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New South Wales
Law Reform Commission

Report
146

Dispute Resolution

June 2018
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25 June 2018

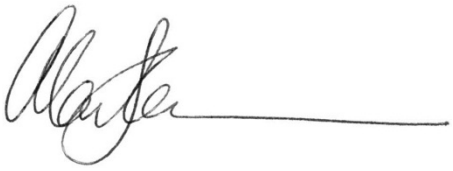
Hon M Speakman SC MP
Attorney General
GPO Box 5341
SYDNEY NSW 2001

Dear Attorney

Review of statutory provisions on dispute resolution

We make this report – Report 146: *Dispute Resolution* – pursuant to the reference to this Commission received 1 March 2013.

Yours sincerely



Alan Cameron AO

Chairperson

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Participants

Commissioners

Mr Alan Cameron AO (Chairperson)

The Hon Justice Paul Brereton AM, RFD

Ms Tracy Howe (term concluded 31 May 2018)

Acting Justice Carolyn Simpson (term commenced 23 May 2018, after deliberations on the report had concluded)

Law Reform and Sentencing Council Secretariat

Ms Erin Gough, Policy Manager

Dr Jackie Hartley, Policy Officer

Mr Samuel Hoare, Intern

Mr Joseph Waugh PSM, Senior Policy Officer

Ms Anna Williams, Research Support Librarian

Terms of reference

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

Specifically, the Commission is to review the statutory provisions that provide for mediation and other forms of alternative dispute resolution with a view to updating those provisions and, where appropriate, recommending a consistent model or models for dispute resolution in statutory contexts, including court ordered mediation and alternative dispute resolution.

In undertaking this review the Commission should have regard to:

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

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

[Received 1 March 2013]

1. Introduction

In brief

Dispute resolution processes can provide many benefits for disputing parties. In particular, they can involve less cost and delay than litigation. Our terms of reference required us to examine ways to improve or update the legislative provisions that deal with dispute resolution and to consider the possibility of a consistent model or models for dispute resolution processes. We have ultimately decided not to recommend any model provisions or any other changes to the law.

Background

1.1 Dispute resolution processes (traditionally referred to as "alternative dispute resolution" or "ADR" processes) can provide many benefits for disputing parties. They can reduce the costs and delays associated with litigation and facilitate flexible outcomes. In the context of litigation, dispute resolution can keep disputes private and avoid exposing them in public hearings. It can ensure cases are managed effectively, for example, by narrowing the issues in dispute. Dispute resolution can also assist parties to preserve, repair or improve their relationships.

1.2 There has been a considerable growth in the use and availability of dispute resolution processes in the past couple of decades. This is reflected in the NSW statute book which now includes around 50 statutes that make provision for, or acknowledge the availability of, some form of dispute resolution.[1]

Terms of reference

1.3 On 1 March 2013, the Attorney General asked us to review statutory provisions for dispute resolution. The terms of reference for the review are set out at page vii above.

1. See, eg, NSW Law Reform Commission, *Dispute Resolution: Frameworks in NSW*, Consultation Paper 16 (2014) Appendix A.

Consultation

1.4 Our consultation process involved two consultation papers, a survey of NSW government agencies that administer dispute resolution provisions, and some face to face consultation.

1.5 The two consultation papers were:

- Consultation Paper 16 – *Dispute Resolution: Frameworks in New South Wales* ("CP 16") (released in April 2014), and
- Consultation Paper 18 – *Dispute Resolution: Model Provisions* in December 2016 ("CP 18") (released in December 2016).

1.6 In the first half of 2014, we also surveyed all NSW government agencies that had a role in administering the dispute resolution provisions. We wanted to understand how broadly the provisions are used and what issues the agencies encountered. We received 91 responses.

1.7 CP 16 gave an overview of the statutory provisions for dispute resolution in NSW. It asked what provisions are appropriate in the variety of contexts the existing provisions cover. We received 14 submissions. These are listed in Appendix C.

1.8 Mediation emerged as the focal point of stakeholder discussion in response to CP 16. We heard that mediation and quasi-mediation processes in NSW statutes vary in detail and coverage and are often inconsistent. Stakeholders suggested that this patchwork might contribute to uncertainty among users. In particular, it is sometimes unclear exactly what types of dispute resolution are available and what safeguards apply in particular statutory contexts. Further, there are currently no provisions that protect parties during commercial/consensual mediation outside a judicial or particular statutory context.

1.9 Despite this, we were not persuaded there would be significant benefit in attempting to consolidate these existing provisions into one or a small number of models. Rather, we considered it might be beneficial to develop model provisions that would apply to mediations taking place outside any statutory or judicial context, except where parties agreed not to apply them. We also considered these model provisions could also be applied in some existing statutory contexts.

1.10 In CP 18, we suggested model mediation provisions on a limited range of topics:

- definitions
- confidentiality of mediation communications and their admissibility in evidence
- mediators' immunity
- termination of mediation, and
- enforcement of the outcome of the mediation.

Submissions to CP 16 had identified these areas as appropriate subjects for uniform provisions to improve consistency and clarity.

1.11 However, the majority of submissions to CP 16 did not support:

- provisions governing the representation of parties to a mediation

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

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

1.12 In CP 18, we suggested the model provisions could be applied in the statutes listed in Appendix A to this Report. We did not think they were appropriate for application to those statutes listed in Appendix B to this Report. Accordingly, we proposed in CP 18 that the statutes listed in Appendix B be excluded from the scheme. This includes statutes that apply to judicially-ordered or supervised mediations, and statutes that already cover the same or similar matters as the model provisions. We thought these excluded statutes could be amended in due course (to the extent appropriate) to bring them into line with the model provisions.

1.13 We initially intended that the model provisions would apply to the related processes known as neutral evaluation and conciliation. Submissions to CP 18 (listed in Appendix D) generally did not support such extension, as we discuss below.

1.14 On 18 July 2017, we convened a roundtable of those who had made a submission. The participants in this roundtable are listed in Appendix E.

Our conclusion

1.15 After further consideration, we have decided not to recommend the adoption of the model provisions suggested in CP 18 or any other changes to the law.

