NCAT Administrative and Equal Opportunity Division
Procedural Direction 8

MEDIATION

This Procedural Direction applies to:	Proceedings in the Administrative and Equal Opportunity Division
Effective Date:	4 March 2016
Replaces Procedural Direction:	Administrative Decisions Tribunal's Mediation: Guideline
Notes:	You should ensure that you are using the current version of this Procedural Direction. A complete set of Procedural Directions and Guidelines is available on the Tribunal website at www.ncat.nsw.gov.au

Purpose

1. This procedural direction outlines the procedures that the Tribunal will follow when conducting mediations.

What is mediation?

2.1 Section 37 of the *Civil and Administrative Tribunal Act 2013* states that the Tribunal may, where it considers it appropriate, use or require parties to use any one or more resolution processes. They are any processes in which the parties to proceedings are assisted to resolve or narrow the issues between them in the proceedings. Schedule 1 of the *Civil and Administrative Tribunal Regulation 2013* defines mediation as a "structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute".

2.2 The main features of mediation are that:

(a) The mediator is trained to conduct mediations and is impartial. He or she does not take sides.

(b) It is a confidential process. With rare exceptions, anything said by a party during a mediation session cannot be used as evidence in the hearing. In general, the mediator cannot disclose information provided by the parties without their consent and the parties cannot disclose information communicated during the mediation. (For further details, see the Agreement to Mediate and the *Civil and Administrative Tribunal Regulation 2013*).

Objectives

3.1 The objective of referring a matter to mediation is to provide a quick and effective mechanism for resolving or partly resolving applications that are before the Tribunal. The Tribunal will only refer certain kinds of applications to mediation. (See below under the heading "Types of matters the Tribunal may refer to mediation")

Advantages of Mediation

4.1 A successful mediation has several advantages over a contested hearing. These advantages are that:

(a) there is a high level of satisfaction among participants;

(b) parties can agree to a settlement that the Tribunal would not have the power to order. For example, parties may agree to changes in the policies or procedures of an organisation even if the Tribunal could not make such an order;

(c) it is quicker and cheaper than a full Tribunal hearing; and

(d) it is private in contrast to hearings which are usually open to the public.

Types of matters the Tribunal may refer to mediation

5.1 The Tribunal may refer the following kinds of matters to mediation:

(a) complaints under the *Anti-Discrimination Act 1977*;

(b) applications under the *Government Information (Public Access) Act 2009*, the *Privacy and Personal Information Protection Act 1998* and *Health Records and Information Privacy Act 2002*; and

(c) applications for review of decisions under the *Children and Young Persons (Care and Protection) Act 1998*.

5.2 The Tribunal will not refer a matter to mediation unless the circumstances are appropriate. The circumstances may not be appropriate where:

(a) a party does not have the intellectual, physical or psychological capacity to meaningfully engage in the process. However, the Tribunal can appoint a person to represent someone who is totally or partially incapable of representing him or herself in mediation. That person would

normally be a “best interest” representative, that is, a representative who is not bound to act on the instructions of the incapacitated person.

(b) There is a history of sexual harassment, violence or extreme animosity between the parties, including a restraining order such as an Apprehended Violence Order between two or more parties. In those cases one or more parties may feel intimidated by being in the same room as another party. In these cases a mediation may be held if the parties are separated throughout the mediation.

Cost

6.1 Unless the Tribunal orders otherwise, the costs of the mediation are payable by the parties in such proportion as they may agree amongst themselves. The Tribunal may order one or more of the parties to pay all or part of the costs of mediation if it considers it to be appropriate. (Schedule 1 NCAT Regulation 2013).

Venue

7.1 The Tribunal can hold a mediation anywhere in New South Wales as long as there is a suitable room or rooms available. The Tribunal will choose a venue that is most convenient for all the parties.

Who attends

8.1 The following people must attend the mediation:

(a) the mediator;

(b) each of the parties to the dispute. If the party is a corporation or a government agency, a person who has authority to settle the matter on behalf of the corporation or agency should attend.

8.2 With the consent of the mediator, each party can bring one or more people, including a lawyer, agent or support person to assist or advise them.

