

Introduction

This submission is made on behalf of the ADR Directorate, NSW Department of Justice & Attorney General, in response to NADRAC's reference from the Commonwealth Attorney General of 1 December 2009 concerning the integrity of ADR processes. It addresses certain aspects of that reference relating to confidentiality, non-admissibility and the immunity of ADR practitioners.

The ADR Directorate has been established within the Department of Justice & Attorney General to coordinate, manage and drive ADR policy, strategy and growth in NSW.

The ADR Directorate has issued the *ADR Blueprint*, a discussion paper released by the Attorney General in May 2009 containing 19 proposals to increase and better integrate ADR across the NSW civil justice system. The ADR Directorate has also released two further discussion papers relating to pre-action protocols and standards and ADR in government.

Further information about the ADR Directorate and the *ADR Blueprint* papers, is available on the ADR Directorate's website at:

http://www.lawlink.nsw.gov.au/lawlink/adr/ll_adr.nsf/pages/adr_index

This submission is intended to assist NADRAC with its reference, by highlighting certain issues that have come to the attention of the ADR Directorate and by providing additional references to NSW legislation and case law.

Any views expressed in the submission are raised for discussion purposes and do not necessarily reflect the views of the Attorney General or the NSW Government.

Confidentiality

Introduction

This submission considers confidentiality or non-disclosure provisions in legislation relating to court or tribunal ordered mediations, and also to mediation or other ADR services established by statute. These provisions prohibit mediators (and in some cases staff relating to the public mediation service) from disclosing information obtained relating to the mediation, except in certain specified circumstances.¹

¹ For convenience this submission will generally refer to "mediation" and "courts", but in most cases the observations made would apply equally to other ADR processes and to tribunals.

The submission does not comment on issues relating to the non-disclosure obligations on *parties* to an ADR process.

In relation to court-ordered mediations, at least, the ADR Directorate does not agree with a previous suggestion of NADRAC² that the question of confidentiality of an ADR practitioner is primarily an ethical issue and is generally best dealt with by reference to standards of professional conduct rather than by legislation.

Statutory non-disclosure provisions can provide greater certainty to parties, compared to leaving the question of non-disclosure by mediators to the terms of the mediation agreement or the ethical or professional standards of mediators. This is particularly significant in jurisdictions such as NSW where parties can be ordered by a court to attend mediation whether or not they consent.

It is also relevant to note that in NSW court or tribunal-ordered mediation may be conducted by a variety of different mediators, including court registrars, private practitioners (including lawyers) on a court or tribunal panel, and government-run mediation services, who may - at least at present - have inconsistent guidelines relating to non-disclosure.

One of the proposals in the *ADR Blueprint*, however, is to move to a system where all mediators on the District and Supreme Court mediators' panels are accredited under the National Mediator Accreditation System ("the NMAS"), and all court-annexed mediations (where a registrar or other officer of the court is the mediator) are carried out by a person accredited under the NMAS. Confidentiality is addressed in s. 6(1) of the National Mediator Accreditation Standards, discussed further below.

The ADR Directorate agrees with NADRAC's more recent suggestion in *The Resolve to Resolve* report that some uniform national guidance relating to statutory confidentiality provisions would assist.

Detailed consideration of the complex issues relating to confidentiality in ADR can be found in several leading textbooks.³

It would be of considerable practicable assistance to policy-makers if NADRAC could draft a model confidentiality legislative provision applying to mediators conducting court-ordered mediations.

² *Legislating for alternative dispute resolution: A guide for government policy-makers and legal drafters*, (2006), at [9.30] p. 79.

³ Including Sourdin, T (2008) *Alternative Dispute Resolution*, 3rd ed, Thomson Reuter, at pp. 241-253, and Boule, L. (2005) *Mediation: Principles, Process, Practice*, 2nd ed, LexisNexis Butterworths, at pp. 539-574.

NSW legislation

There is a high degree of consistency in the terms of non-disclosure provisions relating to ADR processes in NSW legislation. These provisions apply both to court or tribunal-ordered ADR processes, and to other ADR schemes established by statute.