1.16 This conclusion is informed by a number of interrelated considerations. While we have considered some potential uniform provisions, we do not believe that statutory intervention is warranted, for a number of reasons:

1. Mediation is context-specific, and what is appropriate in one context does not necessarily suit another.
2. It is a fundamental precept of voluntary (as opposed to court-ordered) mediation that the parties are in control of the process, and can decide on the terms and arrangements for mediation – including the mediator's rights and immunities.
3. Any generic provision would require a common approach to what is mediation and who is an eligible mediator. Having regard to the diverse contexts for mediation, we have not reached any degree of consensus among stakeholders on these matters.
4. The existing law of without prejudice privilege provides a sufficient default provision for the confidentiality and admissibility of mediation communications, where the mediation agreement does not otherwise provide.
5. There is no particular reason for affording an agreement that results from mediation any greater status than one that results from any other process of negotiation.
6. On balance, suspending limitation periods pending mediation would create more problems and controversies than leaving limitation periods to run, and would tend to promote delay.

7. No sufficient harm has been identified as arising from the current diverse arrangements to warrant the imposition of a uniform statutory regime.

1.17 We have therefore concluded that there would be no sufficient benefit gained from adopting the model provisions we proposed in CP 18. The best course is to leave the existing statutory provisions unchanged and allow them to develop as the need arises.

1.18 Cases of potential and actual confusion among users of dispute resolution services may be resolved by providing better information about processes and encouraging better communication between parties and dispute resolution service providers. Such approaches do not need to be the subject of recommendations for law reform.

2. Responses to our proposed model provisions

In brief

The model provisions we proposed in Consultation Paper 18 dealt with the confidentiality of mediation communications and their admissibility in evidence; granting mediators immunity from liability; identifying when a mediation process has been terminated; and providing for the enforcement of agreements. These proposals did not receive significant support during our consultation process. We have therefore decided not to recommend model provisions.

2.1 In Consultation Paper 18 ("CP 18"), we proposed model provisions that would have applied some protections and immunities to certain mediations in NSW. The model provisions dealt with:

- confidentiality of mediation communications and their admissibility in evidence
- mediator immunity
- when a mediation process has been terminated, and
- the enforcement of mediation agreements.

2.2 In this Chapter, we reproduce the proposed model provisions and review the submissions we received. We also explain why we have decided not to recommend any of the model provisions or changes to the law.

2.3 In summary, the model provisions did not receive significant support from stakeholders. Instead, the submissions we received generally highlight the context-specific nature of many of the existing statutory provisions. They also emphasise how difficult it is to develop consistent provisions that apply across more than one context.

Definitions of accredited mediator and mediation (CP 18 Model Provision 1)

CP 18 Model Provision 1: Definitions of accredited mediator and mediation

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

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

2.4 We proposed the definitions in Model Provision 1, as being necessary to identify the processes and participants to which the model provisions would apply. However, submissions raise a number of problems with these definitions.

"Accredited mediator"

2.5 In CP 18, we suggested that the proposed protections and immunities should apply only to mediations conducted by mediators accredited in accordance with the National Mediator Accreditation System ("NMAS"). The NMAS allows mediators to be voluntarily accredited by Recognised Mediator Accreditation Bodies. Accredited mediators must comply with the NMAS Approval Standards and Practice Standards. In the hope of raising mediator standards generally, we proposed that parties who wished to take advantage of the model provisions would need to select an accredited mediator. This approach aligns with that of the Australian Capital Territory where only mediators who are registered, and therefore subject to competency standards, enjoy immunity.[1]

2.6 However, submissions to CP 18 note that requiring NMAS accreditation may not be appropriate in some cases. For example, such a requirement may exclude mediators who are only accredited under other schemes.[2] These would include mediators who are internationally accredited with the International Mediation Institute[3] and Family Dispute Resolution Practitioners ("FDRP").[4] Legal Aid NSW submits that FDRP accreditation is as robust as NMAS and is appropriate for mediating relationship disputes such as child protection, estates and possibly elder law, particularly where family violence is, or may be, present.[5]

2.7 The NSW Small Business Commissioner says that NMAS accreditation may not be useful in the context of industry-specific dispute resolution schemes that require

1. *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 35; *Court Procedures Act 2004* (ACT) pt 5A.
2. NSW Small Business Commissioner, *Submission DR26*, 1.
3. Law Society of NSW, *Submission DR23*, 2.
4. Under the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) pt 2.
5. Legal Aid NSW, *Submission DR21*, 3.

specialist experience.[6] Some services require higher standards than those covered by NMAS accreditation and such accreditation would not add value to their work.[7] Requiring NMAS accreditation might also exclude some mediators who some parties may prefer; for example, retired judges, barristers with subject matter expertise, and court registrars.[8]

"Mediation"

2.8 We considered that the absence of a standard definition of mediation might cause confusion and create "a risk of injustice and/or harm".[9] We therefore proposed a standard definition to distinguish mediation from other dispute resolution processes. The National Alternative Dispute Resolution Advisory Council ("NADRAC") said that inconsistent terminology may:

- give some participants unrealistic expectations of certain processes
- lead to some disputes being inappropriately referred to certain processes, and
- impede meaningful research and evaluation.[10]

2.9 However, the standard definition of mediation in Model Provision 1 was not widely supported. Some submissions do not support including "neutral evaluation"[11] or conciliation[12] in the definition of mediation. One submission notes that "there are fundamental differences in theory and practice between conciliation and mediation, and they should not be confused or conflated".[13]

2.10 Others, however, acknowledge that "conciliation" is sometimes used to describe something that fits the definition of mediation.[14] The Resolution Institute notes:

> [T]he 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.[15]

2.11 It also observes:

> While there may be some overlap between some [dispute resolution] processes, there is no evidence that the overlap may cause legal practitioners, the public or

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6. NSW Small Business Commissioner, *Submission DR26*, 1.
7. NSW Small Business Commissioner, *Submission DR26*, 3.
8. Law Society of NSW, *Submission DR23*, 2.
9. H Astor, *Submission DR4,* 3.
10. National Alternative Dispute Resolution Advisory Council, *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (2009) [3.57]-[3.58].
11. Legal Aid NSW, *Submission DR21*, 3; Australian Dispute Resolution Advisory Council, *Submission DR19,* 3; NSW Bar Association, *Submission DR20*, 2; Law Society of NSW, *Submission DR23*, 3; Resolution Institute, *Submission DR24*, 5; Australian Dispute Resolution Association, *Submission DR25*, 2.
12. Law Society of NSW, *Submission DR23*, 3; Resolution Institute, *Submission DR24*, 5-6; Australian Dispute Resolution Association, *Submission DR 25*, 2.
13. Australian Dispute Resolution Advisory Council, *Submission DR19,* 3.
14. NSW Bar Association, *Submission DR20*, 2; Resolution Institute, *Submission DR24*, 5.
15. Resolution Institute, *Submission DR24*, 6.

