and to a larger extent, the nature of the dispute.

4.2. Discretionary referral

When approaching such questions, it is important to have regard to the phrases "*where appropriate*" and "*considered necessary*", as they are important qualifiers to this discussion. As is suggested by these qualifiers, there are various circumstances where ADR will not deliver a just, quick, and cheap resolution of disputes,[3] and as such, will be inappropriate.

Accordingly, the Committee supports referrers being given the discretion to refer disputes to ADR where referrers consider it appropriate.

Any such statutory provisions should expressly set out the factors that should be taken into account by referrers when utilising their discretion to refer matters to ADR in all circumstances. Again, regard must be given to the nature and type of dispute in question. In this regard, the Committee notes the discretionary factors set out at paragraph 4.10 of the Consultation Paper.

4.3. When one or more party applies for referral

The Committee draws the NSW Law Reform Commission's attention to its responses at sections 4.1 and 4.2 of the submission above. In most circumstances a referrer should be given the discretion to consider an application for ADR from one or more parties to the dispute.

Referral should occur where the referrer considers that ADR would:

a. be the most appropriate given the nature of the dispute;

b. be fit for the just, quick, and cheap resolution of the dispute; and/or

c. resolve the matter in a timely fashion.

4.4. Where an attempt at ADR is required before proceeding

The Committee is of the view that the circumstances in which parties should be required to attempt ADR before commencing proceedings should be broadened to most civil disputes intended to be litigated. However, given the nature of certain proceedings, such as urgent injunctions and bankruptcy proceedings, such a requirement would be inappropriate. Accordingly, certain civil proceedings should be exempt from such a requirement if implemented. Again, it is submitted that, in relation to civil disputes, the Committee supports the introduction of

[3] *Civil Procedure Act 2005* (NSW) s 56.

statutory scheme of mandatory pre-litigation requirements, similar to the Part 2A amendments to the *Civil Procedure Act 2005* (NSW), which were postponed in late 2011 and eventually repealed in early 2013 (see Schedule 1 to this submission).

4.5. Where the referrer conducts the ADR

The Committee submits that the referrer should only be allowed to conduct the ADR process where the referrer is appropriately qualified for the ADR process in question. With regard to the provisions cited at paragraph 4.25 of the Consultation Paper, the Committee is also of the view that, in certain circumstances, it is appropriate for the referrer to be assisted by others.

4.6. Referral to other bodies for ADR

The Committee submits that it is appropriate to refer a matter to an external body in circumstances where an ADR process would enable the just, quick, and cheap resolution of a dispute. For example, referral to an external body would be appropriate where that external body has specialist or expert knowledge in a particular field.

A balancing exercise should be undertaken on a case by case basis to evaluate whether a dispute should be referred to an external body, having regard to the technical nature of the dispute (amongst other things).

4.7. Obligation to participate

The Committee draws the NSW Law Reform Commission"s attention to its responses at section 4.4 of the submission above.

4.8. Voluntary participation in ADR processes

The Committee submits that parties to a dispute should always be given the option to participate in ADR processes.

4.9. Good faith participation

The Committee submits that, regardless of whether the parties are participating in ADR processes voluntarily or compulsorily, participation in good faith should be obligatory. A willingness to consider alternative methods of resolving the dispute is necessary for ADR to be successful. An obligation to participate in good faith should not only apply to one of the parties to the dispute, as the *Thoroughbred Racing Act 1996* (NSW) purports to do, but should apply equally to all parties to the dispute.

Statutory provisions should ensure that the concept and expectation of good faith participation in ADR is clearly defined. Additionally, it is submitted that there must be consequences for parties who fail to participate in good faith. For example, in Dust Diseases litigation, if the parties fail to participate in good faith, the Dust Diseases Tribunal may omit the costs of mediation in an award of costs to a successful party.

4.10. Consequences of failure to participate

The Committee is of the view that where a party extends an invitation or advises of an intention to participate in ADR to another party, it may be appropriate to impose a penalty on a party who unreasonably refuses to participate. Statutory provisions should allow for the merits and nature of the dispute to be considered, as well as any other attempts that may have been made to settle the matter, and the prospects of the ADR process being successful. The Committee notes that such an approach was suggested in the English decision *of Halsey v Milton*

Keynes General NHS Trust[4] which was cited by the New South Wales Supreme Court in *ET Petroleum Holdings Pty Ltd v Clarenden Pty Ltd (No 2)*.[5]

Where it would be considered unreasonable for a party to refuse to participate in ADR, legislation should impose consequences on the failing party.

[4] *Halsey v Milton Keynes General NHS Trust; Steel v Joy [2004] NLJR 769.*

[5] *ET Petroleum Holdings P/L v Clarenden P/L (No 2) [2005] NSWSC 562.*

5. Existing statutory provisions – practice, procedures and enforcement

5.1. Practice and procedure of ADR sessions

In order to retain consistency in ADR sessions generally, and to ensure that parties are aware and know what to expect from the ADR process, the Committee is of the view that it is important to have in place provisions for the practice and procedure of ADR sessions where the area of law allows for ADR.

Any such provisions must however allow for the best interests of the parties and encourage the just, quick and cheap resolution of the matter.

