



NSW Law Reform Commission
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Attention: Erin Gough, Policy Manager

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Dear NSW Law Reform Commission

Consultation Paper 18 – Dispute Resolution: Model Provisions

The purpose of this correspondence is to respond to the invitation to provide comments on *Consultation Paper 18 – Dispute Resolution: Model Provisions* circulated by the NSW Law Reform Commission (NSW LRC) on 16 December 2016. This correspondence follows my letter of 13 June 2014 in response to *Consultation Paper 16: Dispute Resolution: Frameworks in New South Wales*, which provided some contextual information about the *Government Information (Public Access) Act 2009* (GIPA Act) and the roles and functions of the Information Commissioner.

The proposals under consideration in the consultation paper aim to provide consistent model provisions for mediations occurring outside a statutory or judicial context to promote just, quick and cheap resolution of disputes. The NSW LRC's focus on the benefits of alternative dispute resolution is to be commended.

1. Application to the GIIC Act

1.1. Complaint handling functions under the GIIC Act

Under the GIIC Act, the Information Commissioner has responsibility for complaints management, investigation and reporting functions. Complaints under section 17 of the GIIC Act are distinguishable from reviews of applications made under the formal access pathway provided under the GIPA Act. Complaints concern the conduct (including action or inaction) of an agency in the exercise of functions under the GIPA Act or GIIC Act.

The complaint handling process is set out in sections 17 to 20 of the GIIC Act. The Information Commissioner deals with a complaint by taking appropriate measures to assist in the resolution of the complaint. Such measures can include facilitating the direct resolution of the complaint by the parties to the complaint, by conciliation or other informal process (section 19(1)(c)).

Section 15 of the GIIC Act sets out the general procedures of the Information Commissioner. These include that the Commissioner is to act in an informal manner, as far as possible, and is to act according to the substantial merits of the case without undue regard to technicalities. The Commissioner may determine the procedures to be followed in exercising their functions under the GIIC Act, and is not bound by rules of evidence but may inform himself or herself on any matter in any way that the Commissioner considers to be just.

1.2. Proposal to exclude the GIIC Act from the model provisions

The consultation paper takes the view that the model provisions are not appropriate for certain statutes, including the *Government Information (Information Commissioner) Act 2009* (GIIC Act). The rationale for the exclusions, which are listed in Appendix B to the consultation paper are, in summary:

- Some statutes in Appendix B 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.
- Some of the “mediation” processes under the statutes in Appendix B 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. 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 align broadly with the excluded processes specified in the 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.

The rationale applied by the NSW LRC to support the exclusion has limited application in the context of the GIIC Act.

1.3. Proposal to amend GIIC Act reference to conciliation

Section 19(1)(c) of the GIIC Act empowers the Information Commission to facilitate the direct resolution of a complaint by the parties to the complaint, including by “conciliation or other informal process.”

At paragraph 1.11 of the consultation paper, the NSW LRC explains that “the provisions we have developed would apply equally to the related processes known as neutral evaluation and conciliation.” Accordingly, model provision 1 includes as the proposed definition of mediation:

“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.”

Paragraph 2.4 of the consultation paper proposes that “references to ‘conciliation’ in existing legislation should be removed and replaced, where appropriate, with ‘mediation.’” Footnote 5 provides examples of legislation that would fall under this recommendation, including the GIIC Act.

The reason for proposing this replacement but not extending the model provisions to functions under the GIIC Act is not clear. Paragraphs 2.3 to 2.8 of the consultation paper explain the NSW LRC’s aim to standardise legislative definitions of mediation to distinguish mediation from other alternative dispute resolution processes, and to reduce the risks of inconsistent terminology. These risks are said to include:

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

The model provisions proposed by the NSW LRC seek to address these risks in a meaningful way. However, if legislation such as the GIIC Act is amended to provide that the Information Commissioner may facilitate resolution by “mediation”, without the model provisions applying to that form of mediation, this could foreseeably contribute to the risks identified above. It would result in a scenario where the “Mediation Act” model is implemented, and the GIIC Act is excluded from the “Mediation Act” model, yet the GIIC Act expressly provides for the Information Commissioner to facilitate direct resolution of complaints by “mediation.” In that scenario, a complainant may have an unrealistic expectation that the mediation process conducted by the Information Commissioner would fall under the Mediation Act. The other risks identified may also be enlivened.

As set out below, rather than excluding the statutes in Appendix B, there may be benefits to extending the approach of utilising model provisions to administrative schemes such as the GIIC Act. If so, it would be appropriate for the GIIC Act to be amended to replace “conciliation” with “mediation.”

1.4. Extending the model provisions to the GIIC Act

The consultation paper identifies that some of the processes under the statutes in Appendix B form part of specialist administrative schemes. The GIIC Act falls under this description. The consultation paper highlights that these processes are not classically considered mediation processes.