> the judiciary to be confused. There is a benefit to educate the public about the differences between the various [dispute resolution] processes.[16]

2.12 There is also some support for avoiding the use of specific terms like "mediation" and "conciliation" in favour of a more generic expression such as "assisted dispute resolution" or "dispute resolution".[17] One submission observes that "[h]aving a set definition compromises the ability for the service to adapt to meet the ever changing needs of the market".[18] For example:

> One element of the proposed definition for mediation speaks of parties coming together, which is not technically the case in informal, shuttle or online mediation processes. The outcomes of these processes should not suffer from limitations proposed [in Model Provision 1], because the proposed definition does not provide the flexibility for parties to resolve their disputes at the earliest possible point for the least amount of money with the assistance of a trained neutral facilitator.[19]

The submission particularly notes that too restrictive a definition could impede development of online and computer assisted processes.[20]

2.13 Another submission, however, prefers a tighter definition of mediation, like the one in the *Civil Procedure Act 2005* (NSW), which defines mediation as:

> 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.[21]

The submission notes the need to make clear that disputes are resolved "by agreement" to ensure the model provision does not unintentionally extend to arbitration.[22]

2.14 In our view, the submissions demonstrate the need for different definitions in different contexts, and that a degree of flexibility is required to accommodate new developments in dispute resolution. A single definition that applies to multiple contexts is, therefore, undesirable.

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16. Resolution Institute, *Submission DR24*, 5.
17. Australian Dispute Resolution Advisory Council, *Submission DR19,* 6; Resolution Institute, *Submission DR24*, 5-6.
18. NSW Small Business Commissioner, *Submission DR26*, 2.
19. NSW Small Business Commissioner, *Submission DR26*, 2.
20. NSW Small Business Commissioner, *Submission DR26*, 2.
21. *Civil Procedure Act 2005* (NSW) s 25 definition of "mediation".
22. NSW Bar Association, *Submission DR20*, 2.

Confidentiality and admissibility of mediation communications in evidence (CP 18 Model Provision 2)

CP 18 Model Provision 2: Confidentiality and admissibility of mediation communications in evidence

There should be a model provision for use, where appropriate:

(1) **Definitions**

"**Mediation communication**" means

(a) anything said or done

(b) any document prepared, or

(c) any information provided,

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

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

(2) **Confidentiality of mediation communications**

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

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

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

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

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

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

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

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

(vii) the disclosure is required by law, or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.15 Submissions to CP 16 supported a uniform approach to the confidentiality of mediation communications and their admissibility in evidence in legal proceedings.

2.16 Model Provision 2 drew upon aspects of the Mediation Bill 2016 (Singapore),[23] the *Mediation Ordinance 2012* (Hong Kong) and the *Commercial Mediation Act 2010* (Ontario). Submissions identified these as appropriate models. Our model provision also aligned with provisions in the United Nations Commission on International Trade Law ("UNCITRAL") *Model Law*,[24] and with the exceptions to confidentiality and inadmissibility recently identified by the UK Supreme Court.[25] NADRAC has recommended a similar general rule about confidentiality and privilege subject to specified exceptions.[26]

2.17 The exceptions to confidentiality in Model Provision 2 are also broadly consistent with those provided by s 131 of the *Evidence Act 1995* (NSW). This excludes evidence of settlement negotiations.

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23. Now *Mediation Act 2017* (Singapore).
24. *Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law,* GA Res 57/18, UN Doc A/Res/57/18 (24 January 2003) annex, art 9, art 10.
25. *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44, [2011] 1 AC 662 [30]. See also *Pihiga Pty Ltd v Roche* [2011] FCA 240 [88]–[94].
26. National Alternative Dispute Resolution Advisory Council, *Maintaining and Enhancing the Integrity of ADR Processes: from Principles to Practice through People* (2011) [4.6.1]–[4.6.2].

2.18 We proposed that confidentiality and admissibility be dealt with together. We aimed to reduce procedural complexity and clarify the relationship between confidentiality and "without prejudice" privilege by integrating both protections into the one regime. However, submissions to CP 18 raise a number of issues with our proposed model provision.

Confidentiality of mediation communications

Limited stakeholder support

2.19 Submissions generally do not oppose the model confidentiality provisions, but only a few expressly support them.[27] A number of submissions suggest that the provisions would require some clarifications or changes.

2.20 For example, submissions suggest that the model provision needs to clarify that:

- the provision allowing disclosure "to protect the health or safety of any person" applies to:
  - a child or young person at risk of significant harm,[28] and
  - a disclosure to report or prevent the commission of an offence involving violence or a threat of violence to a person[29]
- the legal advice exception is limited to legal advice that is sought by a party to the mediation or a mediator and no one else[30]
- the parties can agree to their own exceptions to the confidentiality rule having regard to their particular circumstances,[31] and
- information is de-identified for research purposes.[32]

2.21 Submissions also identify additional situations where disclosure should be permitted, for example, where disclosure is necessary:

- to make a complaint about a lawyer or to respond to such a complaint,[33] or
- to prevent damage to property.[34]

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27. Legal Aid NSW, *Submission DR21*, 4; Australian Dispute Resolution Advisory Council, *Submission DR19,* 6.
28. Within the meaning of *Children and Young Persons (Care and Protection) Act 1998* (NSW) ch 3 pt 2, s 244C(2)(c); Legal Aid NSW, *Submission DR21*, 4.
29. Legal Aid NSW, *Submission DR21*, 4.
30. Australian Dispute Resolution Advisory Council, *Submission DR19,* 6-7.
31. Law Society of NSW, *Submission DR23*, 3.
32. Resolution Institute, *Submission DR24*, 8.
33. Legal Aid NSW, *Submission DR21*, 4.
34. Legal Aid NSW, *Submission DR21*, 4-5; Law Society of NSW, *Submission DR23*, 3.

Concern about broad confidentiality requirements

2.22 Upon further consideration, we think that the model provision may be too onerous for some parties in some cases. This is because it extends the obligation of confidentiality to people other than the mediator.

2.23 Currently only three statutory provisions extend confidentiality requirements beyond the mediator:

- the *Farm Debt Mediation Act 1994* (NSW) ("*FDMA*"), which extends confidentiality obligations to any person (without apparent restriction)[35]
- the *Children and Young Persons (Care and Protection) Act 1998* (NSW), which extends confidentiality obligations to any "person who conducts or participates in any alternative dispute resolution process",[36] and
- the *Residential (Land Lease) Communities Act 2013* (NSW), which extends confidentiality obligations to the "Commissioner, a mediator or any other person".[37]

2.24 There is no clear rationale for applying broad confidentiality requirements beyond the situations that these existing provisions cover. There may also be some problems with such an extension.