As outlined in the Consultation Paper, there are a number of ways in which the practice and procedure of ADR sessions may be determined. Certainly directions of the court[6] can assist in some matters and the directions of the ADR practitioner[7] in others. What is appropriate for the particular matter will change depending on nature and circumstances of the dispute. In this regard, one consistent model for ADR sessions may not be able to cover all forms of ADR but in any such provisions setting out the practice and procedure of ADR sessions, the Committee urges the use of consistent language.

Any provisions setting out the practice and procedure of ADR sessions must use clear language and emphasise that the ADR session must be conducted with as little formality and technicality as possible, and that it is made clear that the rules of evidence do not apply in ADR sessions.[8]

The options as to how a party can participate in mediation should remain[9] and indeed similar provisions should be included in all other provisions setting out the practice and procedure for ADR sessions.

The Committee is of the view that the provisions setting out the practice and procedure of ADR sessions should not be exhaustive or prescriptive, but provide guidance, as there needs to be an allowance for flexibility and the discretion of the ADR practitioner to conduct the ADR session to suit the matter and parties.

In any provisions setting out the practice and procedure of ADR sessions, the Committee strongly urges that it be clearly stated that all parties, indeed all persons present, must participate in the ADR process in good faith, regardless of whether they wanted to undertake the ADR process or were ordered to undertake it.

The Committee notes that there are circumstances where the ADR practitioner, as the impartial person, should determine the procedure for the ADR process. However, the Committee also notes that there are circumstances in which the parties should determine the procedure.

Any provisions setting out the practice and procedure of ADR sessions need to allow for communication between the ADR practitioner and the parties as to the best procedure for the ADR session. These provisions must also allow for the discretion of the ADR practitioner as the procedure of the ADR process may change throughout the process.

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[6] *Children's Court Rule 2000* (NSW) r 25; *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 12; *Civil Procedure Act 2005* (NSW) s 32; *Uniform Civil Procedure Rules 2005* (NSW) r 20.2.

[7] *Community Justice Centres Act 1983* (NSW) s 21; *Community Land Management Regulation 2007* (NSW) cl 10; *Land and Environment Court Rules 2007* (NSW) r 6.2(6); and *Strata Schemes Management Regulation 2010* (NSW) cl 23.

[8] *Community Justice Centres Act 1983* (NSW) s 21(3); *Farm Debt Mediation Act 1994* (NSW) s 14(3); and *Uniform Civil Procedure Rules 2005* (NSW) r 20.20(2)(b).

[9] *Uniform Civil Procedure Rules 2005* (NSW) r 20.6(2).

5.2. Representation of parties

The Committee is of the view that it is important that provisions setting out the practice and procedure of ADR sessions outline whether parties are allowed representation and that it be clear whether this is legal representation or representation of another kind (such as a support person, family member or professional advisor).

In some cases, it should be made clear in those provisions that legal representation is not allowed in the ADR sessions in order to keep costs low.[10] If such restrictions on representation remain, this must be expressed clearly and the reasons for the restrictions outlined in the provisions.

Whether leave is required to have people present other than the parties and the ADR practitioner should be made clear, as well as the process, and from whom, leave is obtained. The best interests of the parties must be forefront in the mind of the ADR practitioner in determining whether leave should be granted to assist with the resolution of the matter.

The provisions setting out the practice and procedure of ADR sessions should clearly state that each party must be in attendance and if the party is a corporation or represented by an insurer, someone with authority to settle must be present.[11]

5.3. Presence of other people in ADR sessions

The Committee notes that there are circumstances where the presence of other people in the ADR session is crucial in ensuring the ADR process is successful. On the other hand, the Committee also notes that the inclusion of other people can, at times, be a hindrance to the ADR process.

The Committee is of the view that the presence of other people in ADR sessions should not be regulated, however, there should certainly be provisions allowing for the discretion of the ADR practitioner as to whether other persons may be present throughout the ADR session. In exercising this discretion, the ADR practitioner must take into account the best interests of the parties and whether it will assist with the just, quick and cheap resolution of the matter.[12]

Provisions setting out the practice and procedure of ADR sessions need to allow the ADR practitioner to exclude any person apart from the parties and the ADR practitioner from the ADR session.[13]

Any such provisions dealing with the presence of other people in ADR sessions should clearly outline who may be present at and/or during the ADR session, and explicitly state that their presence is at the discretion of the ADR practitioner.

The Committee acknowledges that there will be matters where the ADR process requires that other people be present during the ADR session to assist or advise the parties.[14] Should such provisions be incorporated into other areas, the Committee recommends that the provisions clearly express that the presence of

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[10] *Professional Standards Act 1994* (NSW) sch 1 cl 9; *Health Care Complaints Act 1993* (NSW) s 50(1); *Anti-Discrimination Act 1977* (NSW) s 91B; *Health Records and Information Privacy Act 2002* (NSW) s 46(4); and *Privacy and Personal Information Protection Act 1998* (NSW) s 49(4).

[11] *Community Land Management Regulation 2007* (NSW) cl 11(1); *Strata Schemes Management Regulation 2010* (NSW) cl 24(1); and *Uniform Civil Procedure Rules 2005* (NSW) r 20.6(1)(a).

[12] *Health Care Complaints Act 1993* (NSW) s 50(2); *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 104(2) and 104A.