Section 31 of the *Civil Procedure Act 2005* is a typical provision:

“31 Confidentiality

(cf Act No 52 1970, section 110Q; Act No 9 1973, section 164G; Act No 11 1970, section 21R)

A mediator may disclose information obtained in connection with the administration or execution of this Part only in one or more of the following circumstances:

- (a) with the consent of the person from whom the information was obtained,
- (b) in connection with the administration or execution of this Part, including section 29 (2),
- (c) if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property,
- (d) if the disclosure is reasonably required for the purpose of referring any party or parties to a mediation session to any person, agency, organisation or other body and the disclosure is made with the consent of the parties to the mediation session for the purpose of aiding in the resolution of a dispute between those parties or assisting the parties in any other manner,
- (e) in accordance with a requirement imposed by or under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth.”

(Section 29 of the *Civil Procedure Act* provides that a court may make orders giving effect to an agreement or arrangement arising out of a mediation session, and on application for such an order a party may call evidence, including evidence from the mediator and any other person engaged in the mediation, as to the fact that an agreement or arrangement has been reached and as to the substance of the agreement or arrangement.)

Similar provisions may be found in the following legislation and regulations:

- *Administrative Decisions Tribunal Act 1997* s. 108
- *Agricultural Tenancies Act 1990* s. 26G

- Children and Young Persons (Care and Protection) Regulation 2000 cl. 11(5)
- *Community Justice Centres Act 1983* s. 29
- *Community Land Management Act 1989* s. 70
- *Consumer, Trader and Tenancy Tribunal Act 2001* s. 63
- Dust Diseases Tribunal Regulation 2007 cl. 45(7)
- *Legal Aid Commission Act 1979* s. 60F
- *Residential Parks Act 1998* s. 93
- *Strata Schemes Management Act 1996* s. 133

Section 58 of the *Health Care Complaints Act 1993* is in similar terms, but there is an additional provision in s. 51(4) that a person cannot be required by subpoena (or any other procedure) to produce evidence of anything said or of any document prepared for the purposes of or in the course of a conciliation process.

Section 16 of the *Farm Debt Mediation Act 1994* differs in that it applies to any person (not just to the mediator or staff of the mediation agency), allows disclosure “with other lawful excuse”, and does not contain any exception relating to protection of a person or property (although such disclosure may of course be a lawful excuse).

A reasonable or lawful excuse exception?

A fundamental issue in drafting a non-disclosure provision is whether to include an exception to enable disclosure in certain exceptional circumstances falling outside the other specified categories authorising disclosure.

As discussed above, s. 16 of the *Farm Debt Mediation Act* includes a “lawful excuse” exception.

Section 112(1) of the *Supreme Court of Queensland Act 1991* provides that an ADR convenor must not, without “reasonable excuse”, disclose information coming to the convenor’s knowledge during an ADR process. Section 112(2) outlines circumstances constituting a reasonable excuse. It is not clear whether s. 112(2) is intended to be an exhaustive statement of circumstances that may constitute a “reasonable excuse”.

There is considerable case law relating to the meaning of the terms “reasonable” and “lawful” excuse in other contexts. A “reasonable excuse” is generally regarded as a somewhat broader exception than a “lawful excuse”.

The advantage of including an exception such as a “reasonable” or “lawful” excuse is that it would enable disclosure in highly unusual or exceptional circumstances where disclosure would otherwise be prohibited. It should be acknowledged that, if such clauses are not included, there is a risk that a significant injustice may be caused in an exceptional case.

The *US Uniform Mediation Act* provides an interesting approach for addressing these issues in the context of discovery in certain court proceedings (including those involving a felony), by enabling an in-camera hearing to determine where an otherwise privileged communication could be disclosed on the basis that the evidence is not otherwise available, and that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality.⁴

On the other hand, the obvious and significant risk of including an exception such as reasonable or unlawful excuse is that, particularly given the uncertainty of the scope of those exceptions, it could undermine the confidence of parties (or potential parties) to a mediation that the mediator would be able to uphold confidentiality. The uncertainty of the scope of these exceptions may also lead to the practical consequence that mediators and mediation organisations may be more likely to require legal advice to respond to these issues.