2.25 The undesirability and ineffectiveness of broad confidentiality provisions can be demonstrated by the existing provision in the *FDMA*. For instance, broad confidentiality provisions may be ineffective because participants may simply not abide by them. This was the case with the first mediation under the *FMDA*:

> I ... co-mediated the first [mediation] following the Act's commencement on 12 February 1995 – which, happily, was settled to the delight of the particular farmers. We later heard that, regardless of confidentiality, the farmers spent their long drive from Sydney to their farm on mobile phones telling all and sundry of their partial debt write-off and time to re-finance the balance.[38]

2.26 Additionally, requiring all participants to keep mediation confidential may potentially cause harm in some cases. For example, one study noted the story of a farmer who found participating in mediation under the *FDMA* had distanced him from his friends:

> Four of his neighbours who went through mediation had to sign secrecy declarations regarding the agreements they made with the bank. He has consequently found it difficult to have open conversations with them.[39]

2.27 The National Conference of Commissioners on Uniform State Laws in the United States expressed similar concerns about broad confidentiality provisions. In a 1999 draft of the Uniform Mediation Act, the Conference did not include a provision

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35. *Farm Debt Mediation Act 1994* (NSW) s 16.
36. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 244C(1).
37. *Residential (Land Lease) Communities Act 2013* (NSW) s 154.
38. G Charlton, "Farm Debt Mediation 18 years on" (2013) 24 *Australasian Dispute Resolution Journal* 77, 77.
39. R Stayner and E Barclay, *A Report for the Rural Industries Research and Development Corporation*, RIRDC Publication No 02/042 (2002) 34.

prohibiting parties to a mediation from disclosing mediation communications to the general public. The reason for this was:

> [b]ecause the disputants are often one-time participants in mediation, they might be unfairly surprised if the provision prohibited disclosure by them as it does for mediators and they were held liable for speaking about mediation with others, including a casual conversation with a friend or neighbor. The statutory silence leaves the disputants free to agree to additional confidentiality protections, and through that agreement they would be on notice of the duty to maintain confidentiality.[40]

2.28 The Conference later noted that even parties who choose mediation in order to ensure their dispute is kept private "may also reasonably expect that they can discuss their mediations with spouses, family members and others" without risking liability.[41] The Commissioners also noted that:

> Such disclosures often have salutary effects – such as bringing closure on issues of conflict and educating others about the benefits of mediation or the underlying causes of a dispute.[42]

2.29 The National Conference therefore included a provision in the Uniform Mediation Act that provides that mediation communications are confidential to the extent agreed by the parties or provided by law.[43]

2.30 It may then be better to allow parties to opt in to confidentiality rather than opt out. Allowing room for the parties to agree to the level of protection may better address individual privacy concerns in particular circumstances. For example, the NMAS standards require that:

> The preliminary conference or intake includes ... explaining to participants the nature and content of any agreement or requirement to enter into mediation including confidentiality.[44]

2.31 There are also some more specific concerns about broad confidentiality requirements. The NSW Small Business Commissioner notes that the proposed definition of mediation communications might limit the use that parties can make of statutory declarations or expert reports commissioned, at least initially, for the purposes of mediation. The Commissioner notes that preparing for a mediation comes at a cost, and parties should not need to incur further costs in obtaining a court's leave to use such materials in other forums.[45]

2.32 There is also the problem of representatives, delegates and agents, and the need for them to report back to decision makers. The NMAS standards currently envisage

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40. National Conference of Commissioners on Uniform State Laws, *Uniform Mediation Act with Prefatory Note and Reporter's Notes* (Draft, July 1999) §3, 30.
41. National Conference of Commissioners on Uniform State Laws, *Uniform Mediation Act* (Revised, 2003) §8, 36.
42. National Conference of Commissioners on Uniform State Laws, *Uniform Mediation Act* (Revised, 2003) §8, 36.
43. National Conference of Commissioners on Uniform State Laws, *Uniform Mediation Act* (Revised, 2003) §8.
44. Australia Mediator Standards Board, *National Mediator Accreditation System* (2015) pt 3 cl 3.2(b).
45. NSW Small Business Commissioner, *Submission DR26*, 2.

the possibility of mediators communicating with third parties who were not present in the mediation:

> With a participant's consent, a mediator may discuss the mediation, or any proposed agreement, with that participant's advisors or with third parties.[46]

Mediator's obligations of confidentiality

2.33 Mediators' obligations of confidentiality are a different concern. A significant number of existing provisions impose a duty of confidentiality on the mediator or other dispute resolution professional and associated staff.[47]

2.34 One issue, therefore, is whether a model provision should impose confidentiality requirements on dispute resolution professionals in relation to private discussions with parties. In the case of private discussions, there may be a good case for a duty of confidentiality (by analogy with legal professional privilege). In the case of communications during a joint formal session involving the dispute resolution professional and two or more parties to the mediation, the need to preserve the appearance of impartiality may justify imposing the duty. There is, however, no reason in principle why the duty of confidentiality should not be imposed by agreement or by professional regulation rather than by express legislative provision.

2.35 The NMAS standards already envisage the possibility of distinct contractual arrangements for confidentiality for some separate mediator/party communications:

> Before holding separate sessions with different participants, a mediator must inform participants of the confidentiality which applies to these sessions.[48]

2.36 The Law Society's 2012 Guidelines for those involved in mediation offered stronger guidance on this point:

> The mediator should explain to the parties that he/she might consult with each of them in separate sessions and that information divulged during such separate sessions will be kept confidential unless he/she has that party's specific agreement to disclose to the other party. He/she should reach an understanding with the participants as to the circumstances in which he/she may meet alone with either of them or with any third party.[49]

2.37 This was repeated in the Law Society's *Charter on Mediation Practice - A Guide to the Rights and Responsibilities of Participants*:

> What is discussed in mediation is confidential unless disclosure is required by law. This means that in nearly all cases, confidentiality will be maintained. Mediators cannot be called as witnesses in any court proceedings which may take place in the future. The mediator will not mention anything discussed by you during a private session to other parties during the mediation (unless you

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46. Australia Mediator Standards Board, *National Mediator Accreditation System* (2015) pt 3 cl 9.3.
47. *Health Care Complaints Act 1993* (NSW) s 58; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 244C; *Civil Procedure Act 2005* (NSW) s 31; *Community Justice Centres Act 1983* (NSW) s 29; *Community Land Management Act 1989* (NSW) s 70; *Legal Aid Commission Act 1979* (NSW) s 60F; *Strata Schemes Management Act 2015* (NSW) s 224.
48. Australia Mediator Standards Board, *National Mediator Accreditation System* (2015) pt 3 cl 9.2.
49. Law Society of NSW, *Dispute Resolution Kit* (2012) ch 3 pt 1 [4.8]. We note that the Kit is no longer available online.

request the mediator to let the other parties know), or to anyone else following the mediation.[50]

2.38 In our view, the need for specific provision about a mediator's duty of confidentiality should be determined as the circumstances require. We note that such a duty may, in appropriate circumstances, also be imposed by agreement of the parties or by professional regulation.

