THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: DisputeResolution:REmv875602

27 June 2014

NSW Law Reform Commission
GPO Box 5199
Sydney NSW 2001

By email: nsw_lrc@agd.nsw.gov.au

Dear Sir/Madam,

Consultation Paper 16: Dispute Resolution Frameworks in New South Wales

I am writing to you at the request of the Law Society's Dispute Resolution Committee ("Committee").

The Committee appreciates the opportunity to provide comments in response to Consultation Paper 16: Dispute Resolution Frameworks in New South Wales ("the Paper").

The Committee commends the NSW Law Reform Commission ("NSWLRC") for the comprehensive coverage of the Paper, which will be a valuable resource for legislators considering alternative dispute resolution ("ADR") legislation.

General Comments

The Paper identifies the considerable diversity in the manner in which ADR is dealt with in legislation. In the Committee's view, there are advantages in providing more standardised provisions, while still allowing for the diversity of practice to accommodate different jurisdictions. Some of the advantages of standardised provisions include:

- Lower compliance costs
- Better understanding for all stakeholders of ADR process and practice
- Support of the ADR profession to self-regulation as accreditation standards become a requirement to practice under certain legislation
- Creation of a consistent body of law.

The Committee is also mindful that, in relation to most of the current legislation that provides for mediation, there has been little litigation about ADR process. This suggests that the market works out issues without generating further disputes (the only area where there is a body of law about mediation appointment appears to be in the Farm Debt Mediation area). In the Committee's view, there is no urgent need for further regulatory or legislative intervention.

In relation to the comments about the value of ADR, particularly in paragraph 1.21 of the Paper and the comments relating to concerns about the appropriateness of ADR and whether it contributes to access to justice, in the Committee's view there is no evidence to support this criticism. There is a need to gather evidence about the true value, risk and cost of ADR processes. The Committee commends to the NSWLRC the recent draft report of the Productivity Commission in so far as it relates to ADR, its value and the lack of an evidence base.

The Committee also notes that there is a failure to understand the basic premise of consensual ADR and that it is open to any party to end the process at any time. The power of a participant to leave the process is the ultimate protection against some of the concerns identified (such as power imbalances).

The Committee supports the further gathering of evidence to support the value or otherwise of ADR processes being imposed in legislation as a prerequisite to, or as part of the process of, litigation in courts and tribunals.

The Committee notes those schemes identified in the Paper that have been operating for some time without evidence of the suggested risks, in particular those now conducted by the Small Business Commissioner, pursuant to the *Farm Debt Mediation Act 1994*, and the other examples identified in the Paper.

The introductory chapters of the Paper identify some of the central issues for legislators when considering ADR in legislation, such as the present confusion about who is a "mediator" or other ADR practitioner when that is referred to in legislation (including issues of accreditation), and the variety of provisions relating to issues such as confidentiality, immunity, privilege and satisfactory participation in an ADR process.

Much work has already been done to identify the issues and to try to recommend proposals for reform. The Committee commends to the NSWLRC, the work of the former National Alternative Dispute Resolution Council ("NADRAC"), in particular its report; "*Maintaining and Enhancing the Integrity of ADR Processes, From Principles to Practise Through People*". The Committee notes that the Paper refers to this NADRAC publication.

A Consistent Approach to the Legislation of ADR

The Paper identifies that the challenges facing legislators when considering ADR legislation mostly relate to the technical considerations of best practice in ADR. The appointment of ADR practitioners, how the process should be governed, and issues of confidentiality, privilege and participation are all important considerations, as noted in Chapters 3 to 7 of the Paper.

This submission does not seek to address each of these technical issues in isolation. In the Committee's view, the first consideration is whether there is a need to address the inconsistencies in current legislation. The value of consistency should then be balanced against the need to provide for diversity of practice and the requirements particular to different jurisdictions and for different types of disputes.

The Committee is of the view that the inconsistencies and the manner in which legislation deals with the regulation of ADR should be addressed, while maintaining attention to the idiosyncrasies of different legislative regimes and programs.

The Committee favours the introduction of overarching legislation that contains, in default of other specific legislation, the following:

- Definitions of Mediations, Evaluation Conciliation and other ADR processes
- Confidentiality provisions and requirements
- Privilege of communications
- Duties of ADR practitioners when the public interest is against confidentiality or privilege (for instance future harm or criminal activity)
- Non-disclosure of information
- Admissibility of evidence
- Privilege with respect to defamation
- Suspending limitation and prescription periods
- Satisfactory participation (for instance a requirement to act genuinely, reasonably or in good faith)
- The right of a party to terminate or withdraw from a mediation
- The enforceability of agreements reached in ADR, though the Committee is concerned that any such provision not impinge upon existing common law or statute relating to the creation of or enforceability of contracts
- Qualification and appointment of mediators. The Committee suggests that the legislation should provide that qualifications and appointment be dealt with by Regulation (for instance the Regulation may provide that for the purposes of certain legislation a mediator must be Accredited under the National Mediator Accreditation Standards or to some other standard and have other qualifications). Such an approach would allow the present practice of appointment as provided by regulation or defined in legislation to continue.
- The provision of ADR by court officers such as registrars or tribunal members or staff (in so far as they might be governed by different requirements).

