THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: ADR/LLP/MLLC/ICC:PWeh:1265541

5 April 2017

Mr Alan Cameron AO
Chair
NSW Law Reform Commission
GPO Box 31
Sydney NSW 2001

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

Dear Mr Cameron,

Dispute resolution: Model provisions

The Law Society of NSW welcomes the opportunity to comment on Consultation Paper 18, "Dispute resolution: Model Provisions" ("the Consultation Paper"). The Alternative Dispute Resolution, Litigation Law and Practice and Medico Legal Liaison Committees have contributed to this submission. This submission has been approved by the Injury Compensation Committee.

The Law Society generally supports the development of model provisions for alternative dispute resolution. However, we offer the following comments on the proposals set out in the Consultation Paper.

Model Provision 1: Definitions of accredited mediator and mediation

"Accredited mediator"
The proposed definition provides that an "accredited mediator" is a mediator who is accredited by a Recognised Mediator Accreditation Body in accordance with the National Mediator Accreditation Scheme (NMAS). The Law Society is aware that there is a considerable difference of views on this proposed definition.

The Law Society agrees with the comments in the Consultation Paper regarding the rationale for the Model Provisions applying only to mediations conducted by mediators who are NMAS accredited. The NMAS is intended to raise standards of mediation and to develop objective standards of competency and experience to protect the public from dispute resolution practitioners without relevant qualifications. The Mediator Standards Board, which administers the NMAS, maintains an online register of accredited mediators. This makes it easy for parties to quickly verify that the NMAS accreditation of any proposed mediator is current, and which Recognised Mediator Accreditation Body most recently conferred or renewed that accreditation. We also understand that NMAS provides certain safeguards to parties, including a complaints procedure and a requirement for NMAS accredited mediators to hold appropriate insurance.

As stated in the Consultation Paper:

> This system [NMAS] allows mediators to be voluntarily accredited by Recognised Mediator Accreditation Boards. Accredited mediators must then comply with the System's Approval Standards and Practice Standards. This will support the NMAS, as parties who wish to take advantage of the model provisions will need to select an accredited mediator. In turn, this may also raise standards in the field generally. This approach aligns with that of the ACT, where only mediators who are registered and, therefore, subject to competency standards, enjoy immunity.[1]

However, the Law Society notes that there are some circumstances in which the mediator chosen by parties may not be NMAS accredited. For example, it remains common practice in civil and commercial matters for the parties to appoint as mediator a former judge or a barrister who is a subject matter expert with substantial experience in an area of law. It is also common for court registrars to facilitate ADR processes during the course of court proceedings. The Law Society understands these mediators may not be NMAS accredited.

While such mediations would not be prevented under the proposed Model Provisions, the difficulty if they fall outside the scope of the Model Provisions is that it will create a dual system and may increase confusion amongst parties. This result would undermine the NSW Law Reform Commission's stated terms of reference, in particular to "where appropriate, [recommend] a consistent model or models for dispute resolution in statutory contexts, including court ordered mediation and alternative dispute resolution."

We have given consideration to proposing an amendment to the Model Provisions that would allow mediations conducted by non-NMAS accredited mediators to opt-in to the operation of the Model Provisions. However, we are aware that this may allow mediators without relevant training or experience to gain the benefit of the Model Provisions, including immunity, which may result in unjust outcomes for parties to mediation. Mediators who are not accredited are not required to have a complaints mechanism, insurance or to subscribe to a code of ethics. Solicitor and barrister mediators are, of course, required to have insurance, are bound by professional ethics and conduct requirements and are subject to a set complaints procedure.

The Law Society suggests that these concerns about the proposed definition may require additional consideration by the Law Reform Commission and perhaps specific consultation with those mediators who may currently fall outside the definition of "accredited mediator".

The Law Society also notes that the proposed definition of an accredited mediator does not include mediators who have been internationally accredited but not NMAS accredited. NMAS does not automatically recognise mediators who have been internationally accredited. However, any mediator possessing the appropriate experience and who has undergone suitable training can apply to have that experience and training recognised.[2]

"Mediation"

The Law Society notes that there may be benefit to setting out the powers of mediators in the Model Provision definitions, whether in the definition of mediation or separately. However, the Law Society understands that these powers are often set out in the mediation agreements.

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[1] NSW Law Reform Commission, Consultation Paper 18 "Dispute Resolution: Model Provisions", December 2016, pages 5-6.