Admissibility of mediation communications

2.39 We aimed to encourage regularity by imposing a default position against admissibility under Model Provision 2(3), subject to the aggrieved party being able to justify why the default position should not apply under Model Provision 2(4)(a).

2.40 In deciding whether to allow a mediation communication to be disclosed, we proposed the courts or the NSW Civil and Administrative Tribunal ("NCAT") must consider the factors in Model Provision 2(4)(b). These factors are broadly similar to those imposed by s 138 of the *Evidence Act 1995* (NSW) ("*Evidence Act*") concerning the admission of illegally or improperly obtained evidence. Other circumstances or matters that a court or tribunal may consider relevant (Model Provision 2(4)(b)(iii)) include those giving rise to an estoppel. Such a claim may arise where there was no concluded settlement, but one party to the negotiations has made a clear statement, intending the other party to act on it, and the other party has in fact acted.[51]

2.41 A number of submissions to CP 16 supported introducing a provision like Model Provision 2(4)(b)(ii), which relates to the public interest.[52]

2.42 However, there are some potential difficulties with this model provision. One particular issue is the interaction between the model provision and s 131 of the *Evidence Act*, which deals with the admissibility of evidence of settlement negotiations between disputing parties.[53] For the purposes of s 131, a reference to a "dispute" is a reference to a "dispute of a kind in respect of which relief may be given in an Australian or overseas proceeding".[54]

2.43 In general, Australian courts have held that specific provisions that make dispute resolution communications inadmissible in subsequent proceedings will override the inadmissibility exceptions in s 131 of the *Evidence Act*.[55] The *Evidence Act* exceptions, therefore, apply only in situations where other statutory inadmissibility provisions are not available.[56]

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50. Law Society of NSW, *Dispute Resolution Kit* (2012) ch 3 pt 1 [3.4]. We note that the Kit is no longer available online.
51. This was recognised as an exception in *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44, [2011] 1 AC 662 [32].
52. NSW Bar Association, *Submission DR12* [28]; The Dispute Group, *Submission DR11*, 6; Law Society of NSW, *Submission DR7,* 8.
53. Law Society of NSW, *Submission DR23*, 4.
54. *Evidence Act 1995* (NSW) s 131(5)(a).
55. *Trkulja v Yahoo! Inc LLC (No 2)* [2012] VSC 217 [18]; *Rajski v Tectran Corporation Pty Ltd* [2003] NSWSC 476 [16].
56. *Pinot Nominees Pty Ltd v Commissioner of Taxation* [2009] FCA 1508, 181 FCR 392 [30].

2.44 We note that inadmissibility provisions in some existing statutory regimes in NSW date back to the establishment of Community Justice Centres in the early 1980s.[57] This raises the question of whether many of the existing provisions are necessary at all, in light of the subsequently enacted provisions in s 131 of the *Evidence Act*.

2.45 In our view, the question of whether the exceptions in the *Evidence Act* should be overridden is one for the individual dispute resolution regime and should not be the subject of a model provision, even one that is only applied to limited areas.

2.46 The model provision would then only apply to a particular kind of dispute, for which relief may not be given in an Australian or overseas proceeding. We have received no submissions suggesting that disputes that might be subject to the model provision would need something other than the privilege and the exceptions currently offered by s 131. Indeed, one submission suggests that the threshold for admission in the model provision is too low, and would ultimately inhibit frankness and openness in mediations.[58]

2.47 In light of s 131 of the *Evidence Act*, we consider that a model provision may be unnecessary. Individual schemes that require a different protection to that offered by the *Evidence Act* should be the subject of separate review and individual amendment.

Mediator's immunity (CP 18 Model Provision 3)

CP 18 Model Provision 3: Mediator's immunity

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

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

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

2.48 Responses to CP 16 were mixed on the subject of mediators' immunity from action, liability, claim or demand. The Law Society of NSW submitted that there is no reason to provide mediators with immunity.[59] In contrast, the Dispute Group contended that, regardless of whether the process is court ordered, all mediators should enjoy the absolute immunity currently available in court-based mediation processes under the *Civil Procedure Act 2005* (NSW).[60] The Bar Association submitted that absolute immunity should extend to mediation of all disputes before courts but not necessarily those that are not yet before the courts.[61]

57. *Community Justice Centres Act 1983* (NSW) s 28.
58. Legal Aid NSW, *Submission DR21*, 5.
59. Law Society of NSW, *Submission DR7,* 7.
60. The Dispute Group, *Submission DR11,* 6; *Civil Procedure Act 2005* (NSW) s 33.
61. NSW Bar Association, *Submission DR12* [20]-[23].

2.49 The Supreme Court strongly supported retaining absolute immunity for court-administered mediation.[62] The model provision sought to achieve this by preserving the operation of *Civil Procedure Act 2005* (NSW) and the *Civil and Administrative Tribunal Regulation 2013* (NSW). NADRAC commented that the immunity is "strongly justified" for court-ordered or court-annexed dispute resolution because, in such circumstances, the dispute resolution is part of a continuum of case management strategies, and may be seen as an "extension of the judicial role".[63] The result is that actions by a mediator enjoying absolute immunity cannot be the subject of civil proceedings even in cases of gross error or if the mediator is motivated by "envy, hatred and malice".[64]

2.50 The proposed model would have established good faith immunity for acts and omissions done for the purpose of mediation in some contexts beyond where it now applies. We proposed that this formulation be applied to mediation under existing legislation unless there are good reasons not to apply it. Good faith immunity generally occurs in the case law surrounding statutory defences to allegations of misconduct of government officials. It is a well-understood and clear concept. The presumption of good faith reflects a presumption of regularity. It is also in line with the general rule that those alleging civil wrongs must prove their allegations.[65] As a matter of policy, it would be counterproductive if each individual mediation outcome were too readily liable to attack because the mediator was required to prove their good faith.

