Resolution Institute

New South Wales Law Reform Commission

Consultation Paper 18

Dispute Resolution:

Model Provisions

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Overview

Resolution Institute would like to thank the New South Wales Law Reform Commission for the opportunity to provide a submission on the proposed Dispute Resolution: Model provisions. Mediation process and engagement is at the core of Resolution Institute's policy and practical interests.

We invited our mediator members (most of whom hold accreditation under the National Mediator Accreditation System (NMAS), or International Mediation Institute (IMI)) to express their views and opinions in relation to each proposal and option in the Discussion Paper.

In general, the 71 survey respondents made positive comments about the draft proposal and options in the Discussion Paper. They commended its importance and that the Discussion Paper captured many key aspects. In their comments focussing on how the Direction could be improved, the primary theme centred on aligning it more strongly with the known and recognised definitions of alternative dispute resolution. Resolution Institute agrees that the current definition of mediation in Model Provision 1 conflates separate and distinct alternative dispute resolution processes and this is contrary to NADRAC recommendations, other states and at the Commonwealth level.

In this submission, we have distilled respondents' comments, sometimes noting individual suggestions where we consider that they may have merit or be a trigger for consideration by the NSWLRC. As well, we have provided Resolution Institute's views, indicating where they accord with those from survey respondents and referencing in particular the National Mediation Accreditation System (NMAS). For a copy of the System, please find a copy attached and/or visit http://msb.org.au/mediator-standards/standards. Resolution Institute strongly supports NMAS and encourages all mediator members to become accredited under NMAS. One of Resolution Institute's core strategic areas is to improve the standard of mediation practice for the benefit of consumers and to support interest based and cost and time effective access to justice. NMAS provides a very clear benchmark for mediation practice in Australia. Since its implementation in 2008, over 3200 mediators have demonstrated their commitment to the provision of quality mediation services, by taking the necessary steps to attain and retain NMAS accreditation. Resolution Institute has 1008 NMAS accredited mediators within its membership.

We hope that this Submission assists the NSWLRC in finalising the model provisions. Resolution Institute would be pleased to offer further written or verbal comment to the NSWLRC on your request.

Comments on the Dispute Resolution: Model Provisions Discussion Paper

Introductory comment

Resolution Institute notes that currently in New South Wales there are a number of different statutory provisions that regulate the provision of alternative dispute resolution (A**DR**) services that are disparate and focused on the subject matter of the dispute and not the framework or the administration of the ADR service.

Resolution Institute notes that the term “ADR” is now frequently replaced by the term “DR”. As ADR is being increasingly used to resolve disputes, many DR organisations and practitioners consider that the word “alternative” embodied in the acronym “ADR”, is now no longer accurate or appropriate. In this submission, Resolution Institute uses the term “DR” instead of “ADR”.

Resolution Institute welcomes the NSW Law Reform Commission’s initiative to create model provisions for dispute resolution services and is of the view that DR can provide many benefits for disputing parties either as a stand alone process or one linked into the broader litigation process.

Resolution Institute welcomes the recognition by the NSW Law Reform Commission that National Mediation Accreditation System (NMAS) is a critical factor in ensuring that there is quality, consistency and accountability in the provision of DR services.

NMAS is overseen by the Mediator Standards Board which has members including law societies, bar associations, professional DR membership organisations, training bodies and bodies (such as courts and tribunals) that employ mediators. This indicates the level of broad support that NMAS has within the dispute resolution community in its efforts to provide highly professional mediation services for the benefit of consumers and to enhance access to justice.

Comments on Model Provisions

Model provision 1: Definition of accredited mediator and mediation

Consistent and clear terminology is important, and it is also important not to conflate the various DR technologies or processes as this unnecessarily and unreasonably constrains the wide range of DR processes. While there may be some overlap between some DR processes, there is no evidence that the overlap may cause legal practitioners, the public or the judiciary to be confused. There is a benefit to educate the public about the differences between the various DR processes.