Subpoenas and other compulsory processes

As discussed above, section 51(4) of the *Health Care Complaints Act 1993* contains an additional provision effectively preventing a subpoena being issued to any person requiring production of a document prepared for the purposes of or in the course of a conciliation process.⁵

It appears to be sometimes overlooked that a legislative provision, which makes anything said or any documents prepared for or used during a mediation *inadmissible*, does not necessarily protect that document from being subpoenaed.

The case law generally recognises that there may be a legitimate forensic purpose to subpoena an inadmissible document if, for example, it would assist a party to initiate a chain of enquiry so as to be able to obtain *other* admissible evidence (see for example *R v Saleam* (1989) 16 NSWLR 14 at 22).

Of course, the legislation or rules may in some circumstances “pick up” or apply the inadmissibility provisions so that they effectively prevent a party from seeking discovery for or a subpoena to produce an inadmissible document. See for example s. 131A of the NSW and Commonwealth *Evidence Act* (which are in

⁴ See Boule (note 3 above) at pp. 557-558.

⁵ See also cl. 45(5) of the Dust Diseases Tribunal Regulation 2007.

significantly different terms); and r. 1.9 of *Uniform Civil Procedure Rules* and definition of “privileged information” (particularly subparagraphs (g) and (h)).

A non-disclosure provision, such as those in NSW referred to above, may protect a *mediator* from being required to produce a mediation document under subpoena. Such a provision would of course not prevent a party from seeking production (by subpoena, notice to produce, or discovery) of a mediation document from one of the *participants* in the mediation.

Disclosures relating to criminal offences

One important issue for any non-disclosure provision is to deal with disclosures made during mediation relating to acts of violence or other serious criminal offences.

There are at least three general types of scenarios that may arise relating to disclosure of information concerning a criminal offence to law enforcement agencies:

1. during a mediation a person discloses that he or she intends to commit a serious criminal offence, or that a child or adult is at risk of harm;
2. during a mediation a person discloses that he or she has committed a serious criminal offence, but there is no reason to think there is any *imminent* risk of harm or of a further offence being committed;
3. no disclosures of an offence are made during the mediation, but the Police subsequently request information from the mediator as part of their investigation into a serious criminal offence.

It appears that in the NSW legislation referred to above disclosure would be permitted only in the first of these scenarios. The exception may be the *Farm Debt Mediation Act* which has a “lawful excuse” exception.

The National Mediator Accreditation Standards (s. 6) also only seem to authorise disclosure in the first scenario.

It appears that legislation in other Australian jurisdictions does not generally authorise disclosure in the second scenario, although there are some exceptions. These include sections 10D(4) and 10H(4) of the *Family Law Act 1975* (Cth) and s. 10(d) of the *Mediation Act 1997* (ACT).

Australian legislation does not appear to authorise disclosure in the third scenarios. In NSW, at least, Police do not generally have statutory powers to obtain information or documents during a criminal investigation. Information could of course be obtained from a mediator or mediation organisation if it was obtained under search warrant or other compulsory process authorised by statute.

Community Justice Centres recently dealt with a couple of matters falling within the third scenario. In both cases Police sought information from CJsCs relating to a mediation where one of the parties was subsequently charged with very serious criminal offences involving violence (in one case allegedly committed against the other party to the mediation).

Although it would be inappropriate to provide any further information about these matters, both of them raised issues about whether disclosure was permitted under s. 29 of the *Community Justice Centres Act*.

In considering these issues, NADRAC may be assisted by consulting with Federal and State law enforcement agencies and with the criminal law divisions of the Commonwealth Attorney General's Department.

Non-admissibility provisions

NSW provisions

There is also a high degree of consistency in non-admissibility or secrecy provisions relating to ADR processes in NSW legislation.

Section 30 of the *Civil Procedure Act 2005* is a typical provision:

“ **30 Privilege**

(cf Act No 52 1970, section 110P; Act No 9 1973, section 164F; Act No 11 1970, section 21Q)

- (1) In this section, **mediation session** includes any steps taken in the course of making arrangements for the session or in the course of the follow-up of a session.
- (2) ...
- (4) Subject to section 29 (2):
 - (a) evidence of anything said or of any admission made in a mediation session is not admissible in any proceedings before any court or other body, and
 - (b) a document prepared for the purposes of, or in the course of, or as a result of, a mediation session, or any copy of such a document, is not admissible in evidence in any proceedings before any court or other body.
- (5) Subsection (4) does not apply with respect to any evidence or document:
 - (a) if the persons in attendance at, or identified during, the mediation session and, in the case of a document, all persons specified in the document, consent to the admission of the evidence or document, or
 - (b) in proceedings commenced with respect to any act or omission in connection with which a disclosure has been made as referred to in section 31 (c).”