2.51 As noted, Model Provision 3(3) would have retained absolute judicial immunity for court-administered mediation in line with the Supreme Court's submission.[66]

2.52 Some submissions to CP 18 support a mediator's immunity subject to an exception where the mediator has not acted in good faith.[67] The Resolution Institute submits that there are reasons why mediators should attract similar protections to those that Australian legal practitioners enjoy in relation to 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.[68]

2.53 One submission, however, notes that the requirement to show an absence of good faith could be difficult, if not impossible, to fulfil.[69] Another submission states that there are no policy or other reasons for mediators having "any sort of statutory

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62. Supreme Court of NSW, *Submission DR2,* 6-7; *Civil Procedure Act 2005* (NSW) s 33, s 55; *Retail Leases Act 1994* (NSW) s 66(3); *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 2.
63. National Alternative Dispute Resolution Advisory Council, *Legislating for Alternative Dispute Resolution: A Guide for Government Policy-makers and Legal Drafters* (2006) [8.30].
64. *Sirros v Moore* [1975] QB 118, 132. See also *Scanlon v Director-General, Department of the Arts, Sport and Recreation* [2007] NSWCA 204; 70 NSWLR 1 [52]-[56].
65. *Cook's Construction Pty Ltd v SFS 007.298.633 Pty Ltd* [2009] QCA 75 [43]. See also *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44; [2002] 2 AC 773 [13].
66. Supreme Court of NSW, *Submission DR2,* 6-7.
67. Legal Aid NSW, *Submission DR21*, 6; Australian Dispute Resolution Advisory Council, *Submission DR19,* 7; Australian Dispute Resolution Association, *Submission DR25*, 2; NSW Bar Association, *Submission DR20* [18].
68. Resolution Institute, *Submission DR24*, 9.
69. Law Society of NSW, *Submission DR23*, 4.

immunity", noting that protecting mediators from liability is only likely to protect the incompetent.[70]

2.54 We have ultimately decided that there is insufficient reason to extend any form of statutory immunity beyond that which is currently available. Some submissions note that the model provision would have prevented parties from granting a mediator a greater level of immunity, if they wished.[71] We consider that the extent of any statutory immunity should be decided as the case requires and that the parties should be able to agree to greater protections than those offered by any relevant statutory regime. Where there is no statutory immunity, the parties should be able to agree to the extent of any immunity that the mediator may enjoy.

Termination of mediation (CP 18 Model Provision 4)

CP 18 Model Provision 4: Termination of mediation

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

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

(a) the mediator purports to terminate a mediation

(b) a party purports to terminate a mediation

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

(d) litigation commences or recommences.

2.55 We proposed Model Provision 4 on the basis that it was necessary to know when a mediation has been terminated so that, for example, all parties know when communications between the parties are no longer confidential or privileged. Such certainty would also have been required if rules were to be adopted about the expiration of limitation periods.[72] We do not now recommend such rules.

2.56 There is some qualified support for Model Provision 4.[73] However, some submissions identify problems with the model provision, including that terminating a mediation when litigation commences or recommences would exclude situations

70. S Lancken, *Submission DR22*, 1.

71. NSW Bar Association, *Submission DR20*, 3-4; Australian Dispute Resolution Association, *Submission DR25*, 2.

72. See [2.73]-[2.82] below where we do not propose a Model Provision about the expiry of limitation periods.

73. Australian Dispute Resolution Advisory Council, *Submission DR19,* 7; Resolution Institute, *Submission DR24*, 10.

where dispute resolution can continue parallel with court proceedings.[74] Some also raise concerns about how "purports" might be applied.[75]

2.57 One submission considers that the question of termination is best left to the parties and mediator, or to the legislation or agreement under which the mediation proceeds.[76]

2.58 On further consideration, we are not persuaded that Model Provision 4 or any similar provision is necessary. Whether a mediation has ended will be a matter of fact to be determined in all the circumstances if any dispute arises in future, and the proposed model provision would not have assisted sufficiently to resolve that question.

Enforcement (CP 18 Model Provision 5)

CP 18 Model Provision 5: Enforcement of mediated settlement agreements

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

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

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

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

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

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

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

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

74. Australian Dispute Resolution Advisory Council, *Submission DR19,* 7; Resolution Institute, *Submission DR24*, 10.

75. Resolution Institute, *Submission DR24*, 10; Law Society of NSW, *Submission DR23*, 4.

76. NSW Small Business Commissioner, *Submission DR26*, 3.

(b) if the Court finds that:

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

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

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

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

(a) the amount of such fees, or

(b) the means for their calculation,

is specified in the agreement.

2.59 Under the *Civil Procedure Act 2005* (NSW), if a court refers a matter to mediation[77] and the parties reach an agreement or arrangement, the court may make orders giving effect to the agreement.[78] Likewise, if NCAT refers a matter to mediation[79] and the parties reach an agreement, the outcome may be formally noted to become an order of the tribunal[80] and be binding on the parties as a tribunal decision. The Housing Industry Association supports these binding outcomes.[81] Similar provisions operate in relation to Aboriginal land rights and workers' compensation mediation.[82]

2.60 Model Provision 5 would have established a mechanism to allow for the enforcement of mediated agreements as orders where:

- the mediation was not ordered by a court or tribunal, and
- the mediation was under a statutory scheme that lacks such enforcement mechanisms.

2.61 At present, such agreements are treated as ordinary contracts. Enforcement therefore requires the plaintiff to bring a claim for breach and establish the grounds for specific performance. During this process, the onus of proof rests on the plaintiff. This procedure for contractual enforcement is onerous and time consuming, and means that mediation may fail to reduce costs and delays for the parties and the community.

2.62 Some submissions to CP 16 favoured the introduction of overarching legislation that, in absence of other specific legislation, provides that agreements reached in dispute resolution are enforceable.[83] Boulle notes that the lack of enforceability of

77. Under *Civil Procedure Act 2005* (NSW) s 26.
78. *Civil Procedure Act 2005* (NSW) s 29.
79. Under *Civil and Administrative Tribunal Act 2013* (NSW) s 37.
80. *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 9.
81. Housing Industry Association, *Submission DR9* [2.1.25]-[2.1.27].
82. *Aboriginal Land Rights Act 1983* (NSW) s 240 applying *Commercial Arbitration Act 2010* (NSW) s 35, s 36; *Work Health and Safety Act 2011* (NSW) s 142, s 143. See also L Boulle, *Mediation: Principles, Process, Practice* (LexisNexis, 3rd ed, 2011) [11.49].
83. Law Society of NSW, *Submission DR7,* 3; S Lancken, *Submission DR8,* 3.