The responses to the survey were clear that firstly, there is a support for DR processes to be defined and provided for. As well, there is a clear need to separately define the distinct DR processes. While there are many similarities between mediation and conciliation processes, there is a stark difference between these and neutral evaluation. Resolution Institute submits that the National Mediator Accreditation System (NMAS) provides a benchmark definition of mediation and is the descriptor of the process that nationally accredited mediators are required to provide. With respect to other DR processes, the former National Alternative Dispute Resolution Advisory Council (**NADRAC**) developed definitions which continue to be current and can be used either in their existing form or with minor modification if required. Resolution Institute submits that using exiting definitions from reputable bodies with high levels of DR expertise, is preferable to creating new definitions that are different from the meaning at the Commonwealth level as well as in other states and territories.

Some of the comments from Resolution Institute members include:

To include those words in the definition of mediation misaligns the true definition of mediation which is the process of guiding disputing parties to a resolution or a decision regarding resolution of a dispute without determination of the disputed matter by a third party

Conciliation is generally taken to be a distinctly more directive and advisory process than mediation. Conciliation has its place especially in statutory schemes and arrangements (e.g. Ombudsman's processes, industrial matters) and should continue to be understood in this sense. However, mediation as an interests based process, assisted by a TPN [third party neutral] should continue to be recognised as a distinct and quite different process.

In accordance with NADRAC definitions they are very different processes. Mediation is a facilitative process where the parties make their own decisions and the mediator is impartial and does not give advice. Why not call all three processes Dispute

Resolution and keep the definitions accurate and clear to ensure consumer protection.

It recognises the reality that, the NADRAC definition notwithstanding, a lot of what is conducted under the rubric "mediation" by retired judicial officers and counsel, is in fact neutral evaluation and/or conciliation.

Mediation is a process where a third party is simply a conduit to assist the disputing parties to reconcile their differences. Including the terms "conciliation and neutral evaluation" is the same as simple mathematics including trigonometry - same field but completely different methods of delivery ADR is the umbrella under which all fall

We suggest that the term 'DR' is used to describe the broad set of dispute resolution processes. It is appropriate to use the word 'mediation' when it refers specifically to a process defined as mediation. The words 'Dispute Resolution Practitioner' be used where it is required as an umbrella term, instead of the words 'Accredited Mediator' and where the word appears for other definitions such as 'mediation communications' the term be 'DR communications'. This approach recognises that the term 'mediation' has a long-established meaning within the NMAS and legal system. The legislation would properly and clearly identify the processes and the practitioner conducting the DR process. There would only be a small amount of extra definitional content required and the system would only allow accredited practitioners to carry out the DR processes.

NMAS defines mediation as follows:

Mediation is a process that promotes the self-determination of participants and in which participants, with the support of a mediator:

(a) communicate with each other, exchange information and seek understanding
(b) identify, clarify and explore interests, issues and underlying needs
(c) consider their alternatives
(d) generate and evaluate options
(e) negotiate with each other; and
(f) reach and make their own decisions.

NADRAC defined words[1] are:

~~A~~DR is an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them. Some examples of the processes include mediation, conciliation or neutral evaluation. (added words underlined and deleted letters struck through))

Conciliation is a process in which the participants, with the assistance of the dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. A conciliator will provide advice on the matters in dispute and/or options for resolution, but will not make a determination. A conciliator may have professional expertise in the subject matter in dispute. The conciliator is responsible for managing the conciliation process.

Note: the term `conciliation', may be used broadly to refer to other processes used to resolve complaints and disputes including:

- informal discussions held between the participants and an external agency in an endeavour to avoid, resolve or manage a dispute
- combined processes in which, for example, an impartial practitioner facilitates discussion between the participants, provides advice on the substance of the dispute, makes proposals for settlement or actively contributes to the terms of any agreement'.