Examples of provisions similar to s. 30 of the *Civil Procedure Act* include s. 107 of the *Administrative Decisions Tribunal Act 1997*, s. 28 of the *Community Justice Centres Act 1983*, s. 51 of the *Health Care Complaints Act 1993*. Section 15 of the *Farm Debt Mediation Act 1994*, and s. 69 of the *Retail Leases Act 1994*, are examples of somewhat different provisions which do not, for example, include consent of the parties as an exception.

It is notable that the client legal privilege provisions (and the common law of legal professional privilege) in Part 3.10 Div 1 of the *Evidence Act*⁶ recognise more circumstances in which the privilege will be lost than the non-admissibility provisions in the ADR legislation in NSW referred to above.

In particular, the *Evidence Act* provides for the loss of privilege in circumstances where the communication was made in furtherance of the commission of an offence or of an act rendering the person liable to a civil penalty, or was made in furtherance of a deliberate abuse of a power. The *Evidence Act* also provides for the loss of client legal privilege through both "express" and "implied" waiver. The issue of waiver is considered further below.

Section 131 of the *Evidence Act*

Section 131 of the *Evidence Act* will (unless displaced by a more specific provision) generally apply to documents produced for and communications made during an ADR process.

In *Tony Azzi (Automobiles) Pty Ltd v Volvo Car Australia Pty Ltd* (2007) 71 NSWLR 140, a party attempted to lead evidence of offers made during a court-ordered mediation in support of an application for indemnity costs. The Court found (at 145-146 [18]-[19]) that s. 30 of the *Civil Procedure Act* rather than s. 131 of the *Evidence Act* applied, since the former was the more specific provision. As a result, the evidence was not admissible under s. 30(4) of the *Civil Procedure Act*, since there is no exception relating to evidence relevant to costs.

It is noteworthy that s. 131 of the *Evidence Act* recognises a significantly greater number of exceptions to inadmissibility than the ADR provisions in NSW referred to above.

There is an important question whether, as a matter of policy, it is desirable for there to be a quite different approach to admissibility depending on whether the mediation was voluntarily agreed to by the parties, (in which case s. 131

⁶ References to the "*Evidence Act*" are to the NSW *Evidence Act* unless otherwise stated, although this is not to suggest there are any differences with the Uniform Evidence Acts in other jurisdictions.

Evidence Act will apply), or whether it was court-referred mediation (in which case the inadmissibility provisions in court legislation will apply).

It appears that the present policy, in NSW and the Commonwealth at least, is to give greater protection from the risk of subsequent admissibility to parties in relation to court-ordered mediations rather than voluntarily arranged mediations. In view of the importance of encouraging parties to engage in ADR before *commencing* litigation, it is not necessarily clear that this difference is desirable.

The following questions arise:

- (1) Whether any specific provisions relating to ADR should be included in the *Evidence Act*, or whether they should continue to be dealt with under s. 131;
- (2) Whether any amendments to s. 131 are necessary, and (if so) the form of those amendments; and
- (3) Whether it is desirable in principle that admissibility provisions differ for court-ordered ADR or voluntary ADR.

If the answer to the 3rd question is yes, it would also assist if NADRAC could draft a model inadmissibility provision for court-ordered mediation.

Section 131(2)(h) – relevant to determining liability for costs

The questions raised above are illustrated particularly by reference to the authorities relating to s. 131(2)(h) of the *Evidence Act*. One of the exceptions specified in s. 131 is if “the communication or document is relevant to determining liability for costs” (s. 131(2)(h)).

Before the introduction of the *Evidence Act*, “without prejudice” communications (whether or not expressly identified in those terms) were generally not admissible to determining questions of costs. At common law, however, a “*Calderbank* offer” (a without prejudice offer where the maker asserts that he or she will seek to rely on it on the question of costs), was admissible on the question of costs. The *Uniform Civil Procedure Rules* also establishes a procedure for compromise offers and their costs consequences: Pt 20 Div. 4, and Pt 42 Div. 3.

