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Dear Sir/Madam

Consultation Paper 18 – Dispute resolution: Model provisions

Thank you for the opportunity to make a submission on the Law Reform Commission’s consultation regarding proposed model provisions for mediation in statutory contexts.

I am pleased to provide the attached submission from our office which, based on our specialist role and experience, highlights the benefits the ombudsman model can offer as a form of alternative dispute resolution (ADR). Although I note that the Commission’s proposed model provisions appear to focus on mediation as perhaps the most well-known form of ADR, the Commission may benefit from being aware of how the ombudsman model provides an effective alternative in many situations to mediation and other forms of dispute resolution.

The success of mediation is often dependent on the willingness of the disputing parties to engage in good faith and in a productive way. This can be undermined by a power imbalance between the parties or where they may be unwilling or unable (e.g. due to incapacity or disability) to act in their own best interests. The success of the ombudsman model rests in part on there being an independent umpire who can fairly safeguard the legitimate interests of each party. This umpire can offer ‘neutral evaluation’ of the parties’ circumstances and help them reach an outcome that is objectively appropriate or reasonable for all concerned.

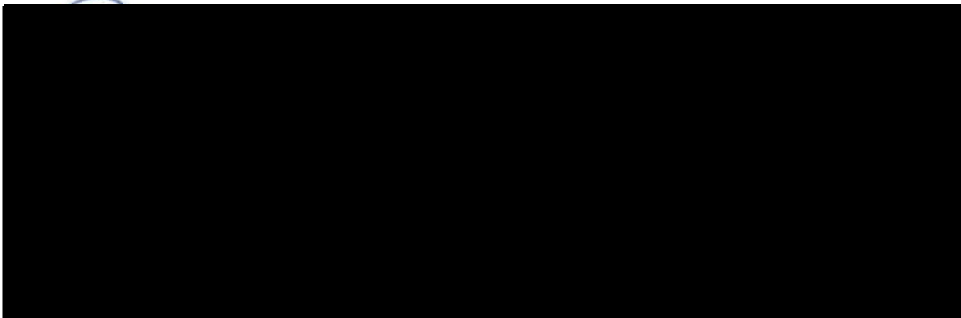
I should note that it is difficult at this stage to comment on how our office’s work will be impacted, whether directly or indirectly, should the government decide to adopt the proposed model provisions in the form of a *Mediation Act* or otherwise. This is because, in the context of disputes between individuals and government agencies or certain non-government service providers, the model provisions may overlap or interfere with our functions under legislation including the *Ombudsman Act 1974* and the *Community Services (Complaints, Reviews and Monitoring) Act 1993* or create uncertainty about which of the schemes will apply.

I am aware that the Commission’s Consultation Paper has stated that the proposed model provisions are not intended to apply to the *Ombudsman Act*, at least not yet. However, in the Commission’s consideration of what may be the best model for ADR and what current

schemes should be changed, it may be helpful for the Commission to be aware of how the ombudsman model, or aspects of it, can provide effective ADR to the people of NSW. Beyond our formal 'conciliation' function under section 13A, the work that we do often reflects our diverse roles as neutral evaluator, arbitrator, expert assessor and independent inquisitor. It is therefore important that the formulation of a mediation model takes account, directly and indirectly, of the overlap with and implications for the ombudsman model.

I trust that the Commission finds our submission useful. Should the Commission require further information or clarification on our submission, Patrick Trieu, Investigation Officer, can be contacted on (02) 9286 0975 or by email at ptrieu@ombo.nsw.gov.au.

Yours sincerely



NSW Ombudsman submission to the NSW Law Reform Commission's Consultation Paper 18 – Dispute resolution: Model provisions

Background

The NSW Ombudsman's office has a role in monitoring and investigating the administrative conduct of NSW government agencies and certain non-government service providers. We act on complaints from the public, as well as by our own-motion, to ensure that agencies and service providers are properly fulfilling their functions and responsibilities and improving their service delivery wherever possible.

In the course of our day-to-day work, we talk to complainants, agencies and service providers to hear their sides of the story, help them better understand the real issues to the dispute, negotiate reasonable outcomes and advise the parties on how they may be able to move forward from the dispute. Apart from acting on individual complaints, we also examine whether there may be systemic issues that need to be addressed to ensure that problems do not occur or re-occur. We therefore proactively review systems, processes and procedures, meet with agencies including other investigating agencies to discuss new and emerging issues, offer training workshops and publish guidance material on best practice.

The ombudsman model

The concept of the 'ombudsman' originates from Sweden and is loosely translated to mean citizen's defender or representative of the people. Over time, the role of the ombudsman evolved to become an independent office with the power and responsibility to resolve disputes between individuals and agencies or service providers. The appeal of the ombudsman model can be seen in the way such an office can be found throughout the world, in both the public and private sectors. The International Ombudsman Institute reports that its current membership consists of more than 170 independent ombudsman institutions from more than 90 countries. Although these institutions may have different names such as Parliamentary Commissioner, Public Mediator or Complaints Commissioner, they share the purpose of addressing disputes about maladministration or violations of rights as an alternative to court adjudication. In the private sector, there are industry-based 'ombudsmen' set up to similarly resolve disputes in banking, telecommunication, utilities and insurance so they do not need to proceed to legal action before the court.