[2] See section 2.5 of the Approval Standards comprising Part II of the National Mediator Accreditation System.

In reviewing this definition the Law Society has looked to other definitions of mediation. Section 2 of the NMAS Practice Standards provides that 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.

Both of these definitions demonstrate that mediation is a voluntary process driven by the parties. For this reason, the Law Society is concerned about the inclusion of conciliation and neutral evaluation within the scope of the Model Provisions. Neutral evaluation and conciliation are forms of dispute resolution that differ from meditation. In mediation the mediator at all times maintains his or her neutrality and impartiality. In neutral evaluation and conciliation the third party is seen by the parties to be in a position of authority and assumes responsibility for generating solutions or forming a view on the likely outcome if the matter is to proceed. The Law Society suggests that the final sentence in the current draft definition of mediation, which provides that the definition include a process that fits the description even when such a process is described as "conciliation" or "neutral evaluation", be removed.

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

The Law Society notes that Model Provision 2 does not allow for a situation where a number of interests are involved and there is the need for input from a variety of sources, for example when parties backed by an insurer need to disclose information further within their corporate structure or to reinsurers. Currently some mediation agreements deal with this issue by using a "legitimate sphere of intimacy" definition which allows for information to be shared to people falling within that sphere. The Law Society has reservations about this approach as the term "legitimate sphere of intimacy" has not been tested and may allow information to be shared quite broadly without the consent of all parties. The Law Society proposes that in order to cater to situations such as these, Model Provision 2 should recognise that parties may agree to their own exceptions to the confidentiality rule having regard to the circumstances of their particular case.

The Law Society suggests that it be made clear that Model Provision 2(2)(b)(iv) includes disclosures for the court approval of settlements for claimants under an incapacity.

In terms of the wording of the Model Provision, the Law Society suggests the following amendments:

- The last line of the definition of "Mediation communication" in Model Provision 2(1) be amended to replace "mediation agreement" with the phrase "agreement to mediate" or, if intended to refer to the provision the subject of Model Provision 5, "mediated settlement agreement".
- Model Provision 2(2)(b) be amended to include the word "only", i.e. "A person may disclose a mediation communication only if ... ".
- Model Provision 2(2)(b)(iv) be amended so that "purposes" be changed to "purpose".
- If the reference in Model Provision 2(2)(b)(iv) to a "settlement agreement" is intended to refer to a "mediated settlement agreement" as established by Model Provision 5, that "settlement agreement" be amended to refer to "mediated settlement agreement".
- The words "or property" be added to Model Provision 2(2)(b)(viii) after the words "or safety".

- That "of" be replaced with "or" in the first line in Model Provision 2(4)(c) so that it reads "Where a person seeks disclosure or admission of the mediation communication in evidence ...".
- The word "the" be inserted before "NSW Civil and Administrative Tribunal" in 2(4)(c)(iii). ("The" is currently included on the Model Provision on page 8 of the Consultation Paper but not on page ix of the Consultation Paper.)

The Law Society also suggests that consideration be given to including a reference to s 131 of the *Evidence Act 1995* (NSW), which relates to the admissibility of evidence of settlement negations.

Model Provision 3: Immunity

The first subsection of Model Provision 3 states as follows:

> (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.

The Law Society considers that the drafting of this provision could be improved to provide additional certainty. For example, how is this provision intended to apply to statements by a mediator? One suggestion is to amend the beginning of the provision to "No matter or thing said or done or omitted to be said or done...".

Model Provision 3(2) states that the immunity provided in 3(1) will not apply if the claimant can show an absence of good faith on the mediator's part. The Law Society agrees that it is important to have safeguards in place for mediators. A high threshold for such allegations will work to reduce the risk of frivolous claims against mediators acting within the bounds of their professional ethical obligations and not endanger the confidentiality and outcomes of mediations.

As currently drafted Model Provision 3 places a difficult evidentiary burden on the party trying to show a lack of good faith. In order to show an absence of good faith during the course of mediation, witnesses would most likely need to give oral evidence. This could be difficult in light of the confidentiality of the mediation process and a possible lack of corroborating evidence.

For clarity, the Law Society suggests that Model Provision 3 be amended to include wording similar to s 53C of the *Federal Court of Australia Act 1976* (Cth) which provides that a mediator has the same protection and immunity as a judge has in performing the functions of a judge.