The exception in s. 131(2)(h) of the *Evidence Act*, however, has been interpreted as changing the common law so that “without prejudice” communications are admissible in determining liability for costs - even where the communications did not disclose an intention to tender the material on the question of costs and where the parties had clearly agreed that the communications would be treated

as “without prejudice” and inadmissible.⁷ In *Gilberg v Maritime Super Pty Ltd (No. 2)* [2009] NSWCA 394, for example, the Court of Appeal admitted evidence, in relation to costs, of offers made at a settlement conference despite the appellant’s objection that the settlement conference was “without prejudice”.

Silver Fox Co Pty Ltd (as trustee for the Baker Family Trust) v Lenard’s Pty Ltd (2004) 214 ALR 621

The same approach has been adopted in relation to mediations. In *Silver Fox Co Pty Ltd (as trustee for the Baker Family Trust) v Lenard’s Pty Ltd (2004) 214 ALR 621*; [2004] FCA 1570⁸ the Federal Court considered an application for indemnity costs based on offers of compromise said to have been made during a mediation. The applicants sought to rely on affidavit evidence about what was said to have occurred during the mediation - despite the fact that the mediation agreement contained clear confidentiality provisions which the Court found did not permit the adducing of evidence of the course of the mediation or of what offers were made during it (at 622 [30]-[32]).

Mansfield J admitted the evidence of the offers made during the mediation, because they were relevant to determining liability for costs and the exception in s. 131(2)(h) of the *Evidence Act* therefore applied. His Honour stated that: (at 624 [36])

“Section 131(1), subject to its exceptions, gives effect to the policy of ensuring the course of negotiations — whether private or by mediation — are not adduced into evidence for the purpose of influencing the outcome on the primary matters in issue. Clearly, it is in the public interest that negotiations to explore resolution of proceedings should not be inhibited by the risk of such negotiations influencing the outcome on those primary issues. It is equally in the public interest that negotiations should be conducted genuinely and realistically. The effect of s 131(2)(h) is to expose that issue to inspection when costs issues only are to be resolved. There is no apparent public interest in permitting a party to avoid such exposure by imposing terms upon the communication, whether by the use of the expression “without prejudice” or by a mediation agreement.”

This passage was cited in the joint report of the Australian, New South Wales and Victorian Law Reform Commissions on the Uniform Evidence Acts (ALRC

⁷ See for example *Australian Competition & Consumer Commission v Australian Safeways Stores Pty Ltd (No. 3)* [2002] FCA 1294 at [6]-[18] per Goldberg J; *MB v Protective Commissioner* [2000] NSWSC 882 at [2] per Hodgson CJ in Eq; and *Venus, P (2003) “Without prejudice: can communications lose their privilege?” (2003) 41(2) Law Society Journal (NSW) 50.*

⁸ Reversed on appeal, but on unrelated grounds: *Poulet Frais Pty Ltd v The Silver Fox Company Pty Ltd (2005) 220 ALR 221*; (special leave to appeal refused: *Silver Fox Co Pty Ltd v Lenards Pty Ltd* [2006] HCATrans 54).

102), which considered that no amendment to s. 131 was necessary (at [15.171], [15.179]).

His Honour also decided (at 624 [37]) that neither s. 135 (general discretion to exclude evidence) nor s. 138 (exclusion of improperly obtained evidence) of the *Evidence Act* applied. In relation to s. 135, his Honour found that the terms of the mediation agreement did not demonstrate that it would be “unfairly prejudicial” to admit the evidence. His Honour considered that there may be some particular circumstances where exposure of the course of settlement negotiations may be unfairly prejudicial to a party, but that no such circumstances had been identified.

Tony Azzi (Automobiles) Pty Ltd v Volvo Car Australia Pty Ltd (2007) 71 NSWLR 140

Justice Brereton adopted a somewhat different approach in *Azzi*, where a party also attempted to lead evidence of offers made during a mediation in support of an application for indemnity costs. The mediation resulted from a referral by Bergin J under s. 26 of the *Civil Procedure Act*. His Honour held (at 145-146 [18]-[19]) that s. 30 of the *Civil Procedure Act* rather than s. 131 of the *Evidence Act* applied, since the former was the more specific provision. As a result, the evidence was not admissible under s. 30(4) of the *Civil Procedure Act*.