Dispute resolution practitioner is an impartial person who assists those in dispute to resolve the issues between them. A dispute resolution practitioner who intends to provide mediation can complete appropriate training and assessment to be accredited by a Recognised Mediation Accreditation Body in accordance with the National Mediator Accreditation System. (added words underlined)

~~Early~~ neutral evaluation is a process in which the participants to a dispute ~~present, at an early stage~~ in attempt~~ing~~ to resolve the dispute, present arguments and evidence to a dispute resolution practitioner. That practitioner decides on the key issues in dispute, and most effective means of resolving the dispute without determining the facts of the dispute. (added words underlined and deleted words struck through)

[1] National Alternative Dispute Resolution Advisory Council, Dispute Resolution Advisory Council, Dispute Resolution Terms: The Use of the Terms in (Alternative) Dispute Resolution (2003)

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

Our submission supports an approach which is aligned and where possible uniform with NMAS Practice Standards as to confidentiality and admissibility of mediation documents and material into evidence.

NMAS Practice Standard cl 9 Confidentiality states:

9.1 A mediator must respect the agreed confidentiality arrangements relating to participants and to information provided during the mediation, except:

(a) with the consent of the participant to whom the confidentiality is owed; or

(b) where non-identifying information is required for legitimate research, supervisory or educational purposes; or

(c) when required to do otherwise by law;

(d) where permitted to do otherwise by ethical guidelines or obligations;

(e) where reasonably considered necessary to do otherwise to prevent an actual or potential threat to human life or safety.

9.2 Before holding separate sessions with different participants, a mediator must inform participants of the confidentiality which applies to these sessions.

9.3 With a participant's consent, a mediator may discuss the mediation, or any proposed agreement, with that participant's advisors or with third parties.

9.4 A mediator is not required to retain documents relating to a mediation, although they may do so should they wish, particularly where duty-of-care or duty-to-warn issues are identified.

9.5 A mediator must take care to preserve confidentiality in the storage and disposal of written and electronic notes and records of the mediation and must take reasonable steps to ensure that administrative staff preserve such confidentiality.

There is no opposition to the proposal to have admissibility and confidentiality dealt with together, however there does need to be some boundaries to the disclosure in that the disclosure only extends to documents and information that is necessary to be disclosed to satisfy the purpose of the disclosure. Regarding disclosure for research and education purposes, the information disclosed would need to be de-identified so that parties to the mediation could not be identified.

Model provision 3: Mediator's Immunity

Resolution Institute submits that for DR to grow and develop into a broadly recognised method of dispute resolution, consideration needs to be given to protections for mediators. Users of mediation may have greater confidence in the processes if they know that mediators have the same obligations and protections whether the mediation is conducted by a court appointed mediator or a non-court appointed mediator. Consideration should be given to granting absolute immunity to all accredited mediators, whether the mediation is occurring in the shadow of litigation or during litigation.

Some respondents made the following points:

I'd like to see the privilege extended to mediations generally so that the mediator can proceed without fear or favour confident in the knowledge that they can robustly reality test situations

Previous issues (raised in previous questions) could lead to such disclosure and there are circumstances of disclosure at present. Disclosure for purposes connected with the mediation or professional discipline are distinct from and should not lead to loss of protection against defamation. No mediator will take on the risk and cost and insurance will go up.

While the current system supports private entities whether they be individuals, lobby groups corporations any entity that has casts amounts of resources and finances to initiate defamation proceedings would be unbalanced and unfair to mediators in these situations.

Repeal of this provision would leave the matter ambiguous and allow a party to commence litigation against a mediator even though it may ultimately fail. The removal of the provision will increase the risk of litigation and likely flow on to PI insurance premiums.

In Resolution Institute's view, there are reasons why consideration should be given that mediators attract similar protections to Australian legal practitioners about protections from legal proceedings. The ongoing training, experience and knowledge mediators are required to possess and continue to demonstrate are significant and are comparable to those of legal practitioners.

Model provision 4: Termination of mediation

The response from members significantly supported the propositions set out in model provision 4 (2)(a) to (c). They raised concerns with the word “purports”, recommending its replacement with a word that removes the potential for uncertainty that “purports” may infer about intention of the mediator or parties.