Arrangements to improve alternative dispute resolution mechanisms and processes for schemes under the statutes in Appendix B appear to require further consideration. This is because significant benefits would flow from incorporating alternative dispute resolution processes into administrative handling schemes, and from providing consistency across such processes where appropriate. Informal resolution and alternative dispute resolution processes allow the complaint handler to focus on resolution of complaints and disputes, rather than investigation in all cases. Complaint handlers can be empowered to provide a fair process that enables the parties to resolve a dispute themselves. If this cannot be achieved, it is at that stage that it may become appropriate for the complaint handler to take further action – such as write a report, make a decision, or conduct an investigation.

The recognition of administrative schemes that are inherently specialist and may require tailored dispute resolution mechanisms is an approach which, therefore, may be more favourable than a general exclusion. For example, the enforcement arrangements in the model provisions may not be appropriate where there are extant arrangements in place with a Tribunal, including the NSW Civil and Administrative Tribunal (NCAT).

If the complaint handling processes in the GIIC Act are included, it would be preferable for mediation to be at the discretion of the Information Commissioner. This is because, as reflects the different measures available under section 19 of the GIIC Act, not all complaints are suitable for mediation.

2. Potential dispute resolution provisions in the GIPA Act

Currently there are inconsistencies between the GIIC Act and GIPA Act with respect to provisions for alternative dispute resolution. The Information Commissioner’s review powers as set out in the GIPA Act do not currently provide for informal

resolution or alternative dispute resolutions mechanisms. As recognised by the NSW LRC, benefits flow from enhanced alternative dispute resolution mechanisms incorporated in statutes. That position has application to the GIPA Act.

Inclusion of a legislated power in the GIPA Act for the Information Commissioner to resolve reviews using alternative dispute resolution mechanisms would enable flexibility and better align with functions in the GIIC Act to deliver benefits articulated in the consultation paper, together with consistency of operation between the GIPA and GIIC Acts with respect to the functions of the Information Commissioner.

If alternative dispute resolution mechanisms are brought into the GIPA Act, mediation would be a useful mechanism in resolving reviews. This would be consistent with other similar jurisdictions and it is anticipated that it would deliver benefits experienced in those jurisdictions. For example:

- As summarised in the Jurisdictional Compendium of Information Access laws in Australia, [published on the IPC's website](#), the Information Commissioner for the Northern Territory has mediation powers provided alongside other review powers and dispute resolution functions. In that context, mediation is a precondition to a Tribunal proceeding if the matter has not already been referred to mediation during the process of investigation.
- The [Office of the Australian Information Commissioner's Annual Report 2015-16](#) at page 68 confirms its continued efforts to "explore and implement appropriate alternative dispute resolution (ADR) mechanisms, this resulted in 374 review applications (82%) finalised without proceeding to a formal IC review decision. We have a strong focus on resolving applications for review by agreement between the parties where possible."
- The Office of the Information Commissioner Queensland publishes on its [website](#) the percentage of reviews that are resolved informally compared to reviews resolved by written determination. Its past results have been 89%, 91% and 88% of reviews resolved through informal processes for 2013-14, 2014-15, and 2015-16 respectively.

Should alternative dispute mechanisms be brought into the GIPA Act, arrangements similar to those proposed for the GIIC Act would be preferred.

3. Implementation options

3.1. Mediation Act model preferred

The consultation paper seeks submissions on the desirability and usefulness of implementing the model provisions as a "Mediation Act" or inserted in each of the statutes for amendment. From the perspective as Information Commissioner, including the provisions in an overarching "Mediation Act" is preferable as it provides the most flexibility. The consultation paper proposes that the provisions could apply by default, with parties free to contract out of all or part of the legislation. Similar benefits could flow if complaint handling mechanisms such as the GIIC Act were included, as each regime could, through its own legislation, opt in and out of the overarching provisions as appropriate.

3.2. Accreditation within administrative schemes

The consultation paper notes that the person performing the role of "mediator" in contexts such as complaint handling under the GIIC Act are involved in the "mediation" process as part of their employment and are unlikely to be accredited.

However this does not prohibit the accreditation of staff who are involved in these processes, with appropriate transitional arrangements. In this respect, the advantages identified in the consultation paper of having mediations conducted by mediators accredited in accordance with the National Mediator Accreditation System, including raising standards in the field generally, are noted. These advantages would be likely to also benefit complaint handling bodies such as those identified in Appendix B.

4. Further assistance available

I hope these comments will be of assistance to you. Please do not hesitate to contact me if you have any queries. Alternatively, your officers may contact [REDACTED]

Yours sincerely


[REDACTED]
CEO, Information and Privacy Commission NSW
Information Commissioner
NSW Open Data Advocate