In relation to the policy underlying provisions such as s. 30 of the *Civil Procedure Act* and s. 15 of the *Farm Debt Mediation Act*, his Honour said: (at 147 [22]; original emphasis)

“They do not recognise any exception for proceedings relating to costs. The policy of facilitating an environment for negotiation and compromise is seen as being advanced by permitting the negotiating parties to say things comfortable in the knowledge that they cannot be used against them in court *in any circumstances*, and those circumstances include on an application in respect of costs.”

Brereton J also rejected a submission that the offers made during the mediation were intended to act as “*Calderbank*” offers on the grounds that there was no evidence of that. His Honour also stated that: (at 148 [30]-[31])

“I am not prepared to draw any such inference because it is, so far as I am aware, exceptional if not unknown for offers made during a mediation to be intended to operate in that way. Conventionally, if a mediation fails, one party will often send to the other a *Calderbank* letter following completion of the mediation, in which it will restate its last offer at the mediation, and that it will remain open for a certain period of time, and that it will be relied on in connection with costs. That did not happen here.

Moreover, given the context of a mediation, the offer was not realistically open for a lengthy period of time. The time constraints under which mediations are conducted are yet another reason why, as a matter of policy, different considerations apply to offers made at them than to

Calderbank offers or formal offers of compromise under the Rules. This occasions no hardship to the offeror, who can protect its position by a *Calderbank* letter following the mediation if it wishes to do so.”

His Honour also made some comments in relation to *Silver Fox v Lenard's* and to *Burgess v Mount Thorley Operations Pty Ltd* [2003] NSWIRComm 22, where Schmidt J held that an offer made at a conciliation conference under s. 109 of the *Industrial Relations Act 1996* was admissible on an application for indemnity costs under s. 131(2)(h) of the *Evidence Act*. His Honour stated (at 147 [25]) that in neither of these cases was there a provision equivalent to s. 30(4) of the *Civil Procedure Act*, and that in those circumstances, it may well be that evidence of offers made at a mediation or conciliation conference can be admitted.

Finally, Brereton J noted that:

“As I have concluded that evidence of what transpired at the mediation is not admissible, it is unnecessary for me to consider the plaintiffs’ alternative argument that it should be rejected as a matter of discretion as unduly prejudicial under the *Evidence Act*, s 135, save to record that there is much force in that argument, given that the plaintiffs embarked on the mediation in the belief, encouraged by the mediation agreement to which all parties subscribed, that evidence could not subsequently be given of anything said or done at the mediation. This argument does not appear to have been considered in *The Silver Fox Co* or in *Burgess v Mount Thorley Operations*.”

Comment

It is not clear how the public interest in exploring the resolution of proceedings, referred to by Mansfield J in *The Silver Fox*, is served by allowing evidence to be given of offers made during a mediation when the parties had come to an express agreement when deciding to mediate that such evidence should not be disclosed.

The matters referred to by Brereton J in *Azzi* also appear to support the view that not allowing evidence of offers during a mediation to be given will promote rather than hinder the mediation process.

It is notable in the cases referred to above, however, that evidence of offers made during the mediation was not raised to support a submission that the other party had failed to participate in the mediation in good faith. If evidence is sought to be tendered for this purpose on a question of costs, that may raise more complex issues, particularly where legislative provisions (such as s. 27 of the *Civil Procedure Act*) require parties to participate in the mediation in good faith.

Consent to admit evidence

Consent

The invitation to comment on this reference raises the question of whether parties to the mediation should be able to waive confidentiality.

It is difficult to see why, if all parties to the mediation consent, evidence of what was said during a mediation should remain inadmissible. The NSW provisions referred to above generally recognise that such evidence should be admissible where the parties consent.

One issue relates to whose consent is required to admit a document, prepared for or used in a mediation, which identifies persons other than the parties to the mediation. Section 28(6) of the *Community Justice Centres Act* requires that only the persons in attendance in the mediation, not all the persons identified in the document, need consent.