Regarding (2)(d), nearly 47% of the 71 respondents disagreed with the premise that there should be a presumption that the mediation has been terminated only because litigation has commenced or recommenced. Resolution Institute favours the approach described in the NMAS Practice Standard cl 3 *Conducting mediation: Suspending or terminating* which states:

> 3.1 A mediator may suspend or terminate the mediation if they form the view that mediation is no longer suitable or productive, for example where:
>
> (a) a participant is unable or unwilling to participate or continue in the mediation
>
> (b) a participant is misusing the mediation
>
> (c) a participant is not engaging in the mediation in good faith
>
> (d) the safety of one or more participants may be at risk

This approach supports mediators using their professional skills to continue or to terminate a mediation considering a range of factors, litigation being only one.

Model provision 5: Enforcement of mediated settlement agreements

77% of the respondents agreed that Courts should be able to enforce a mediated settlement agreement. The views of Resolution Institute members reflect the position that mediation agreements should be sufficiently robust and so aligned with participants' needs and interests that external enforcement is generally unnecessary. The availability of external enforcement provides an added layer of certainty which respondents favour.

A concern is raised about (2)(b) in that one of the factors that must be satisfied that the mediation is conducted by an accredited mediator. While Resolution Institute advocates a legislative and administrative framework that supports and promotes a national accreditation system for mediators, we submit that it could be punitive to the participants if they were unable to have a mediated agreement enforced because of the mediator's lack of accreditation. In line with mediation being "a process that promotes the self-determination of participants", it is appropriate that participants are able to seek enforcement of a mediated agreement, even if that agreement was made in the presence of a non-accredited mediator. Resolution Institute considers that it may be appropriate to re-visit this matter as NMAS is increasingly used and as consumers' awareness of the importance of using accredited practitioners is raised.

Resolution Institute considers that clause 3 of model provision 5 could be open to abuse by a party and should be considered as a discretionary factor by the Court in determining to exercise its powers. While such a term may, in the future, be inserted into a standard mediation contract, there may be conflict about whether the mediator orally brought the issue to the attention of each party.

Removal of statutory defamation privilege

Over 50% of responses to the question of whether a defence of absolute privilege to defamation proceedings arising from the conduct of mediations should be repealed, was answered in the negative. See response to Model Provision 3.

Suspension of limitation periods

Resolution Institute does not make a recommendation in regard to whether there should be an extension of limitation periods where mediation is being attempted. Resolution Institute points to some of the issues raised by our members that go to the benefits and detriments of introducing such a measure. It would be unfortunate if the parties were not able to give mediation a good chance to resolve the disputes because of the threat of a limitation period; on the other hand, parties and their advisors need certainty about such a critical matter as 'limitation periods'. Some of the responses to this question included the following comments:

Either leave as is if the stats say this period works well or extend the period. Do not leave it open ended. Align the period with other processes e.g. extend by the same period if mediation attempted.

Mediation is directed at the very simple aim of resolving disputes. Often it is the natural vehicle to enable 2 parties to continue some kind of relationship or association. It is important that limitations periods not operate to restrict the ability to mediate. There should be nothing in theory or practice to prevent a party from citing an expired limitation period as a factor contributing to the strength of their own legal position. However, I would have concerns if 'party A's' good faith agreement to mediate was able to be used to the favour of the other party by extending their limitation period. If party A is aware of this risk then the incentives to mediate are reduced. If party A is not aware of this risk, then they are put to a real disadvantage and many vulnerable parties may find themselves in this position.
As to statute-based conciliation under a legislative scheme, I do not think that limitation period should be extended because it is the limitation period that partly defines the jurisdiction of the statute-based mediation.

This would lead to a lack of discipline in conducting proceedings (which includes trying to settle through mediation) and entrench on fundamental policy in the CPA s56 etc.

Often timing can be used to advantage in non-compliance.

Implementation options

Whether there should be an update to existing legislative provisions or new model provision in a standalone Act requires a focus on the practical and administrative factors and also on the strategic purpose of the implementation.

Resolution Institute is of the view that these provisions should apply to mediation whether it has been conducted within the Court processes or external to them.

