

1997

AUSTRALIAN CAPITAL TERRITORY LEGISLATIVE ASSEMBLY

MEDIATION BILL 1997

EXPLANATORY MEMORANDUM

CIRCULATED BY AUTHORITY

of

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ATTORNEY-GENERAL

MEDIATION BILL 1997

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 community mediation such as there is in some of the 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 aims to fill this gap

OBJECTIVES

The Bill has three main objectives. The first objective is to provide for the registration of mediators. Those persons who are at present accredited as mediators by a prescribed agency will be recognised as registered mediators. However, once the Bill comes into operation a person seeking registration as a mediator must have been assessed by a prescribed agency as competent according to the *ACT Mediation Competency Standards*. Prescribed agencies are those organisations which at present provide mediation services in the ACT (eg the Resolution Centre, the ACT Law Society, LEADR)

The second objective is to provide for the confidentiality of anything said, admitted or done during a mediation session. 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 mediator from civil suit. It is essential that a 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. It is envisaged that the Mediation Act, for which this Bill provides, will commence in its entirety soon after it has been passed by the Legislative Assembly, thus allowing for the early approval of agencies and registration of mediators under the Act.

Interpretation

In **subclause 3(1)** 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.

In **subclause 3(1)** the term “**Mediator**” is given a meaning which reflects the provisions for the registration of mediators under the Act.

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

Approval of agencies

Clause 4 provides for the approval by the Minister of agencies. This is an important provision. Rather than approving mediators the Minister will approve agencies, such as the Resolution Centre and the ACT Law Society, which will register individuals as mediators who meet certain criteria.

Determination of competency qualifications

Clause 5 refers to qualifications, standards of competency and personal attributes. A person seeking registration as a mediator would be expected to have a sound knowledge of the theory and practice of mediation. The

standards of competency are the *ACT Competency Standards for Mediators*. In regard to personal attributes, the person must be judged to be of good fame and character

Instruments to be disallowable

Clause 6 is a normal provision in relation to an instrument. Its aim is to ensure procedural fairness and to act as a check on the exercise of a discretion

Mediators at commencement of Act

Clause 7 reflects the present situation with regard to the provision of mediation services in the ACT. Certain agencies (see comment under clause 4 above) at present accredit mediators. These mediators will be recognised as registered under the Act for a period of 2 years (see subclause 8(1) below), at which time they will need to seek re-assessment in order to have their registration renewed

Registration of mediators

Clause 8 outlines the procedure for the registration of new 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 also 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

Duration and Renewal of registration

Clauses 9 and 10 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

Subclause 9(1) recognises that there are, at present, many mediators providing mediation services in the ACT. It allows for a flexible process in requiring those mediators to be assessed as competent according to the standards of competency determined by the Minister under clause 5

Cancellation of registration

Clause 11 is important as it allows an agency to cancel the registration of a mediator whose competency or professional behaviour is inadequate

Admissibility of evidence in a mediation session

Clause 12 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. There are exceptions to the general provision as indicated under subclause 12(2).

Subclause 12(2) is based upon subclause 131(2) of the Commonwealth *Evidence Act 1995*. The list of exceptions is 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 subclause 12(2) on the Commonwealth Act there is consistency between the Commonwealth and ACT legislation in this area of Court procedure.

Secrecy

Subclause 13(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 13(2)(a) to (d) provide for exceptions. The exception under **paragraph 13(2)(a)** is not likely to arise very often. **Paragraphs 13(2)(b) and (c)** are self-evident. The exception in **paragraph 13(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 14 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 15** 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.