



## **Administrative and Equal Opportunity Guideline Occupational Division Guideline**

May 2018

# **Resolution Processes**

## **What does this Guideline explain?**

1. This Guideline answers the following questions:
  - a) What is a resolution process?
  - b) What is the aim of a resolution process?
  - c) What kinds of resolution processes does the Administrative and Equal Opportunity and Occupational Division use?
  - d) What kinds of cases are referred to mediation?
  - e) Can the Tribunal require a party to participate in mediation?
  - f) Where does the mediation take place?
  - g) What do the parties have to do before a mediation?
  - h) How much time is allocated for mediation?
  - i) Who is the mediator?
  - j) Who pays the mediator?
  - k) Who comes to the mediation?
  - l) What happens at the mediation?
  - m) What is the mediator's role?
  - n) Is the mediation confidential?
  - o) What are the possible outcomes of mediation?
  - p) What do some of the words in this Guideline mean?

## **Definitions**

2. Definitions that explain words or concepts used in this Guideline are at the back of the Guideline.

## **What is a resolution process?**

3. A resolution process is 'any process in which parties to proceedings are assisted to resolve or narrow the issues between them'.

## What is the aim of a resolution process?

4. The aim of a resolution process is to resolve all or some of the issues in dispute. That objective is consistent with the Tribunal's guiding principle which is to 'facilitate the just, quick and cheap resolution of the real issues in the proceedings'.

## What kinds of resolution processes are used?

5. The Division uses both informal and formal resolution processes. Informal processes are used in directions hearings, case conferences and final hearings. At those times Members may help parties identify, narrow or resolve the issues.
6. A Member may also refer the parties to a more formal resolution process called mediation. The rest of this guideline is about mediation.

## What kinds of cases are referred to mediation?

7. A Member can refer any case in the Administrative and Equal Opportunity Division and some cases in the Occupational Division to mediation. If there is a history of violence or intimidation between the parties, mediation may not be appropriate.
8. If a child or a vulnerable person is involved in the case, the Tribunal may appoint a person to represent that person at a mediation. (Cross reference to guideline on GALS)

## Can the Tribunal require a party to participate in mediation?

9. Yes. The Tribunal can require a party to participate in mediation. In most cases parties agree to participate.

## Where does the mediation take place?

10. Most mediations are held at the Tribunal in Sydney CBD. A mediation may be held at a regional location if that is more convenient for most people.

## What do the parties have to do before a mediation?

11. Each party and the mediator must sign an Agreement to Mediate. The agreement covers issues such as co-operation and confidentiality.
12. Before the mediation each party should make a list of their concerns, what they think the other party's concerns may be and the options for resolving the case which address those concerns. Parties are also encouraged to think about what will happen if the case does not settle.

General information on how to [prepare for mediation](#) has been developed by LawAccess NSW. LawAccess NSW has also prepared a [worksheet for parties](#) to complete and refer to when they attend mediation.

13. Parties should bring any relevant documents such as medical reports or investigator's reports. In some cases, parties may be directed to prepare a statement of issues, provide some evidence or exchange other information before the mediation.

## How much time is allocated for mediation?

14. The Tribunal allocates either half a day or a whole day for the mediation. If more time is needed, the mediator will decide what arrangements should be made.

## Who is the mediator?

15. A Member of the Tribunal or a person on the Tribunal's list of mediators who has relevant training and experience will be the mediator. Parties may also use an external mediator.
16. The Tribunal may refer a case to Community Justice Centres for mediation.

## Who pays the mediator?

17. If the mediator is a Member or one of NCAT's mediators, generally the Tribunal pays the mediator. The Community Justice Centres pay the mediator if the Tribunal refers the parties to that organisation for mediation.
18. If the parties organise an external mediator, they will need to agree on how the mediator will be paid.

## Who comes to the mediation?

19. The mediator and each party attends the mediation. If a party is a corporation or a government agency, a person who has authority to settle the matter should sign the mediation agreement and attend if possible. If a person with authority to settle the matter is not able to attend, he or she should be available to give instructions by phone during the mediation. If that is not possible, the matter can be settled subject to approval being given within a short period. A party may bring their lawyer, agent or a support person. Mediations are not open to the public.
20. If there is no other option and the mediator agrees, a party may participate in the mediation by phone or video link.