Model Provision 4: Termination of mediation

As set out above, the Law Society is of the view that the touchstone of mediation is that it is a voluntary process driven by the parties. It is the parties who choose to enter into mediation and they may choose to end it. We understand that it is not the role of a mediator to terminate a mediation. The Law Society recommends that Model Provision 4(2)(a) be removed.

The Law Society is also concerned that the proposed Model Provision 4(2)(b) provides that a termination could be effected by a party "purporting" to terminate the mediation. Further consideration may need to be given to what would be sufficient conduct by a party to "purport to terminate" a mediation.

Model Provision 5: Enforcement of mediated settlement agreement

As a general point, the Law Society notes that Model Provision 5 does not address parties using settlement agreements other than for enforcement, such as invoking terms in defence of a claim or for procedural purposes. This is currently being contemplated by UNCITRAL Working Group II and the most recent draft report contains a number of drafting proposals relevant to this area.[3]

Model Provision 5(2)(b): Mediation conducted by an accredited mediator
The concerns set out above regarding the definition of "accredited mediator" are directly relevant to this provision. We refer to our comments above.

Model Provision 5(2)(c): "explicitly consented"
The Law Society does not support Model Provision 5(2)(c) and the proposed opt-in approach, which requires the consent of the other party for the settlement agreement to be enforceable. Generally, the settlement agreement should be enforceable in the same way as any other agreement. There may be complications that arise in relation to the development of a discrete line of jurisprudence regarding the enforceability of a mediation settlement agreement if the consent of the other party is required.

Model Provision 5(3): Mediator to draw parties' attention to effect of Model Provision 5(2)
The Law Society notes the requirement in Model Provision 5(3) for the mediator to draw the effect of Model Provision 5(2) to the attention of the parties before the mediated settlement agreement is signed. The Law Society is concerned that this places an undue burden on the mediator that exposes them to liability and creates an opportunity for parties who do not wish to implement the agreed outcome to deflect responsibility to the mediator. There are also practical concerns about having to establish what the mediator did or did not draw to the parties' attention and the adverse impact this may have on the confidentiality of the mediation.

The Law Society suggests that Model Provisions 5(3) and (4)(b)(iii) be removed and that the parties themselves be responsible for understanding the effect of entering into a mediated settlement agreement. This is consistent with the general body of law that deals with enforceable contracts.

Model Provision 5(4): Court may refuse to give orders
The Law Society notes that Model Provision 5(4) allows for specific circumstances in which the court may refuse to make orders under Model Provision 5(2). We note that the types of defences contemplated at UNCITRAL Working Group II are broader than the Model Provisions and the defence that the agreement is void as expressed in the current draft.[4] As currently drafted, Model Provision 5(4)(b)(i) risks the outcome that a court will be able to review a bargain struck by the parties essentially to determine whether it was a good deal.[5]

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[3] UNCITRAL, "Report of Working Group II (Dispute Settlement) on the work of its sixty-sixth session (New York, 6-10 February 2017)", section A "Legal Effects of Settlement Agreements" available at: http://www.uncitral.org/pdf/english/workinggroups/wg_arb/acn9-901_as_submitted_watermark.pdf.
[4] UNCITAL, "Report of Working Group II (Dispute Settlement) on the work of tis sixty-fifth session (Vienna, 12023 September 2016), 18-20, available at:
https://documents-dds-ny.un.org/doc/UNDOC/GEN/V16/085/10/PDF/V1608510.pdf?OpenElement.
[5] Note that a similar discussion was had at Working Group II's 65th session in context of the defence to enforcement of mediator misconduct. The use of the word 'reasonable' was avoided in the objective test of causation that would be used to test whether any conduct during the mediation that had the potential to vitiate consent would have had such an impact. It was avoided because of two reasons – firstly the lack of a reasonable person standard as an element of some civil law systems, but relevantly for the Australian context – to avoid the courts having to re-examine the entire process of the conciliation and to adjudicate on the reasonableness of the parties' settlement.

The Law Society considers that it may not be appropriate for the courts to be placed in this role, particularly in commercial cases.

Model Provision 5(5): fees and expenses

We suggest that the first word in Model Provision 5(5), "Any", be replaced with "An".

More generally, the Law Society is concerned that this clause may be too restrictive as it effectively requires the mediator to ensure that the parties insert into their mediated settlement the details of any undertaking to pay fees regarding the amount of such fees or the means for their calculation. Often the parties will draw up their own agreement, including provisions regarding fees and expenses, at the end of mediation and the mediator will not play a part in settling the wording.