Farm Debt Mediation agreements means that parties "are left to their own devices" in the event of non-compliance.[84]

2.63 However, some submissions to CP 18 note problems with Model Provision 5 including:

- the question of how it would interact with, for example, existing processes to register and enforce mediated outcomes in family law, care or adoption matters[85]
- the possibility that requiring mediators to give advice about enforceability could lead to disputes about what was said and may even give rise to mediator liability[86]
- Model Provision 5(4)(b)(i) fails to have regard to the reality that settlement agreements, because of their context, are sometimes "less than paragons of precise drafting",[87] and
- the fees provision ignores the possibility that the payment of the mediator's fees can (and should ideally) be dealt with in the agreement to mediate rather than in the mediated agreement.[88]

2.64 Some submissions say the enforceability of an agreement that parties intend to be legally binding should not depend, as Model Provision 5 proposed, on the accreditation of the dispute resolution practitioner.[89]

2.65 Some submissions consider the model provision entirely unnecessary.[90] Likewise, some prefer that settlement agreements be enforceable according to ordinary principles of contract law.[91] Another submission notes that "mediation agreements should be sufficiently robust and so aligned with participants' needs and interests that external enforcement is generally unnecessary". However, the submission adds that "external enforcement provides an added layer of certainty".[92]

2.66 We are not persuaded that there is sufficient value in having a separate procedure for enforcing mediated agreements. Such arrangements may be of some benefit to under-resourced parties to a dispute. However, for many commercial transactions, it

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84. L Boulle, *Mediation: Principles, Process, Practice* (LexisNexis, 3rd ed, 2011) [11.49].
85. Legal Aid NSW, *Submission DR21*, 6.
86. NSW Bar Association, *Submission DR20* [27]-[30]; Law Society of NSW, *Submission DR23,* 5; Resolution Institute, *Submission DR24*, 11; NSW Small Business Commissioner, *Submission DR26*, 3.
87. NSW Bar Association, *Submission DR20* [34]. See also Australian Dispute Resolution Association, *Submission DR25*, 2.
88. Law Society of NSW, *Submission DR23*, 6.
89. Australian Dispute Resolution Advisory Council, *Submission DR19,* 7; Law Society of NSW, *Submission DR23*, 2, 5; Resolution Institute, *Submission DR24*, 11; NSW Small Business Commissioner, *Submission DR26*, 3.
90. NSW Bar Association, *Submission DR20* [22], [24]; Australian Dispute Resolution Association, *Submission DR25*, 2.
91. Law Society of NSW, *Submission DR23*, 5; NSW Small Business Commissioner, *Submission DR 26*, 2, 3.
92. Resolution Institute, *Submission DR24*, 11.

would be inappropriate to introduce another avenue for enforcement and review outside of those currently available at law.[93]

Statutory defamation privilege (CP 18 Proposal 1)

CP 18 Proposal 1: Removal of statutory defamation privilege

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

2.67 In CP 18, we proposed repealing any provisions establishing a defence of absolute privilege to defamation proceedings arising from the conduct of mediations.

2.68 A defence of absolute privilege to defamation proceedings arising from mediations was first introduced by the Community Justice Centres pilot project in 1980.[94] The co-ordinating committee thought it likely that mediations might involve "a heated exchange of views, accusations and abuse", and considered it desirable to protect the parties to a mediation from possible suits for defamation.[95] Along with subsequent provisions based upon it,[96] this privilege has never been tested. Similarly, there is no known evidence to support the claim made when it was inserted into the *Land and Environment Court Act 1979* (NSW) in 2007[97] that "[w]ithout the protection afforded by [defamation privilege], parties involved in a [mediation] might be less frank and less willing to make concessions to settle a dispute".[98]

2.69 An express statutory privilege against defamation is potentially not needed in cases where there are effective admissibility and confidentiality provisions in place. However, given that mediation communications are generally inadmissible under s 131 of the *Evidence Act*, allegedly defamatory statements made in the course of mediation will be inadmissible in any attempt to prosecute a defamation claim, unless an exception applies. Likewise, as mediation communications are generally confidential and thus cannot "leave the room", the risk of damage from any allegedly defamatory statement is limited. Existing provisions offering immunity to mediators and any relevant provisions in an agreement to mediate could further protect mediators against liability for defamation.

2.70 The absence of defamation privilege in any international mediation legislation supports a conclusion that the defamation privilege is probably not needed. We therefore proposed that NSW repeal provisions that establish a defence of absolute privilege to defamation claims.

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93. See Law Society of NSW, *Submission DR23*, 5-6.
94. *Community Justice Centres (Pilot Project) Act 1980* (NSW) s 28(2).
95. J Schwartzkoff and J Morgan, *Community Justice Centres: A Report on the New South Wales Pilot Project, 1979–81* (Law Foundation of NSW, 1982) 27.
96. *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 10(2); *Civil Procedure Act 2005* (NSW) s 30(2); *Community Justice Centres Act 1983* (NSW) s 28(2); *Community Land Management Act 1989* (NSW) s 69(2); *Dust Diseases Tribunal Regulation 2013* (NSW) cl 49(2); *Strata Schemes Management Act 2015* (NSW) s 222; *Land and Environment Court Act 1979* (NSW) s 34(10A), s 34(10B); *Legal Aid Commission Act 1979* (NSW) s 60D.
97. *Courts and Other Legislation Amendment Act 2007* (NSW) sch 2.
98. NSW, *Parliamentary Debates*, Legislative Assembly, 30 November 2007, 4787.

2.71 Submissions generally did not comment on our proposal.[99] Despite the arguments in favour of removing the statutory defamation privilege, one submission considers it is still a useful provision to allow mediations to continue without concerns about potential defamation proceedings arising.[100]

2.72 While the privilege appears unnecessary and there is no evidence that any of the statutory provisions have been invoked, we accept that they may perform a limited function in removing any concerns that statements made during mediation might give rise to liability for any of the parties. Therefore, we make no recommendation about the existing provisions.

Suspension of limitation periods

2.73 Legislation generally sets out limitation and prescription periods that prevent a person from taking legal action after a specified period of time. This means that, in some cases, a person must commence legal action in order to maintain their claim. In CP 16, we asked whether provisions were needed to suspend any limitation and prescription periods while mediation is attempted.[101]

2.74 The suspension of limitation periods appears to be possible at common law and in equity. If one party indicates that they will extend the limitation period, and the other party enters into mediation in reliance on this, a departure from the agreement and an attempt to enforce the limitation gives rise to an equity in favour of the other party.[102] However, as with all equitable remedies, the availability of specific performance to enforce the parties' agreement is at the court's discretion and subject to equitable "defences".