The Committee proposes that any such legislation should not apply to contractual ADR, not currently regulated by legislation, except to the extent that the parties do not otherwise deal with particular matters in their contract. This allows freedom of contract and supports diversity of practice, which is one of the valuable hallmarks of current ADR practice.

The Committee suggests that even if ADR is mandated by legislation, the parties should be free to contract as to the following (unless the legislation provides otherwise):

- The selection of an ADR practitioner and what they are paid
- Practice standards for ADR practitioners (as these are covered by accreditation requirements). The Committee notes that independence and impartiality are also covered by accreditation requirements.

If overarching ADR legislation is implemented, the Committee considers that there is merit in it dealing with the default provisions for appointment and process of ADR where parties use simple words like mediation, conciliation or evaluation in their contract. So for instance the legislation would apply to a clause such as; *"If the parties are in dispute in relation to any matter arising out of this contract they will first attempt mediation".*

By legislating common practice for ADR (in default of specific legislation), it would be possible to promulgate legislation that, in the short term, does not require the repeal or amendment of the 50 or so statutes that presently refer to ADR. Over time, these statutes may be reviewed and brought into line with the overarching legislation, except where specific circumstances or policy imperatives dictate otherwise.

In the long term, the goal of just, cheap and quick justice would be enhanced by there being less compliance effort needed to ensure a common language about and understanding of the use and practice of ADR processes in NSW. Such legislation would make NSW the leader in ADR good practice both in Australia and internationally.

However, the Committee encourages caution and a wide ranging consultation and discussion before the creation of such legislation. There is a risk that if legislation is introduced without proper consultation and support that the present confusion surrounding ADR identified in the Paper will be exacerbated.

In the Committee's view, the consultation should include at least the following:

- All sectors of the legal profession;
- The Judiciary and Courts;
- Tribunals and their Members;
- The ADR profession through its various membership and accreditation bodies;
- Government Agencies who administer ADR, such as the Rural Assistance Authority, the Small Business Commissioner and the Health Care Complaints Commissioner etc;
- Legal Aid, Community Legal Centres and Pro-Bono interest holders; and
- Frequent users of ADR such as Government agencies, Insurers, Banks and business interests.

The Committee also supports the consideration of a triage service to identify the suitability of disputes to ADR processes, and to support the consistent collection of data to determine how and what type of ADR is most effective.

Responses to questions raised in the Paper

2. Existing statutory provisions - overview

2.1. (1) In what ways can existing statutory ADR provisions be improved?
(2) What areas require ADR provisions where none are currently provided?
(3) What existing ADR provisions are unnecessary?

The Committee refers to its comments above.

Where there is no current regime or definition of ADR or its various processes, there is a need for there to be some consistency in definition and understanding.

It is not possible to say which ADR provisions are "unnecessary". All fulfil some legislative purpose though the inconsistency and diversity between them may be creating some confusion.

In the Committee's view, some legislative requirements about duties to "act in good faith" or mediate or negotiate "in good faith" are vague and difficult to interpret.

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

3.1. Types of disputes
(1) Should the type or category of dispute determine what ADR provisions should apply in a particular case?
(2) If so, what ADR provisions should apply to what types of dispute?

The Committee favours a regime in which overarching ADR provisions are clear with the opportunity for them to be varied through specific legislation or regulation.

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

(1) What problems have been caused by the lack of standard ADR terminology and definitions?

(2) In what circumstances would it be desirable to use standard terminology and definitions for ADR processes?

(3) In what circumstances would it be better to use a broader, more flexible term that incorporates the possibility of many different types of ADR?

(4) In what circumstances would it be better to use a narrower, more restricted term that limits the types of ADR that can be used?

The greatest problems in the non-standardised use of terms is confusion and a resultant lack of understanding among stakeholders about what is or is not appropriate practice in ADR. These problems may be restricting the uptake of appropriate ADR processes.

(5) What types of ADR are suitable for the different types of disputes?

In the Committee's view, this question is too broad for a simple answer.

The Committee supports a continuing exploration of ADR processes for different disputes.

What is missing in NSW is an overall triage service for disputes that will allow best practice referral and the collection of meaningful data to answer this question.

3.3. – 3.8. Existing uses and definitions

The Committee does not believe that there are pressing and immediate "problems" caused by any of the existing uses and definitions of the terms referred to in questions 3.3 to 3.8. However, the Committee notes that inconsistencies in use do cause confusion and have the potential to lead to satellite litigation and other problems.

The Committee supports consultation with stakeholders to agree on standard definitions of ADR terms that will be the default definition for all legislation, absent a specific exemption in particular legislation to meet industry or other needs. The promulgation of standard definitions will make NSW a leading jurisdiction.

The discussion and consultation regarding standard terms will support engagement in ADR as more people become aware of the differences between processes. Standard language allows for robust and useful judicial exploration of process.

4. Existing statutory provisions – initiating and participating in ADR

4.1. Compulsory referral

(1) In what circumstances should a referrer be required to refer matters to ADR?