This subsection previously required that all persons identified in the document consent, but was amended following a recommendation of the NSW Law Reform Commission in its report in CJsCs⁹. The other provisions in NSW referred to above generally continue to require the consent of all persons identified in the document.

Death of a party

The definition of “party” in the client legal privilege provisions in s. 117 of the *Evidence Act* includes a personal representative of the party if the party has died, and a successor to the rights and obligations of a party.

If a party to a mediation subsequently dies, the question of consent can arise both in relation to the non-disclosure provisions and the non-admissibility provisions. This issue has arisen in practice for CJsCs, where in criminal proceedings information was sought relating to a mediation between the accused and the deceased. The accused consented to disclosure, but this left uncertain whether consent was required from a representative or the next of kin of the deceased, because s. 29 of the *Community Justice Centres Act* did not contain the extended definition of “party” found in s. 117 of the *Evidence Act*.

Waiver

There is of course a considerable body of case law relating to questions of both “express” and “implied” waiver or loss of legal professional privilege: see for

⁹ NSW Law Reform Commission (2005) *Report 106, Community Justice Centres*, at [6.33]-6.35], Recommendation 10, pp. 115-117.

example *Mann v Carnell* (1999) 201 CLR 1. These issues are addressed in s. 122 of the *Evidence Act*.

These issues could readily arise in relation to mediation. A party could, for example, act inconsistently with the mediation confidentiality agreement, or make a claim about what was said during mediation, but then seek to rely on the inadmissibility provision to prevent the other party leading evidence of what occurred during the mediation.

Immunity of ADR practitioners

Statutory immunity from liability

A mediator conducting court-ordered mediations under the *Civil Procedure Act* has, in the exercise of his or her functions as a mediator in relation to those proceedings, the same protection and immunity as a judicial officer of the court has in the exercise of his or her functions as a judicial officer (s. 33).

By contrast, Community Justice Centre mediators (at least when not conducting court-ordered mediations) are protected from liability only when acting in good faith for the purposes of executing the *Community Justice Centres Act* (s. 27).

One reason for the “judicial immunity” protection in s. 33 of the *Civil Procedure Act* is that court-ordered mediations may be conducted by court officers such as registrars (although in practice not by judges). In NSW court-ordered mediations may also, however, be conducted by private practitioners on a court-appointed panel.

If – consistent with its previous position – NADRAC considers that provisions such as s. 33 of the *Civil Procedure Act* provide an unwarranted exemption from liability, it would assist if NADRAC considered whether it would be appropriate in court-ordered mediations to provide a greater degree of protection for court officials conducting such mediations, compared to the protection for private practitioners conducting court-ordered mediations.

Concealing knowledge of a serious indictable offence

In NSW s. 316 of the *Crimes Act 1900* provides that is an offence, without reasonable excuse, for a person who knows or believes that a serious indictable offence has been committed and who has information which might be of material assistance in securing the apprehension, prosecution or conviction of the offender, to fail bring that information to the attention of a member of the Police Force or other appropriate authority. Certain professions or vocations, including mediators and arbitrators, are prescribed for the purposes of s. 316(4) so that the Attorney General’s approval is required before any prosecution can be brought against such a person (cl. 6(i), (j) Crimes (General) Regulation 2005).

Section 28(7) of the *Community Justice Centres Act* provides that CJC mediators and staff are not liable to be proceeded against for concealing a serious indictable offence without reasonable cause in respect of any information obtained in connection with the administration or execution of the Act.

The NSW Law Reform Commission briefly examined this provision in 2005, but did not recommend it be amended.¹⁰

The only provisions in other legislation in NSW providing an exemption from liability for failing to conceal a serious indictable offence appear to be:

- s. 58A of the *Health Care Complaints Act 1993* (conciliators); and
- s. 72 *Young Offenders Act 1997* (the Director-General, a conference administrator, a conference convenor, a person giving a caution (other than a police officer or specialist youth officer) or a person acting under the direction of the Director-General, conference administrator or convenor).

ADR Directorate, New South Wales, 15 February 2010.

¹⁰ NSW Law Reform Commission (2005) *Report 106, Community Justice Centres*, at [6.41]-[6.42] p. 118.