## What happens at the mediation?

21. The mediator will normally start by describing their role and explaining what will happen on the day. Each party will be given the chance to talk about what has happened and how that has affected them. The other party will be asked to listen carefully so that they understand the other person's point of view. The mediator will then help the parties think of options for resolving the case that are likely to be acceptable to everyone.
22. The mediator may speak to the parties separately to help them think about realistic options for resolving the case.
23. The mediator will then bring the parties together to see if they can come to a final agreement.

## What is the mediator's role?

24. The mediator's role is to help the parties identify their concerns, think about the options for resolving the dispute and reach an agreement that is acceptable to all parties.

25. The mediator is neutral and independent. Generally the mediator will not give their opinion about the case. But if a party wants some guidance about the strengths and weaknesses of their case, they can ask the mediator for that guidance. Only mediators who are lawyers with expertise in the subject matter of the dispute will give that kind of information. The information will generally be given in a private session without the other parties present.

### Is the mediation confidential?

26. In general, anything that happens in a mediation and documents prepared for a mediation are confidential. That means that a party cannot talk about what happened at the mediation or give a document prepared for mediation to anyone who was not there. With a few exceptions, the parties cannot talk about what happened at the mediation at the hearing. This allows various disclosures to be made, and settlement proposals to be discussed at the mediation on what is known as 'without prejudice' basis.

27. The Mediation Agreement and clause 11 of Schedule 1 to the Regulation set out the exceptions to the general rule about confidentiality.

### What are the possible outcomes of mediation?

28. If the case does not settle, or if all of the issues are not resolved, it will be listed for hearing. The mediator will not hear the case.

29. If the case settles, the parties should write down what they have agreed to and sign it, preferably on the day of the mediation. In most cases, the respondent will also ask the applicant to sign a Deed of Release which records the agreement and requires the applicant to withdraw the application. Alternatively, parties may ask the Tribunal to make orders that everyone agrees should be made. Those orders are called consent orders. The Tribunal can only make orders that it would have been able to make if the case was decided after a hearing.

30. If the consent orders affect a vulnerable person the Tribunal must take into account their interests before making those orders.

### What do some of the words in this Guideline mean?

- **Act:** *Civil and Administrative Tribunal Act 2013 (NSW)*
- **Listed mediator:** A listed mediator is a person whose name appears on a list compiled by the President.
- **Mediation:** Mediation is defined in cl 4, Sch 1 to the *Civil and Administrative Tribunal Regulation 2013* 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'.
- **Party or parties:** A person or entity involved in a particular case or joined to the proceedings under section 44 of the Act. The Tribunal calls the person or entity that brings an application 'the applicant' and the person or entity they seek orders against 'the respondent'.

- **Registrar:** The Principal Registrar or any other person employed as a Registrar of the Tribunal
- **Regulation:** *Civil and Administrative Tribunal Regulation 2013*
- **Resolution process:** A resolution process is defined in s37 (2) of the *Civil and Administrative Tribunal Act 2013* as “any process (including, for example, alternative dispute resolution) in which parties to proceedings are assisted to resolve or narrow the issues between them in the proceedings.”
- **Rules:** Civil and Administrative Tribunal Rules 2014
- **Vulnerable person:** A child under 18 or a “person who is totally or partially incapable of representing himself or herself...because the person is intellectually, physically, psychologically or sensorily disabled, of advanced age, a mentally incapacitated person or otherwise disabled.”

### This Guideline applies to:

Proceedings in the Administrative and Equal Opportunity Division and Occupational Division of the Tribunal.

### Effective Date

25 May 2018

### Notes

You must use the latest version of this Guideline. The latest version of this Guideline is on the [NCAT website](#).

The law about the information in this Guideline is mainly in:

- Section 37 of the *Civil and Administrative Tribunal Act 2013*
- Schedule 1 to the *Civil and Administrative Tribunal Regulation 2013*
- Clause 37 of the Civil and Administrative Tribunal Rules 2014
- Section 59 of the *Civil and Administrative Tribunal Act 2013*.

There is a copy of this Act on the [NSW Legislation website](#).

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Deputy President

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