Additionally, many private mediations are governed in contract by the agreement to appoint the mediator and those contract terms cover who is to pay. While that can be changed by agreement during the mediation, it may be too onerous to have the mediator ensure this is the case to make it enforceable. The Law Society considers that the parties' obligation to pay the mediator's fees and expenses should be governed by the agreement to mediate. The mediation settlement agreement can accommodate a variation to this agreement made between the parties.

The Law Society submits that in all mediation agreements where proceedings have already commenced there should be a standard clause to the effect that the costs in the mediation shall be costs in the cause, unless the parties otherwise agree.

International considerations

The Law Society notes that consideration does not appear to have been given to how Model Provision 5 will interact with future international instruments. The Consultation Paper states at paragraph 2.28 that: "if the mediated settlement agreement is recorded as an order of the Court, any effort to enforce it in international jurisdictions will be assisted by treaties, like those with the UK and New Zealand, that provide for the recognition and enforcement of court judgments". The Law Society understands that this is not necessarily the case. Australia has only a few bilateral treaties on the recognition and enforcement of foreign judgements, and notably absent are agreements with many of our major bilateral trading partners.

We also note that the February 2017 Draft Convention on the Recognition and Enforcement of Foreign Judgments ("the Draft Convention") that is currently being negotiated under the aegis of the Hague Conference on Private International Law is proposing to limit its scope to judgments "on the merits" of a dispute.[6] However, the Draft Convention also makes separate provision for the recognition and enforcement of judicial settlements.[7] It is as yet uncertain whether mediated settlement agreements that are entered as judgments/court orders will also be able to circulate under the Draft UNCITRAL Convention and Model Law on the Enforcement of International Commercial Settlement Agreements Resulting from Conciliation (currently being simultaneously negotiated at UNCITRAL Working Group II), or whether the instruments will be limited in scope to only those settlement agreements that have not yet been converted into a judicial settlement/consent order.

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[6] Article 3(1)(b) February 2017 Draft Convention on the Recognition and Enforcement of Foreign Judgments, available at https://assets.hcch.net/docs/d6f58225-0427-4a65-8f8b-180e79cafdbb.pdf. See also the *Explanatory Note providing background on the proposed draft text and identifying outstanding issues,* dated April 2016 available at: https://assets.hcch.net/docs/e402cc72-19ed-4095-b004-ac47742dbc41.pdf.

[7] Article 13 February 2017 Draft Convention on the Recognition and Enforcement of Foreign Judgments, available at https://assets.hcch.net/docs/d6f58225-0427-4a65-8f8b-180e79cafdbb.pdf.

Proposal 1: Removal of statutory defamation privilege

No comment.

Suspension of limitation periods

In cases where mediation is occurring outside commenced court proceedings, the Law Society notes that the parties can suspend the operation of limitation periods by agreement. However, in practice a defendant may see little incentive in agreeing to the suspension of the limitation period. The Law Society suggests that it may be useful to have a provision for suspension of the operation of limitation periods to allow the parties to explore mediation. Further consideration would need to be given to when such a suspension should commence and end.

Implementation options

The Law Society supports implementation option 1, whereby a new Act is created that applies to mediations in the circumstances set out in the Consultation Paper. However, we offer the following comments.

The Law Society understands that the intention of the Model Provisions is to apply to mediations conducted under NSW law. However, as currently drafted it would be sufficient that the mediation is conducted wholly or partly in NSW, which would capture mediation on matters of federal law. We suggest that it be made clear that the Model Provisions are not intended to apply to mediations relating to matters that are the subject of federal legislation.

The Law Society also suggests that further information is required on what is meant by "partly conducted in NSW" in Option 1(a). As currently drafted, this is quite broad – for example, this could include a mediation session conducted in Victoria where further discussions are conducted by email correspondence between counsel and parties who are in NSW in order to come to a final agreement or negotiate final terms. Additional consideration would need to be given to what will be considered a sufficient nexus with NSW for the Model Provisions to apply.

The Law Society would support a transition period of 2 years for the implementation of the Model Provisions. This equates to one accreditation cycle under the NMAS, which would enable all mediators who wish to obtain NMAS accreditation to do so before the commencement of the Model Provisions.

If you have any questions please contact Ella Howard, Policy Lawyer, at ella.howard@lawsociety.com.au or on (02) 9926 0252.

Yours sincerely,

Pauline Wright
President