Resolution Institute is also of the view that the model provisions will be expanded in the future to cover additional issues and across other States and Territories. For this reason, there is purpose to have stand alone, model provisions that can be easily amended and transposed.

Recommendations as to the Model provisions, proposals and options.

Resolution Institute proposes the following Model provisions

Model provisions

Model provision 1: Definitions of accredited dispute resolution practitioner and Dispute Resolution (DR)

Dispute Resolution or DR is an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them. Some examples of the processes include mediation, conciliation or neutral evaluation.

Mediation is a process that promotes the self-determination of participants and in which participants, with the support of a mediator:

(a) communicate with each other, exchange information and seek understanding
(b) identify, clarify and explore interests, issues and underlying needs
(c) consider their alternatives
(d) generate and evaluate options
(e) negotiate with each other; and
(f) reach and make their own decisions.

Conciliation is a process in which the participants, with the assistance of the dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. A conciliator will provide advice on the matters in dispute and/or options for resolution, but will not decide. A conciliator may have professional expertise in the subject matter in dispute. The conciliator is responsible for managing the conciliation process.

Note: the term `conciliation’, may be used broadly to refer to other processes used to resolve complaints and disputes including:

- informal discussions held between the participants and an external agency in an endeavour to avoid, resolve or manage a dispute
- combined processes in which, for example, an impartial practitioner facilitates discussion between the participants, provides advice on the substance of the dispute, makes proposals for settlement or actively contributes to the terms of any agreement’.

Dispute Resolution Practitioner is an impartial person who assists those in dispute to resolve the issues between them. A dispute resolution practitioner must be accredited by a Recognised Mediation Accreditation Body in accordance with the National Mediator Accreditation System.

Neutral evaluation is a process in which the participants to a dispute in attempt to resolve the dispute, by presenting arguments and evidence to a dispute resolution practitioner. That practitioner decides on the key issues in dispute, and most effective means of resolving the dispute without determining the facts of the dispute.

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

(1) **Definitions**
"**DR communication**" means
(a) anything said or done
(b) any document prepared, or
(c) any information provided, for the purposes of DR, in the course of the DR, or to follow up including any invitation to participate in a DR process or any DR 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 DR communication except as provided for by Model Provision 2(2)(b) or (2)(c).
(b) A person may disclose a DR communication if:
(i) all the parties to the DR consent and, if the information relates to the Dispute Resolution Practitioner, the Dispute Resolution Practitioner agrees to the disclosure
(ii) the disclosed information is publicly available, and 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 Dispute Resolution Practitioner 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, Dispute Resolution Practitioner, 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 an DR communication with leave of the court or tribunal under Model Provision 2(4).
(d) The disclosure must be no wider than is reasonably necessary to satisfy the purpose of the disclosure.

(3) **Admissibility of DR communications in evidence**
A court or tribunal may admit a DR 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 DR 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 DR 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 DR communication to be disclosed or to be admitted in evidence, notwithstanding the general public interest in favour of preserving the confidentiality of DR 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 DR 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: Dispute Resolution Practitioner'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 DR process 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 DR

(1) Where the question of whether a DR process has been terminated arises in any proceedings, the court or tribunal must determine whether the DR process has been terminated.
(2) Unless evidence to the contrary is adduced, the court or tribunal must presume a DR process has terminated if:
(a) the Dispute Resolution Practitioner provides evidence of notification of termination of a DR process
(b) either party provides notification of termination of the DR process, or
(c) a time limit for the DR process (and any extensions) agreed by the parties expires.

Model Provision 5: Enforcement of DR settlement agreements

(1) "**DR settlement agreement**" means an agreement by some or all of the parties to the DR process settling the whole, or part, of their dispute.
(2) If a party to a DR 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) 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 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

(4) Any undertaking by one or more of the parties to a settlement agreement to pay the fees and expenses of the Dispute Resolution Practitioner is enforceable if:
(a) the amount of such fees, or
(b) the means for their calculation, is specified in the agreement.

Conclusion