

1997

AUSTRALIAN CAPITAL TERRITORY LEGISLATIVE ASSEMBLY

**MEDIATION BILL 1997
[No 2]**

EXPLANATORY MEMORANDUM

CIRCULATED BY AUTHORITY

of

**GARY HUMPHRIES MLA
ATTORNEY-GENERAL**

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BACKGROUND

Mediation may be best described as a form of facilitated negotiation where a neutral third party (called a "mediator") helps the parties to a dispute to isolate the issues in contention and to reach their own mutually acceptable solution to the dispute. Mediation can be used in a wide range of disputes, and, in many cases, produces an outcome which would not have been possible through the strict application of the law.

At the present time in the ACT some Acts provide for mediation or reconciliation but there is no overall piece of legislation governing the provision of mediation as in some States; for example, in NSW where Community Justice Centres have been established under the *Community Justice Centres Act 1983* to provide mediation services in connection with specified classes of dispute. The Mediation Bill 1997 [No 2] represents the first legislative step in raising the prominence of mediation in the Territory.

OBJECTIVES

The Bill has three main objectives. The first objective is to provide for the registration of mediators and the ongoing professional supervision of registered mediators. Once the Bill comes into operation a person seeking registration as a mediator must have been assessed by an approved agency as competent according to the *ACT Mediation Competency Standards*. An approved agency is a body or organisation declared to be such under the regulations to the Act.

The second objective is to provide for the confidentiality of anything said, admitted or done during a mediation session conducted by a registered mediator. If mediation, as a means of resolving disputes, is to be successful, there is a need for an assurance, backed by law, that the parties to the dispute can speak freely without fear that what they say or do during a mediation may be used later on in evidence against them. This confidentiality provision therefore aims at fostering an atmosphere of trust which encourages the parties to a dispute to discuss issues openly and honestly. In this way the prospect of reaching an agreement is enhanced.

The third objective of the Bill is to provide for the immunity of a registered mediator from civil suit. It is essential that a registered mediator be able to act without fear of being sued by any of the parties, if she or he is to carry out the role of being a mediator effectively. This immunity is, however, subject to a proviso: that the mediator acts in good faith in carrying out the function of a mediator.

FINANCIAL CONSIDERATIONS

Nil

CONSIDERATION OF THE CLAUSES OF THE BILL

Short title and Commencement

Clauses 1 and 2 are standard provisions in most Acts. They identify the title of the Act and, most importantly, when the Act will come into force.

As provided in **subclause 2(2)**, the commencement date for the substantive provisions of the Act will be delayed until 1 July 1998. This will allow agencies to put in place procedures necessary for their approval under the Act in order that they may register people who apply to be mediators.

Interpretation

To become an **“approved agency”** a body or organisation must satisfy the Minister that it meets certain criteria, most notably, that it accepts, as the primary criterion in assessing a person for registration as a mediator, demonstrated competence according to the *ACT Competency Standards for Mediators*, that it has in place a code of ethical and professional conduct and a mechanism for addressing consumer complaints.

An **“approved agency”** will also be required to provide the Department with a list of registered mediators which the Department will make publicly available.

The term **“mediation session”** is described rather than defined. The description reflects the practical realities of what is actually involved in conducting what is commonly called “mediation”. Given this pragmatic description of a “mediation session” a separate definition or description of the term “mediation” is considered unnecessary.

No formalities are provided in the Bill to highlight the commencement and end of a “mediation session”. This, it is considered, would be an unnecessary complication, as the factual circumstances would normally be evident to the parties and, in cases of doubt, the evidence of the mediator can be expected to determine the issue.

The term **“registered mediator”** is given a meaning which reflects the provisions for the registration of a mediator. The Act will only apply to “registered mediators”. This does not mean that other (unregistered) mediators will not be allowed to practise mediation. At present, some “private” mediators practise mediation without having been accredited by an agency. The Act will not prevent them from continuing to do so.

Subclause 3(2) removes any confusion that might arise as to the distinction between the terms “parties to a mediation session” and “mediator”.

Competency standards

Under **clause 4** the primary criterion for the assessment of a person seeking registration as a mediator will be demonstrated competence according to the *ACT Competency Standards for Mediators*.

Registration of mediators

Clause 5 outlines the procedure for the registration of mediators, once the Act has come into operation. In accordance with the principles of natural justice, the clause provides for the review of an application for registration which has been refused.

The clause aims to prevent forum shopping by providing that a person who has been refused registration may not re-apply for registration for a period of 6 months.

An applicant may also have to meet certain internal requirements of the agency before being registered. For instance, the Law Society's criteria for the accreditation of a member as a mediator require, at the present time, the member to have practised as a lawyer for a minimum of 5 years or be considered by the Society to be experienced in the field of mediation; in addition, the member must have successfully completed an approved mediation training course or be considered by the Society to be otherwise appropriately experienced.

Individuals who do not wish to seek registration through any of the established mediation agencies (such as, The Resolution Centre or the Canberra Mediation Service) may form their own agency for the purpose of seeking registration. Any such agency may seek to be recognised as an "approved agency" under the regulations. It will, of course, need to satisfy the criteria for approval referred to above.

Duration and Renewal of registration

Clauses 6 and 7 recognise that registration is not a once only event. Because of continuous developments in the concept of mediation, it is important that mediators keep abreast of new developments in mediation and not allow their skills to become stale or out of date, if they are to remain competent.

Cancellation of registration

Clause 8 is important as it allows an agency to cancel the registration of a mediator whose competency or professional behaviour is inadequate.

Admissibility of evidence

Clause 9 is critical for the effective operation of mediation in resolving disputes. Its objective is to encourage parties to be open and frank in negotiations, in the safe knowledge that what they say or do cannot be used against them later on.

in evidence, if the matter in dispute goes before a court or tribunal for resolution. However, the confidentiality provided is not absolute. The exceptions to the general provision are the same as those provided for in subsection 131(2) of the Commonwealth *Evidence Act 1995*. Those exceptions are considered adequate to cover the various situations in which it would be unreasonable to claim protection under the general principle of confidentiality. Moreover, in basing clause 9 on the Commonwealth Act there is consistency between the Commonwealth and ACT legislation in this area of court procedure.

Secrecy

Subclause 10(1) obliges a mediator to maintain secrecy in regard to a mediation session. This is essential if the parties to a mediation session are to have trust and confidence in a mediator.

Paragraphs 10(2)(a) to (d) provide for exceptions. The exception under **paragraph 10(2)(a)** is not likely to arise very often. **Paragraphs 10(2)(b) and (c)** are self-evident. The exception in **paragraph 10(2)(d)** is important. If, for example, during a mediation session a party expresses an intent to injure another person, the mediator would not be obliged to remain silent.

It should be noted that the parties to a mediation session are not bound by secrecy, the reason being that, to do so, would place unreasonable limitations and restrictions on the parties, particularly where the parties may be the representatives of a community whose wishes they are expected to reflect in the mediation session.

Protection from defamation

Clause 11 extends to a mediation session the same protection from defamation that applies universally to all judicial proceedings. That protection means that no defamation proceedings may arise out of anything said or done or document produced at a mediation session. The intention is that the parties to a mediation session will not be inhibited by the fear of defamation action being taken against them.

Protection of mediators

The object of **Clause 12** is to enable a mediator to carry out her or his duty without any fear of being sued by a party to the mediation session. The requirement of "good faith" should be noted.

Regulations

The regulations will identify the agencies approved for the purposes of the Act and the competency standards for the assessment of mediators.