2.75 The parties' ability to extend the limitation period, in effect, by agreement, has been legislated in Western Australia,[103] Ontario,[104] and in the UK[105] (for certain cross-border disputes pursuant to an EU Directive). As the Law Reform Commission of Western Australia noted, codification of these extensions increases certainty for the parties.[106] In particular, such provisions would support an argument for equitable estoppel. They would also encourage parties to attempt to settle their disputes by ensuring that they are not "forced" to litigate to preserve their rights. Courts have shown a willingness to grant extensions of time to commence proceedings where protracted mediation has contributed to the expiry of the limitation period.[107] A legislative suspension of the running of time for limitation purposes during mediation accords with general principles of fairness and ensures that attempts to mediate do not prejudice parties' legal rights. The NSW Bar Association submitted that a provision dealing with limitation periods during mediation "may be useful in order to

99. Law Society of NSW, *Submission DR23*, 7.
100. J Thompson Powter, *Submission DR15*, 1.
101. NSW Law Reform Commission, *Dispute Resolution: Frameworks in New South Wales*, Consultation Paper 16 (2014) [8.28]-[8.32].
102. See *Commonwealth v Verwayen* (1990) 170 CLR 394.
103. *Limitation Act 2005* (WA) s 45.
104. *Limitations Act 2002* (Ontario) s 11(1).
105. *Limitation Act 1980* (UK) s 33A, s 33B.
106. Law Reform Commission of Western Australia, *Limitation and Notice of Actions,* Project No 36 Part 2, Report (1997) [18.3].
107. See, eg, *Rundle v Salvation Army (South Australia Property Trust)* [2007] NSWSC 443 [42]-[45].

ensure that a potential defendant does not use mediation to delay the commencement of proceedings to its own advantage".[108]

2.76 In light of these benefits, in CP 18 we considered proposing a model provision that draws on the UNCITRAL *Model Law*, and legislation in Ontario and Western Australia[109] by providing expressly for the suspension of limitation periods while mediation is ongoing:

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

2.77 On balance, our view in CP 18 was that such a provision was not warranted. However, we recognised the arguments in favour of such a provision and welcomed submissions on this question.

2.78 Only a few submissions responded to our invitation.

2.79 The Law Society of NSW notes that there may be little incentive in practice for a defendant to agree to suspend a limitation period. Therefore, "it may be useful to have a provision for suspension of the operation of limitation periods to allow the parties to explore mediation".[110] The Law Society adds that "[f]urther consideration would need to be given to when such a suspension should commence and end".[111]

2.80 The Resolution Institute notes that the need to give mediation a good chance to resolve disputes must be balanced against the need for certainty about such critical matters as limitation periods, and the risk that a suspension could be used to the disadvantage of a vulnerable party.[112]

2.81 The NSW Small Business Commissioner considers that the ability to mediate after filing a claim provides sufficient flexibility, and that a general provision dealing with the suspension of limitation periods might create "perverse outcomes".[113]

2.82 For these reasons, we confirm our original conclusion that such a provision is not warranted.

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108. NSW Bar Association, *Submission DR12* [31].
109. *Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law,* GA Res 57/18, UN Doc A/Res/57/18 (24 January 2003), art 4 footnote 4; *Limitations Act 2002* (Ontario) s 11(1); *Limitation Act 2005* (WA) s 45.
110. Law Society of NSW, *Submission DR23*, 7.
111. Law Society of NSW, *Submission DR23*, 7.
112. Resolution Institute, *Submission DR24*, 12.
113. NSW Small Business Commissioner, *Submission DR26*, 3.

Appendix A:
Existing NSW statutory provisions considered for amendment

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

Appendix B:
Existing NSW statutory provisions proposed to be excluded

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

1. *Apprenticeship and Traineeship Act 2001* (NSW) s 50 repealed by *Apprenticeship and Traineeship Amendment Act 2017* (NSW).
2. Now *Associations Incorporation Regulation 2016* (NSW).

Act or Regulation	ADR provisions
Land and Environment Court Act 1979 *Land and Environment Court Rules 2007*	s 34, s 34AA pt 6.2
Legal Profession Uniform Law (NSW)	s 288
Local Court Act 2007 *Local Court Rules 2009*	s 36 r 2.5, r 4.3
Local Government Act 1993	s 440I
Mining Act 1992	pt 8 div 2
Ombudsman Act 1974	pt 3
Petroleum (Onshore) Act 1991	pt 4A
Police Act 1990	s 176
Privacy and Personal Information Protection Act 1998	s 49
Real Property Act 1900	s 135
Retirement Villages Act 1999	pt 8 div 2
Strata Schemes Management Act 2015 *Strata Schemes Management Regulation 2010* *Strata Schemes Development Act 2015*	s 217–225 pt 8[3] s 181
Succession Act 2006	s 98
Thoroughbred Racing Act 1996	s 29G
Veterinary Practice Act 2003	s 43(3)
Workplace Injury Management and Workers Compensation Act 1998 *Workers Compensation Commission Rules 2011*	ch 7 pt 6 div 4, s 355 r 17.9–17.12

3. Now *Strata Scheme Management Regulation 2016* (NSW) pt 9.

Appendix C: Submissions to CP 16

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

Appendix D: Submissions to CP 18

DR15 Jane Thompson Powter, 3 March 2017
DR16 NSW Information Commissioner, 10 March 2017
DR17 NSW Department of Family and Community Services, 14 March 2017
DR18 NSW Ombudsman, 24 March 2017
DR19 Australian Dispute Resolution Advisory Council, 16 March 2017
DR20 NSW Bar Association, 31 March 2017
DR21 Legal Aid NSW, 31 March 2017
DR22 Stephen Lancken, 2 April 2017
DR23 Law Society of NSW, 5 April 2017
DR24 Resolution Institute, 7 April 2017
DR25 Australian Dispute Resolution Association, 2 May 2017
DR26 NSW Small Business Commissioner, 3 May 2017

Appendix E: Consultation

Consultation

Sydney, 18 July 2017 at 10:30am

Candace Barron, Office of NSW Small Business Commissioner
Mary Walker, Australian Dispute Resolution Association
Meredith Frohreich, Housing Industry Association
David Edney, NSW Young Lawyers
Alan Limbury, Strategic Resolution
Pauline Wright, Law Society of NSW
Nerida Harvey, Law Society of NSW
Ella Howard, Law Society of NSW
Chris Wheeler, NSW Ombudsman
Sandra Duke, NSW Ombudsman
Steve Lancken, Negocio
Roxane Marcelle-Shaw, Office of the Information and Privacy Commissioners
Ian Davidson SC, NSW Bar Association
Louise Pounder, Legal Aid NSW
Justine Field, Legal Aid NSW
Fiona Hollier, Resolution Institute

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