[13] *Residential (Land Lease) Communities Act 2013* (NSW) s 151(1) and *Community Justice Centres Act 1983* (NSW) s 21(5).

[14] *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 318C; *Farm Debt Mediation Act 1994* (NSW) s 17(4); and *Health Care Complaints Act 1993* (NSW) s 50(2).

such persons is at the discretion of the ADR practitioner, taking into account the best interests of the parties and the purpose of the ADR session to assist with the just, quick and cheap resolution of the matter.

5.4. Adjournment of the ADR processes

The Committee is of the view that there should be provisions allowing for the adjournment of ADR processes, however, in doing so, the ADR practitioner should take into account whether adjourning the ADR process is in the best interests of the parties and will lead to a just, quick and cheap resolution of the matter.

Any discretion to adjourn the ADR processes should sit with the ADR practitioner, however, the parties may request an adjournment at any stage.

If provisions allowing for the adjournment of ADR processes were to be included, the Committee recommends that there be provisions, or guidelines, for the ADR practitioner to consider when determining if the ADR process should be adjourned.

As outlined in the Consultation Paper, there are currently provisions allowing for the adjournment of proceedings at any stage to enable parties to negotiate[15] and allowing a session to be adjourned if a party would be significantly disadvantaged if the session were to continue.[16] The Committee is of the view that these provisions should be considered for inclusion in all provisions setting out the practice and procedure of the ADR process.

5.5. Provisions allowing parties or ADR practitioners to terminate proceedings

The Committee is of the view that provisions setting out the practice and procedure of ADR sessions should allow for the parties and/or ADR practitioner to terminate or withdraw from the ADR process. In this regard, however, any such provisions should ensure that the parties and the ADR practitioner are aware that any such decision should not be taken lightly and regard must be had to the best interests of the parties and the just, quick and cheap resolution of the matter.

The Committee is also of the view that any such provisions allowing for parties to terminate or withdraw from the ADR process should ensure that it is clear to the parties that any such decision is as the discretion of the ADR practitioner, and indeed the ADR practitioner may not agree to the termination or withdrawal.

As the Committee is of the view that such provisions should be included in the provisions setting out the practice and procedure of ADR sessions, the terms “withdrawal from” and “terminate” must be clearly defined.

5.6. Provisions regarding the conclusion of ADR processes

The Committee is of the view that the provisions setting out the practice and procedure of the ADR process should deal with the conclusion, or otherwise, of the ADR process, and the implications of same on the overall matter.

Any such provisions should clearly outline the effects on the parties, and the matter, if agreement is reached or not reached, as well as outlining the duties and responsibilities of the ADR practitioner in both circumstances.

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[15] *Employment Protection Act 1982* (NSW) s 13(b).

[16] *Farm Debt Mediation Act* (NSW) s 14(1A).

5.7. Costs of ADR

The Committee recognises that it is difficult to have a blanket provision dealing with the costs of the ADR, as each matter and ADR process will have different costs provisions.

The Committee is of the view that any provisions setting out the practice and procedure of the ADR process should deal with the costs of the process, so that the public and the profession are aware of the cost implications before entering into the ADR process.

Any such provisions should also outline the extent of the ADR practitioner and/or Court in determining the costs of the ADR process and how, and by whom, they are paid.

5.8. Enforceability of agreements

The Committee agrees that all provisions dealing with the enforceability of agreements arising from ADR processes include the requirements parties must fulfil in order to render the agreement enforceable.

The Committee is also of the view that any such provisions setting out the practice and procedure for all ADR processes should contain similar provisions so that regardless of the ADR process, the parties, and indeed the ADR practitioner, are aware of the requirements in order to ensure the agreement is enforceable.

5.9. Other impacts of agreements and other outcomes of ADR

The Committee acknowledges that each ADR process will have its own idiosyncrasies, as will each matter. The Committee is therefore of the view that any provisions setting out the practice and procedure of ADR processes offers enough flexibility to the parties and ADR practitioner to ensure the best interests of the parties, the purpose of the ADR process, and the just, quick and cheap resolution of the matter; are considered and the ADR process can be adapted to ensure these considerations are first and foremost.

6. Existing statutory provisions – ADR practitioners

6.1. Appointment and accreditation of ADR practitioners

6.1.1. In what circumstances should provisions deal with the appointment and accreditation of different types of ADR practitioners?

The Committee is of the view that ADR is very much perceived as a part of the overall system of justice in society by the general public. The public faith in the judicial system is paramount for the good of society and the profession as a whole. Therefore, the conduct of ADR practitioners and the process of appointment of such practitioners are of great importance to the reputation of the justice system.

Circumstances where there is a suspicion of bias or where requisite expert knowledge is required to understand the dispute are examples of circumstances where provisions should establish criteria for the appointment of an ADR practitioner.

Although there is no compulsory national accreditation required for ADR practitioners there is a voluntary accreditation scheme by the mediation standards board. This scheme is known as the National Mediation Accreditation System (**NMAS**), which takes into account other recognised mediation bodies for various forms of ADR. The NMAS is overseen by the National Mediation Accreditation Committee (**NMAC**), which administers the National Mediation Standards Body (**NMSB**), which aims to develop a consistent approach to the application of the NMAS.