8.3 In some cases the applicant is aggrieved by the conduct of a person who is not a party to the proceedings or to the mediation. That situation could arise in equal opportunity matters where the person who is alleged to have sexually harassed the applicant is not a party, or has not agreed to mediate. A similar situation could arise in relation to a public sector agency in privacy complaints where the person whose conduct is the subject of the application, is not the nominated representative of the organisation or agency, attending the mediation. In either case, the applicant cannot expect a particular person to attend the mediation unless that person is a party. Where the party is a private organisation or a public sector agency, it is strongly recommended that, wherever possible, the person who does attend has the authority to resolve the matter on behalf of the respondent.

8.4 Each party, or representative of a party, should attend the mediation in person. In rare cases where it is not physically or financially possible for a person to attend in person, arrangements can be made for that person to take part by phone. Face-to-face mediation is always better than mediation by phone but the Tribunal understands that if it is not possible for a person to attend a mediation, participation by phone is the next best option.

Timing of mediation

9.1 A mediation can be held:

(a) after the first meeting at the Tribunal; or

(b) any time before the hearing.

9.2 Mediation after the first meeting at the Tribunal. A Tribunal Member will offer mediation to the parties at the first case conference or directions hearing, if the circumstances are appropriate. The Tribunal Member will allocate a mediation date and the Registry will arrange for a mediator to conduct the mediation within a few weeks, at a time and place that is the most convenient for all the parties. Generally parties will not be directed to prepare witness statements or other documents before the mediation takes place. However, the Tribunal Member may make directions as to the filing and service of statements and submissions that will come into effect if the mediation is unsuccessful. A hearing date will be allocated if the mediation fails to resolve the dispute.

9.3 Mediation before a hearing. Even if the matter is not referred to mediation after the first meeting at the Tribunal, it may be referred for mediation at any stage before the hearing takes place. The Tribunal is not obliged to offer mediation if it is not appropriate. Parties may try to settle the case without help from a Tribunal mediator. The Tribunal cannot generally offer mediation on the day of the hearing because it is unlikely that a mediator would be available on such short notice.

The mediator and his/her role

10.1 A person on the Tribunal's list of mediators with formal training and experience in mediation will conduct the mediation.

The role of the mediator is to:

(a) be independent and impartial;

(b) assist discussion;

(c) ensure the parties remain focused and respectful to each other; and

(d) help the parties to identify concerns, think about and evaluate options and negotiate an agreement.

10.2 The mediator will not:

(a) offer any opinion about who is “right” or “wrong”;

(b) make decisions for any of the parties.

10.3 The mediator may telephone the parties before the mediation to make sure that they are prepared for mediation. The mediator can only disclose information obtained in connection with a mediation in limited circumstances. For example, the mediator can disclose information with the consent of the person to whom it relates or in order to carry out their role as a mediator. The mediator will not be involved in the hearing of the matter if the mediation does not resolve the dispute.

Preparing for mediation

11.1 Before mediation, parties should make a list of:

(a) their concerns;

(b) what they think the other party’s concerns may be;

(c) options that may address the concerns of all the parties;

(d) the alternatives if mediation is not successful; and

(e) any questions that they may have.

11.2 Parties should bring any factual reports such as medical reports or investigator’s reports or other documents that are relevant to their application.

The mediation session

12.1 The mediator will normally begin by outlining their role and the mediation process. Each party will then be given an opportunity to express their concerns. Following this exchange of information, the parties will be asked to suggest options which are likely to be acceptable to everyone. The mediator may wish to speak to the parties individually to help them develop options that may resolve the dispute. Generally the parties will meet again to come to a final agreement.

Outcome of mediation

13.1 If the parties agree to a settlement at the mediation, they should make a written record of the agreement and sign it. A document prepared as a result of a mediation session is normally not admissible in evidence before a court or tribunal. If the agreement contains outcomes, which the Tribunal could order, then the parties may wish the Tribunal to make orders in terms of the agreement reached between the parties. The matter will be listed before the Tribunal to make those orders. If the agreement contains outcomes that the Tribunal does not have the power to order (such as changes to an

organisation’s procedures) then the document remains an agreement between the parties. In that case the Tribunal will order that the application be dismissed.

(Sgd)

4 March 2016

MAGISTRATE NANCY HENNESSY

Deputy President