The Commonwealth Productivity Commission recognised that government and industry ombudsmen practise alternative dispute resolution (ADR) techniques but their work also go beyond ADR in the traditional sense to discharge their unique roles as external dispute resolvers.¹ The Commission found that "There is a general consensus among stakeholders that ombudsmen are effective in promoting access to justice" and that "These views are supported by data on timeliness, user satisfaction and complaint numbers."² Additionally, it reported that:

¹ Productivity Commission (2014), *Access to Justice Arrangements*, Vol 1, Inquiry Report No. 72, at p 284.

² Productivity Commission, *Access to Justice Arrangements*, Vol 1, at p 318.

“Ombudsmen are highly accessible, compared to other methods of dispute resolution such as tribunals or courts, because they are free, can be accessed remotely by phone or internet, provide interpreter services and guide complainants through the process without the need for professional advocates.”³

The Productivity Commission recommended that, where appropriate, governments should subsume new roles for dispute resolution within existing ombudsman offices rather than create new schemes.⁴ Relevantly, the Commission also noted that there is a need for greater ADR use especially by governments as “The administrative functions of government give rise to a significant number of civil disputes ... [f]or example [in] planning decisions, service contracts and administrative decisions related to welfare and immigration.”⁵

Advantages of the ombudsman model in the context of ADR

The role of the ombudsman is in many ways akin to that of a neutral evaluator, arbitrator, expert assessor and independent inquisitor. It sits somewhere in the middle of the dispute resolution scale with informal mediation at one end and formal court adjudication at the other. The ombudsman does not only look to resolve the dispute at hand using ADR principles, the ombudsman is also concerned with finding out the facts of what occurred and ensuring that problems beyond those in dispute are being addressed.

When compared to traditional ADR processes such as mediation, the ombudsman model has the following advantages:

- Unlike a mediator, the ombudsman has the power and responsibility to proactively identify and address issues of concern beyond those which the disputing parties consider to be in dispute.
- The ombudsman can provide specialist neutral evaluation and make recommendations to the disputing parties on what they could or should do.
- The ombudsman can resolve disputes through the power of persuasion and reasoned argument so that the disputing parties need not necessarily meet or negotiate with each other.
- As the ombudsman’s role is to resolve disputes reasonably and objectively, no reliance is placed on the skills of each disputing party to negotiate or advocate their own case.
- The ombudsman can offer early intervention before disputes arise or become protracted as complainants can seek the ombudsman’s assistance or make a complaint to the ombudsman at any time.
- From having a role which routinely deals with a high volume of complaints on an ongoing basis, the ombudsman can review trends and develop and promote best practice principles that can benefit stakeholders.

³ Productivity Commission, *Access to Justice Arrangements*, Vol 1, at 332.

⁴ Productivity Commission, *Access to Justice Arrangements*, Vol 1, Recommendation 9.3, at p 50 and 336.

⁵ Productivity Commission, *Access to Justice Arrangements*, Vol 1, at p 295.

Our recommendations

Having regard to the benefits of the ombudsman model as a form of ADR, the Law Reform Commission may wish to:

1. Expand the scope of the model provisions to incorporate the beneficial aspects of the ombudsman model. For example, the role of resolving certain disputes may be subsumed into an existing ombudsman in line with the Productivity Commission's recommendation or the disputing parties may be allowed to agree to give the third party ADR practitioner powers and responsibilities akin to an ombudsman to the appropriate extent.
2. Consider renaming and redefining 'mediation' in Model Provision 1, particularly where it refers to the disputing parties "com[ing] together in an endeavour to resolve their dispute" since successful ADR does not necessarily require the parties to meet or negotiate directly with each other. On the contrary, it may be an impediment to dispute resolution if vulnerable, emotional or irrational parties are brought together.
3. Consider adopting provisions concerning the confidentiality and inadmissibility of ADR communications similar to those relating to secrecy and privilege in the *Ombudsman Act 1974* which already apply to the NSW Ombudsman's role. Examples include a power for the third party ADR practitioner to give a direction restricting the disclosure of information (cf. s 19A), a prohibition on the disputing parties disclosing information that can prejudice the resolution of the dispute (cf. s 19B), a prohibition on the third party ADR practitioner from disclosing information unless with the parties' consent or to prevent harm to a person (cf. s 34), and the third party ADR practitioner is not compellable to give evidence in proceedings unless for the proper purpose of enforcing a settled agreement (cf. s 35).
4. Consider how the model provisions may unintentionally overlap or interfere with existing dispute resolution schemes, such as provided by the *Ombudsman Act 1974* or *Community Services (Complaints, Reviews and Monitoring) Act 1993*, whether the model provisions are to be implemented under a *Mediation Act* or otherwise.