Considering the abovementioned role that ADR plays in the justice system and the terms of reference of the Consultation Paper, most notably the desirability of the just, quick and cheap resolution of disputes,[17] the Committee is of the view that:

(a) *provisions should recognise the NMAS as the reputable standard for accreditation when appointing ADR practitioners; and*

(b) *the NMAS should be a mandatory requirement.*

The NMAS, since its inception on 1 July 2008, is commonly recognised by the profession as the required accreditation that ADR practitioners should have. For example, the NSW Law Society has made the NMAS a mandatory requirement practitioners must have before they can be member of the Law Society's mediation panel. The Committee is of the view that provisions should therefore recognise that standard in all circumstances when appointing or determining suitable accreditation of ADR practitioners.

6.1.2. How should the provisions be expressed?

The Committee suggests that such a provision could be expressed as follows:

(1) When selecting the appropriate ADR practitioner, the ADR practitioner must:

(a) be approved by both parties;

(b) have the requite experience and understanding in the area; and

[17] New South Wales Law Reform Commission Consultation paper, *Dispute Resolution Frameworks in New South Wales,* p vi.

(c) have the requisite accreditation.

6.2. Control and independence of ADR practitioners

6.2.1. In what circumstances should provisions deal with the control and independence of different types of ADR practitioners?

The Committee is of the view that ADR practitioners should always be independent and impartial when appointed.

With regards to the control of ADR practitioners, if a report is required by the order of a judge or registrar then there should be a provision indicating the obligation the ADR practitioner has in preparing such a report in the manner and timeframe required. In circumstances of repeated failure to abide by the court timetable to lodge the report, a provision should indicate that the ADR practitioner be referred to the relevant accreditation body.

6.2.2. How should such provisions be expressed?

The Committee suggests that such a provision could be expressed as follows:

Impartiality:

When appointing an ADR practitioner, the ADR practitioner must be independent with no relation, business or personal, to any party in the dispute.

Lodging reports:

(1) reports are to be lodged by direction of the court officer; and

(2) failure to lodge the requisite report by the appointed ADR practitioner will result in referral to the relevant accreditation authority of the ADR practitioner.

6.3. Miscellaneous powers and obligations of ADR practitioners

The Committee is of the view that where a particular type of task is required for a given ADR process, or by an ADR practitioner, a provision or guideline should indicate what is required of the ADR practitioner in order to facilitate the ADR process.

6.4. Immunity of ADR practitioners

6.4.1. In what circumstances should provisions deal with the immunity of ADR practitioners?

The Committee is of the view that ADR practitioners should have immunity from suit in relation to their involvement with ADR processes. The reason for this is so that ADR practitioners are not discouraged to participate in ADR processes because of a fear of liability. As noted by NADRAC, the "*legislative immunity is strongly justified in relation to court-ordered or court-annexed ADR*", because in such circumstances, a mediator plays a "*quasi-judicial function*".[18]

[18] Ibid [8.30].

6.4.2. How should such provisions be expressed?

The Committee suggests that such a provision could be expressed as follows:

Immunity of ADR practitioner:

An appointed ADR practitioner will have immunity from suit from all parties for failure of the parties to come to a resolution at the conclusion of the ADR process.

7. Existing statutory provisions – use of information

7.1. Non-disclosure of information

7.1.1. In what circumstances should provisions deal with non-disclosure of information?

As referred to in the Consultation Paper, there are a number of statutes that provide for non-disclosure of information or impose confidentiality obligations upon ADR practitioners. The Committee submits that, in general, such non-disclosure provisions are necessary and central to the ADR process, as they may increase the willingness of parties to enter into ADR and engage in open and frank negotiations without the concern that any information disclosed may affect their case at a later date. NADRAC has observed that "*ADR processes largely rely on the good faith of the parties to the dispute and the truthfulness of their statements*".[19]

Consequently, non-disclosure of information or confidentiality provisions can promote the prospects of the parties reaching an agreement thus reducing the need for any court action. However, as also raised by NADRAC, there is considerable legislative variation in terms of confidentiality and non-admissibility in relation to ADR processes.[20] This variation and lack of clear consistent guidelines raise issues for ADR practitioners and participants in ADR processes.

To facilitate resolution of disputes, the Committee submits that rules in relation to confidentiality should be consistent for all ADR processes, whether court ordered or otherwise, unless there are compelling reasons for departure.

The Committee recognises that there are some situations where ADR practitioners should be entitled to disclose information, such as to prevent injury to persons or property and in accordance with requirements imposed by law. The Committee also submits that disclosure should be allowed in circumstances where a complaint has been made about the conduct of the ADR practitioner and requires investigation or is the subject of litigation.

7.1.2. How should such provisions be expressed?

In an effort to promote consistency, the provision should be expressed similar to the provision set out in section 31 of the *Civil Liability Act 2005* (NSW), but amended as set out below. For ease of reference, all of the suggested legislative drafting referred to in this section 7, refers generally to "*ADR*" and would require amendment as per the definitions under each relevant act.

The Committee suggests that such a provision could be expressed as follows:

(1) An ADR practitioner may disclose information obtained in connection with the administration or execution of this Part only in one or more of the following circumstances:

(a) with the consent of the person from whom the information was obtained;

(b) in connection with the administration or execution of this Act;

[19] National Alternative Dispute Resolution Council, „Submission in response to the Australian Law Reform Commission Discussion Paper 72 Review of Australian Privacy Law", January 2008.