(2) How should provisions requiring such referral be expressed?

Mandatory referral and mandatory pre-trial protocols need careful consideration. As referred to in this submission, there are some excellent examples of mandatory referral which create a useful tool for the resolution of disputes.

Any mandatory referral must address the specific industry need and/or the needs of disputants.

4.2. Discretionary referral

(1) In what circumstances should a referrer be able, but not required, to refer matters to ADR?

(2) How should provisions enabling but not requiring referral to ADR be expressed?

(3) In what circumstances should a provision set out the conditions to be met before a referrer can refer a matter to ADR?

(4) How could such conditions be expressed?

The Committee does not see a limit on circumstances where a referrer should be able to refer to ADR, provided referrers are well trained in triage and/or mapping to ADR. This approach has proved very successful in the Courts and Tribunals (for instance the AAT and Federal Magistrates Court and NCAT).

The Committee refers to its previous comments regarding definitions. It is useful if referrals are made consistently and providers are aware of the services that they are obliged to provide. Consistency of use of terminology will assist to ensure that appropriate process is applied.

The primary consideration in any referral should be to ensure that no party is harmed or disadvantaged.

4.3. When one or more party applies for referral

(1) In what circumstances should one or more parties to a matter be able to request that the matter be referred to ADR?

(2) In what circumstances should a referrer have a discretion to deal with an application for ADR?

(3) How should provisions which set out the referrer's discretion to deal with an application for ADR be expressed?

(4) In what circumstances should a provision set out the grounds on which a referrer could dismiss an application for ADR?

(5) How should provisions that set out the grounds on which a referrer can dismiss applications be expressed?

The Committee refers to its earlier comments.

The Committee can see little danger in referrals being made where one party believes that there is a benefit in ADR. There may be costs issues that can be dealt with by way of special costs orders.

4.4. Where an attempt at ADR is required before proceeding

(1) In what circumstances should parties be required to attempt ADR before a matter can proceed?

(2) How should such provisions be expressed?

The Committee refers to its earlier comments.

4.5. Where the referrer conducts the ADR

(1) In what circumstances should provisions allow a referrer to conduct the ADR proceedings?

(2) How should such provisions be expressed?

The Committee opposes Courts and Tribunals providing ADR as part of their service. This creates a risk to the integrity of the Court or Tribunal and the ADR process.

If it is economically and otherwise feasible, ADR should be provided at arm's length to the Courts or Tribunals where determinations are to be made.

4.6. – 4.10. Participating in ADR

In the Committee's view, careful consideration and extensive consultation is needed to determine what, if any, amounts to satisfactory participation in ADR.

The Committee supports a "soft touch" approach that expresses satisfactory participation in terms of willingness to listen and engage. There should be no requirement to resolve.

The Committee considers that conduct requirements such as "good faith" risk satellite litigation and require careful consideration.

5. Existing statutory provisions – practice, procedures and enforcement

5.1. – 5.6. Practice and procedure of ADR sessions

The Committee considers that these matters should be left to accredited ADR providers, as guided by practice standards. There is no need to legislate these matters.

5.7. Costs of ADR

(1) In what circumstances should provisions deal with the costs of ADR?

(2) How should such provisions be expressed?

The Committee considers that a statutory default position that the costs of ADR form costs of the cause unless otherwise agreed or ordered would do much to avoid ongoing inconsistency and confusion.

6. Existing statutory provisions - ADR practitioners

6.1.– 6.4. Appointment, accreditation, powers and obligations of ADR practitioners

The Committee refers to its earlier comments.

Legislation (if considered appropriate) should support the continued self-regulation of the ADR "profession".

There is no policy reason why ADR professionals should be offered immunity.

There are cheap and accessible insurance options for accredited ADR professionals.

Powers of ADR professionals should be set out in the definition section of the relevant legislation.

7. Existing statutory provisions – Use of information

7.1. Non-disclosure of information

(1) In what circumstances should provisions deal with non-disclosure of information?

(2) How should such provisions be expressed?

7.2. Inadmissibility

(1) In what circumstances should provisions deal with inadmissibility of evidence in later proceedings?

(2) How should such provisions be expressed?

7.3. Privilege with respect to defamation

(1) In what circumstances should provisions deal with the privilege with respect to defamation in ADR processes?

(2) How should such provisions be expressed?

The NADRAC publication referred to earlier in this submission, offers a very useful starting point for discussion in relation to these issues.

The Committee supports a wide ranging discussion about these issues and a default codification to create certainty.

8.5. Identifying and managing power imbalances

(1) In what circumstances should provisions identify and manage power imbalances between participants in ADR sessions?

(2) How should such provisions be framed?

In the Committee's view, it is the role of the courts to deal with power imbalances. Mediators need to be trained and certified to ensure that power imbalances are not abused in ADR.

9. The regulatory framework

The Committee refers to its earlier comments in relation to the regulatory framework.

The Committee thanks you for the opportunity to comment. If you have any questions please feel free to contact Menaka Venkata, policy lawyer for the Committee on menaka.venkata@lawsociety.com.au or (02) 9926 0214.

Yours sincerely,

Ros Everett

Ros Everett
President