[20] National Alternative Dispute Resolution Council, „The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction", September 2009 [6.77].

(c) if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property;

(d) if the disclosure is reasonably required for the purpose of referring any party or parties to an ADR session to any person, agency, organisation or other body and the disclosure is made with the consent of the parties to the ADR session for the purpose of aiding in the resolution of a dispute between those parties or assisting the parties in any other manner;

(e) in order to investigate allegations of fraud, negligence or other malpractice by ADR practitioners; or

(f) in accordance with a requirement imposed by or under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth.

7.2. Inadmissibility of evidence

7.2.1. In what circumstances should provisions deal with inadmissibility of evidence in later proceedings?

The Committee submits that in general, and particularly in commercial proceedings, inadmissibility provisions should remain. However, in cases where persons are at risk (such as abuse or family violence cases) there should be an exception to the general inadmissibility requirement. This exception may also be extended to circumstances where property is at risk.

There are also arguments that there should be exceptions to non-admissibility provisions to allow evidence to be given of inappropriate conduct in ADR processes following the introduction of conduct standards such as „good faith" and „genuine effort". At this stage, the Committee does not believe that such an exception should be introduced as the concepts are difficult to define and may be open to abuse.

7.2.2. How should such provisions be expressed?

The Committee suggests that such a provision could be expressed as follows:

(1) Evidence of anything said or of any admission made in an ADR session is not admissible in any proceedings before any court or other body [or a tribunal]; and

(2) a document prepared for the purposes of, or in the course of, or as a result of, an ADR session, or any copy of such a document, is not admissible in evidence in any proceedings before any court or other body [or a tribunal].

(3) Subsections (1) and (2) do not apply with respect to any evidence or document:

(a) if the persons in attendance at, or identified during, the ADR session and, in the case of a document, all persons specified in the document, consent to the admission of the evidence or document,

(b) if it is evidence of the fact that an agreement or arrangement has been reached and as to the substance of the agreement or arrangement; or

(c) if the evidence or document falls within any one of the categories allowing for disclosure as outlined in section 7.1 above.

7.3. Privilege with respect to defamation

7.3.1. In what circumstances should provisions deal with the privilege with respect to defamation in ADR proceedings?

The Committee submits that the same provisions that apply to judicial proceedings should apply to ADR proceedings with respect to privilege and defamation. As for issues of disclosure and admissibility, these provisions should be consistent across all legislation.

7.3.2. How should such provisions be expressed?

The Committee suggests that such a provision could be expressed as follows:

(1) The same privilege with respect to defamation as exists with respect to judicial proceedings and a document produced in judicial proceedings exists with respect to:

(a) an ADR session, or

(b) a document or other material sent to or produced to an ADR practitioner, or sent to or produced at the court or the registry of the court [or relevant tribunal], for the purpose of enabling an ADR session to be arranged.

(2) The privilege conferred by subsection (1) extends only to a publication made:

(a) at an ADR session, or

(b) in a document or other material sent to or produced to an ADR practitioner, or sent to or produced at the court or the registry of the court [or relevant tribunal], for the purpose of enabling an ADR session to be arranged.

9. The regulatory framework

9.1. Relationships between various forms of regulation

9.1.1. How should ADR be regulated in different contexts?

The Committee submits that because of the variable and complex nature of ADR, general statutory frameworks alone may not be sufficient to deal with different forms of ADR appropriately.[21] As such, regulations or codes of practice are required to fill any statutory gaps that may be present. That being said, going forward, there will be a need for co-ordination between statutory provisions and any established regulations so as to ensure a harmonious and effective ADR system.

The kinds of regulation required to be maintained and enforced will largely depend on the context. For example, where legislation requires parties to compulsorily participate in an ADR process, appropriate professional standards must be maintained and enforced to ensure that such processes work effectively in practice.[22]

9.1.2. What role should different forms of regulation play?

The Committee acknowledges that there is a view for minimum legislative intervention when regulating ADR processes.[23] According to NADRAC, *"[w]hen introducing ADR for the first time, there may be a need for some element of compulsion or legislative control*".[24] An example of such a new area may be defamation suits, as discussed above at section 7.3 of this submission. In other cases, judicial supervision, contracts, codes of practice or other forms of self-regulation may be more appropriate.

According to NADRAC, some underlying general principles of ADR, such as confidentiality and non-disclosure of information, are viewed as primarily ethical obligations on the part of the ADR practitioner, which should be dealt with by professional standards and codes of conduct, rather than statutes.[25] However, as discussed above at section 7 of this submission, the Committee is of the view that the principles of non-disclosure and confidentiality should be addressed in statutory form. As previously mentioned, in the Committee's view, such statutory provisions are necessary and central to ADR processes, as they may increase the willingness of parties to enter into ADR and engage in open and frank negotiations without the concern that any information disclosed may affect their case at a later date.

[21] National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (2001) 123.

[22] National Alternative Dispute Resolution Advisory Council, *Legislating for alternative dispute resolution: A guide for government policy-makers and legal drafters* (2006) [5.27].

[23] Andrew Boon, Richard Earle and Avis Whyte, „Regulating Mediators?" (2007) 10(1) *Legal Ethics* 26, 27.

[24] National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (2001), 14.

[25] Ibid, [9.30].

9.2. Acts and Regulations

9.2.1. What role should Acts and Regulations play in regulating ADR?

In light of the Committee's views expressed throughout this submission, the Committee submits that statutory ADR provisions have a large role to play in regulating ADR. However, such statutory regimes are currently diverse and in many instances, inconsistent. As such, there is a need for consistency as to the substance and meaning of each ADR process.

That being said, and having regard to the commentary at paragraphs 9.5 and 9.6 of the Consultation Paper, the Committee supports the view that in certain circumstances, statutory ADR provisions may not be appropriate. Furthermore, it is submitted by the Committee that NADRAC's guide, "*Legislating for alternative dispute resolution: A guide for government policy-makers and legal drafters",* sets out the appropriate considerations that should be considered by government policy makers when contemplating the need for ADR provisions in Acts and Regulations.

9.2.2. In what circumstances would provisions in Acts and Regulations be appropriate for regulating ADR?

It is submitted by the Committee that ADR provisions in Acts and Regulations should address the substantive matters that are essential for the effective operation of ADR processes, such as referral of ADR processes, the obligations of parties to participate in ADR, immunity of ADR practitioners, admissibility and enforceability of ADR processes.[26]

However, the Committee supports NADRAC's view that, without being exhaustive, "*the legislative framework should be clear about the [ADR] processes the dispute is being referred to*". As previously submitted, regulations and codes of practice have a role to play in filling any statutory gaps, in order to ensure the flexibility of ADR processes.[27]

9.3. Contracts

The Committee is of the view that contracts have a role to play in regulating ADR, particularly in circumstances where such contractual devices are entered into before a dispute has arisen. For example, contract provisions may require mediation before the parties can proceed to arbitration or litigation. Such an arrangement is illustrated by the Law Society of NSW's model clause, which provides for pre-filing mediation in order to prevent a party from unnecessarily initiating arbitration or legal proceedings.[28]

In order to be effective, any such contractual devices should assist with the management of the ADR process from start to finish. It is also advisable that ADR clauses incorporate the standards of professional bodies and ADR organisations in private contracts.[29]

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[26] National Alternative Dispute Resolution Advisory Council, *Legislating for alternative dispute resolution: A guide for government policy-makers and legal drafters* (2006), [4.14].

[27] Ibid [4.20].

[28] Law Society of NSW, *Dispute Resolution Kit* (2012) 36.

[29] National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (2001), xviii.

9.4. Codes of practice and guidelines

It is submitted by the Committee that codes of practice and guidelines have a role to play in ensuring accountability and consistency of ADR processes, by maintaining both standards of practice and public faith in the field of ADR.

In the Committee's view there should be a mandatory standard that applies generally to all ADR practitioners. A code of practice or guidelines should be established that set out such mandatory standards, which could include (but are not limited to):

(a) ethical standards of ADR practitioners;

(b) maintaining and improving the quality and status of ADR;

(c) facilitating consumer education about ADR;

(d) building consumer confidence in ADR processes; and

(e) creating coherence in the ADR field.[30]

The codes of practice or guidelines should also cover matters such as competency standards required of ADR practitioners, their accountabilities and safeguards including the extent of immunity, admissibility and enforceability of ADR processes.[31]

9.5. Model provisions

The Committee endorses the Law Society of NSW's model clause, which provides for pre-filing mediation, so that a party cannot commence legal or arbitration proceedings (apart from urgent interlocutory relief) unless the party has participated in mediation under the clause.

For completeness, the text of the model clause is set out below:

1. *If a dispute arises from this contract, a party to the contract must not commence court or arbitration proceedings relating to the dispute unless that party has participated in a mediation in accordance with paragraphs 2 and 3 of this clause. This paragraph does not apply to an application for urgent interlocutory relief.*
2. *A party to this contract claiming that a dispute has arisen from the contract ("the Dispute") must give written notice specifying the nature of the Dispute ("the Notice") to the other party or parties to the contract. The parties must then participate in mediation in accordance with this clause.*
3. *If the parties do not agree, within seven days of receipt of the Notice (or within a longer period agreed to in writing by them) on:*

    1.1 the procedures to be adopted in a mediation of the Dispute; and

    1.2 the timetable for all the steps in those procedures; and

    1.3 the identity and fees of the mediator; then:

    1.4 the President of The Law Society of New South Wales will appoint the mediator and determine the mediator's fees and determine the proportion of those fees to be paid by each party (to be in equal shares unless otherwise agreed by the parties);

    1.5 the parties must mediate the Dispute:

[30] Ibid, 57.

[31] Ibid, 58.

1.5.1 with the mediator appointed under paragraph 3.4;

1.5.2 with a genuine commitment to participate; and

1.5.3 in accordance with the Mediation Guidelines of The Law Society of New South Wales.

4. *If a party commences proceedings relating to the Dispute other than for urgent interlocutory relief, that party must consent to orders under section 26 of the Civil Procedure Act 2005 that the proceedings relating to the Dispute be referred to mediation by a mediator.*
5. *If the parties do not agree on a mediator within seven days of the order referred to in paragraph 4, the mediator appointed by the President of the Law Society of New South Wales will be deemed to have been appointed by the Court.*
6. *If a party:*

6.1 refuses to participate in a mediation of the Dispute to which it earlier agreed; or

6.2 refuses to comply with paragraph 3.5 of this clause, a notice having been served in accordance with paragraph 2; then

6.3 that party is not entitled to recover its costs in any court proceedings or arbitration relating to the Dispute, even if that party is successful; and

6.4 that party is deemed to have consented to a decree of the Supreme Court of New South Wales that it will specifically perform and carry into execution paragraph 3.5 of this clause.

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The Committee thank the NSW Law Reform Commission for the opportunity to comment on the Consultation Paper and would be very pleased to provide further information and submissions as required.

Thomas Spohr | President

NSW Young Lawyers | The Law Society of New South Wales

T: [redacted] | **E:** [redacted] | **W:** www.younglawyers.com.au

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Chair, Civil Litigation Committee

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Schedule 1

Repealed text of sections 18A – 18I of the Civil Procedure Act 2005 (NSW):

Part 2A – Steps to be taken before the commencement of proceedings

Division 1 – Preliminary

18A Interpretation

(1) In this Part:

"alternative dispute resolution" means processes (other than a judicial determination) in which an impartial person assists persons in dispute to resolve or narrow the issues in dispute, including (but not limited to) the following:

(a) mediation (whether or not by a referral under this Act);

(b) expert determination;

(c) early neutral evaluation;

(d) conciliation;

(e) arbitration (whether or not by a referral under this Act).

"civil dispute" means a dispute that may result in the commencement of civil proceedings.

"costs", in relation to compliance with the pre-litigation requirements, means costs payable in or in relation to complying with the requirements, and includes fees, disbursements, expenses and remuneration.

"dispute resolution statement" means a statement filed under Division 3.

"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.

"pre-litigation protocol" --see section 18C.

"pre-litigation requirements" means the requirements set out in section 18E.

(2) In the event of an inconsistency between a provision of regulations made under this Part and a provision of any rules of court made under this Part, the provision in the regulations prevails to the extent of the inconsistency.

(3) Any provision of this Part that enables or provides for rules of court to be made in relation to a matter operates, in relation to a particular court, to confer power on the rule committee for the court to make local rules in relation to the matter under the Act that constitutes the court.

(4) Nothing in subsection (3) limits the operation of section 11 (Relationship between uniform rules and local rules).

(5) If costs of compliance with the pre-litigation requirements are awarded or taken into account in civil proceedings in accordance with a provision of this Part, those costs are to be treated as if they formed part of the costs of the proceedings and the amount of costs payable may be assessed accordingly.

18B Application of Part

(1) This Part applies in relation to civil disputes and civil proceedings other than excluded disputes or excluded proceedings.

(2) Each of the following is an "excluded dispute":

(a) any civil dispute where a person is in dispute with another person who is the subject of a vexatious proceedings order under the Vexatious Proceedings Act 2008;

(b) any civil dispute (other than a civil dispute referred to in paragraph (a) or (c)) that involves claims that may result in the commencement of excluded proceedings if the issues in dispute are not resolved or narrowed;

(c) such other civil disputes (or civil disputes belonging to a class of civil disputes) that are declared under subsection (4) (a) or (5) to be excluded disputes.

(3) Each of the following are "excluded proceedings":

(a) any civil proceedings that result from a civil dispute referred to in subsection (2) (a) or (c);

(b) any civil proceedings in the Dust Diseases Tribunal;

(c) any civil proceedings in the Industrial Relations Commission, including the Commission in Court Session (the Industrial Court);

(d) any civil proceedings in relation to the payment of workers compensation;

(e) any civil proceedings in relation to the enforcement of a farm mortgage to which the Farm Debt Mediation Act 1994 applies;

(f) any civil proceedings in relation to a claim to which the Motor Accidents Act 1988 or the Motor Accidents Compensation Act 1999 applies;

(g) any civil proceedings in relation to a claim made under the Motor Accidents (Lifetime Care and Support) Act 2006;

(h) any civil proceedings in which a civil penalty under a civil penalty provision (however described) of or under an Act (including a Commonwealth Act) is sought;

(i) any ex parte civil proceedings;

(j) any appeal in civil proceedings;

(k) such other civil proceedings (or civil proceedings belonging to a class of civil proceedings) that are declared under subsection (4) (a) or (5) to be excluded proceedings.

(4) The Governor may make regulations declaring that:

(a) specified civil disputes or civil proceedings (or classes of civil disputes or civil proceedings) are excluded disputes or excluded proceedings for the purposes of this Part, or

(b) specified civil disputes or civil proceedings (or classes of civil disputes or civil proceedings) that have been excluded by rules of court under subsection (5) are not to be treated as excluded disputes or excluded proceedings for the purposes of this Part.

See section 18A (2) in relation to the resolution of inconsistencies between regulations made by the Governor and rules of court.

(5) Rules of court (including the uniform rules) may declare that specified civil disputes or civil proceedings (or classes of civil disputes or civil proceedings) are excluded disputes or excluded proceedings for the purposes of this Part.

18C Pre-litigation protocols

(1) A "pre-litigation protocol" is a set of provisions setting out steps that will constitute reasonable steps for the purposes of the pre-litigation requirements in their application to a specified class of civil disputes to which this Part applies.

(2) Without limiting subsection (1), a pre-litigation protocol for a class of civil disputes may provide for any of the following matters:

(a) appropriate notification and communication steps;

(b) appropriate responses to notifications and communication steps;

(c) appropriate correspondence, information and documents for exchange between the persons involved in the dispute;

(d) appropriate negotiation and alternative dispute resolution options;

(e) appropriate procedures to be followed in relation to the gathering of evidence (including expert evidence).

(3) The Governor may make regulations setting out a pre-litigation protocol for a specified class of civil disputes to which this Part applies.

Rules of court (including the uniform rules) may also set out a pre-litigation protocol for a specified class of civil disputes to which this Part applies.

Division 2 – Pre-litigation requirements

18D Compliance with pre-litigation requirements prior to commencement of civil proceedings

Each person involved in a civil dispute to which this Part applies is to comply with the pre-litigation requirements before the commencement of any civil proceedings in a court in relation to that dispute.

18E Pre-litigation requirements

(1) Each person involved in a civil dispute to which this Part applies is to take reasonable steps having regard to the person's situation, the nature of the dispute (including the value of any claim and complexity of the issues) and any applicable pre-litigation protocol:

(a) to resolve the dispute by agreement; or

(b) to clarify and narrow the issues in dispute in the event that civil proceedings are commenced.

(2) For the purposes of this section, reasonable steps include (but are not limited to) the following:

(a) notifying the other person of the issues that are, or may be, in dispute, and offering to discuss them, with a view to resolving the dispute;

(b) responding appropriately to any such notification by communicating about what issues are, or may be, in dispute, and offering to discuss them, with a view to resolving the dispute;

(c) exchanging appropriate pre-litigation correspondence, information and documents critical to the resolution of the dispute;

(d) considering, and where appropriate proposing, options for resolving the dispute without the need for civil proceedings in a court, including (but not limited to) resolution through genuine and reasonable negotiations and alternative dispute resolution processes;

(e) taking part in alternative dispute resolution processes.

(3) Each person involved in a civil dispute to which this Part applies is not to unreasonably refuse to participate in genuine and reasonable negotiations or alternative dispute resolution processes.

(4) Nothing in this section requires a person to provide any correspondence, information or document that might tend to incriminate the person.

18F Protection and use of information and documents disclosed under pre-litigation requirements

(1) A person involved in a civil dispute to which this Part applies who receives any information or documents provided by another person involved in a civil dispute in accordance with the pre-litigation requirements (and not otherwise available to the recipient) is subject to an obligation not to use the information or documents, or permit the information or documents to be used, for a purpose other than in connection with:

(a) the resolution of the civil dispute between the persons involved in the civil dispute; or

(b) any civil proceedings arising out of the civil dispute.

(2) Despite subsection (1), a person involved in a civil dispute or a party to civil proceedings to which this Part applies may:

(a) agree in writing to the use of information or documents otherwise protected under subsection (1); or

(b) be released from the obligation imposed under subsection (1) by leave of the court.

(3) A court may treat a failure to comply with the obligation under subsection (1) as a contempt of court if the court is satisfied that there was no lawful or reasonable excuse for the failure.

(4) If documents exchanged in accordance with the pre-litigation requirements are permitted by this section to be used in civil proceedings arising from the dispute to which the requirements applied, those documents are to be obtained and admitted into evidence in accordance with the usual rules and procedures applicable in the court in relation to the obtaining and admission of documentary evidence.

(5) Nothing in this section:

(a) limits any other undertaking to a court (implied or specific) whether at common law or otherwise, in relation to information or documents disclosed or discovered in civil proceedings; or

(b) limits the operation of section 18O in relation to a mediation to which that section applies.

Division 3 – Filing of dispute resolution statements by parties to civil proceedings

18G Dispute resolution statement to be filed by plaintiff

(1) A plaintiff who commences civil proceedings to which this Part applies is to file a dispute resolution statement at the time the originating process for the proceedings is filed.

(2) A dispute resolution statement filed under subsection (1) is to specify:

(a) the steps that have been taken to try to resolve or narrow

the issues in dispute between the plaintiff and the defendant in the proceedings; or

(b) the reasons why no such steps were taken, which may relate to (but are not limited to) the following:

(i) the urgency of the proceedings (including that the limitation period for the commencement of the proceedings is about to expire);

(ii) whether, and the extent to which, the safety or security of any person or property would have been compromised by taking such steps.

18H Dispute resolution statement to be filed by defendant

(1) A defendant in civil proceedings to which this Part applies who has been served with a copy of a dispute resolution statement filed by the plaintiff is to file a dispute resolution statement at the time the defendant files a defence in the proceedings.

(2) A dispute resolution statement filed under subsection (1) is to:

(a) state that the defendant agrees with the dispute resolution statement filed by the plaintiff; or

(b) if the defendant disagrees in whole or part with the dispute resolution statement filed by the plaintiff--specify the respect in which, and reasons why, the defendant disagrees and specify other reasonable steps that the defendant believes could usefully be undertaken to resolve the dispute.

18I Dispute resolution statement to comply with uniform rules

A dispute resolution statement filed under this Division is to comply with such additional requirements as may be specified in rules of court (including the uniform rules).