

Chapter 4: Public sector mediation

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Introduction

It is government policy for agencies to use alternative dispute resolution (ADR) techniques wherever possible (Premier's Memorandum 89-42 and 94-25). The only exception is for industrial disputes, where there are mandatory dispute resolution procedures.

Mediation is one widely recognised technique of resolving disputes internal to an agency or arising from complaints or claims made against an agency.

While mediation may not be a panacea for all disputes, it has been found to be useful where:

- the parties will have an ongoing relationship
- the dispute is long-standing or likely to escalate
- alternative redress such as investigation or litigation is likely to be costly in time and resources
- the public interest is served by having the dispute resolved promptly, efficiently and economically.

When using mediation, agencies need to be mindful of general accountability issues. This chapter provides a framework to help ensure there is no conflict between the principles of confidentiality and public accountability in mediation.

The material in this chapter is based on the 1996 Public Sector Mediation Guidelines produced by representatives of the Audit Office, the Attorney General's Department and the NSW Ombudsman.

4.1 Mediation

Mediation is a voluntary and confidential process where a neutral third party, the mediator, assists the parties involved in the dispute to reach some common ground and arrive at a settlement.

The mediator does not make judgements about who is right or wrong, or give advice, legal or otherwise. The mediator does not tell the parties what to do.

During the mediation, the mediator or mediators will assist the parties to isolate the critical issues in dispute, develop options for their resolution and help the parties to reach an agreement which accommodates the interests and needs of all the disputants, as far as possible.

This way the outcome will usually be one which is more suited to the parties' needs rather than one which is imposed on them or recommended by an outside authority such as a court or investigatory agency.

Mediations are conducted in a private, informal atmosphere which encourages parties to negotiate in a freer or more frank manner than they might otherwise have done. Parties can communicate in a way that is not usually possible via formal meetings, telephone contact, letters and submissions.

The presence of the mediator often ensures more productive discussion, greater clarity on the choices for each party, and increased opportunities for understanding of each other's point of view.

By its nature, mediation is a speedy and cost effective form of dispute resolution.

Even if an agreement is unable to be reached, prejudice to other action is minimised if the parties have agreed to conduct negotiations on a basis of confidentiality of the process and not to use the material that arises during the mediation in other proceedings.

If the parties consent, public accountability may best be served by publishing the outcome of a successful mediation, as well as its rationale.

Practical tip

A mediator, having no part in the conflict, is free to leap topics, to recall forgotten elements, to alter the focus of a conversation away from conflict and towards agreement.

4.2 Adopt a dispute resolution protocol

All contracts entered into by agencies should incorporate a clause allowing for mediation between the parties where negotiations fail over disputes arising from contract breach, termination, validity or subject matter. It would not be prudent to embark on a conventional litigation course without weighing the merits of ADR. Even when the parties are involved in litigation, ADR should be considered.

Internal grievance procedures and policies on handling complaints should incorporate a commitment to using mediation or other ADR techniques where appropriate.

Staff should be trained both to identify disputes suitable for mediation and to understand the protocols of mediation.

4.3 Choosing to mediate

In determining whether resolution of a particular dispute is amenable to mediation, look for positive answers to the following considerations.

- Are the issues negotiable?
 - Do legislative duties or obligations restrict the ability to negotiate?
 - Would some concessions result in both parties being winners?
 - Will there be benefits in negotiating some issues even if others appear non-negotiable?
 - Are there various options for settlement worth exploring?
 - Are there appropriate remedies that a court may not be able to award?
- Will mediation be more cost effective than a traditional form of dispute resolution such as litigation?
 - Is the cost of protracted dispute or litigation likely to be high?
 - Is there a reasonable risk of an unfavourable imposed situation?
- Are the parties suitable?
 - Is there a need for a continuing business or professional relationship between the parties?
 - Is there a willingness to negotiate on the part of all parties?
 - Is there a capacity to make decisions on the part of all parties?
 - Would some form of settlement still be possible even if parties are only willing to mediate on restricted terms?
- Will there be impact on third parties?
 - Is a successful mediation possible with only the consenting parties there?
 - Is confinement of issues feasible in the absence of non-consenting parties?
 - Will implementation of any agreement still be possible despite non-participation of third parties?
- Is there a special community interest in this dispute?
 - Could resolution involve developing a set of general rules for the future?
 - Would the public consider the offer to mediate an acceptable or even preferable outcome to other courses?
 - Should the mediation be open rather than confidential or adopt other special procedures to satisfy the public interest?

4.3.1 When mediation is not appropriate

Mediation is not appropriate if:

- confidential negotiations are restricted by legislative duties or obligations
- settlement is likely to set an unacceptable precedent, policy, rule or law, and/or
- confidential negotiations would subvert a regulatory function or otherwise appear to be improper to the public.

4.4 Selecting a mediator

Successful mediation partly depends on the skill of the mediator and the parties' confidence in his or her independence. When selecting a mediator:

- preferably select a mediator from a panel maintained by a reputable body (see 4.11)
- obtain details of length of experience, relevant training and professional background, number and type of mediations undertaken, and hourly rates
- check that mediator fees reasonably compare to charges for other professional services
- make the selection of mediator a mutual decision of the parties
- consider whether a specialist or generalist mediator is needed – some specialise in one area eg banking and finance, while others are more general
- preferably share the charge of the mediator with the other parties:
 - consider non-equal payment shares in circumstances where cost sharing would be burdensome, or payment by the other party is a sticking point and speedy attempted resolution is likely to be cost effective or in the public interest, and
 - advise and seek agreement of the mediator if this course of action is taken.

Practical tip

The best mediators have good listening skills, patience, and the ability to provide accurate summaries of the parties' progress during the mediation.

Some mediators are more directive

Some try to empower the parties to make their own decisions in their own way

4.5 Selecting an agency representative

When selecting an agency representative:

- courtesy, as well as communication and negotiation skills, is an advantage in mediation
- consider the advantages of choosing someone with experience in resolving similar disputes
- give them a clear, but defined, delegation to make decisions binding on the agency
- consider limiting their discretion by a range or limit to monetary compensation or other actions in the delegation
- allow for the potential for re-evaluation of liability during the mediation by not setting overly restrictive and unreasonable limits
- arrange for immediate contact with staff of greater seniority during mediation if further delegation is needed to reach settlement
- if using legal representation, preferably use practitioners known to have commitment and experience in resolving disputes by ADR, and
- ensure that fees for legal or professional assistance during the mediation are agreed upon in advance.

4.6 Preparing for the mediation

When preparing for mediation:

- Ascertain key facts and perceptions and gather all relevant material.
- Identify key issues and agency interests which need to be met. Try to identify the likely interests of the other parties.
- Determine potential areas or options for settlement based on the interests identified.
- Realistically assess the alternatives available if agreement cannot be reached eg court action. Consider the likely outcome and costs involved.
- If appropriate, seek professional or legal advice on issues such as liability, the range of possible compensation or nature of likely orders if the matter was litigated or otherwise determined. If similar disputes have been resolved through litigation, note the amount and nature of those resolutions for comparison purposes.
- If likely settlements are so significant as to warrant additional community assurance of propriety, obtain an independent assessment by an appropriately qualified person eg lawyer, risk assessor etc of the reasonableness of the nature and quantum of the range of likely settlement options.
- Consider the level of commitment desired in any agreement reached eg draft a binding document or something less.
- Arrange for technical/legal support to be on hand or contactable during the mediation if necessary.
- Prepare photocopies of key documents that may need to be exchanged at the preliminary conference or during the mediation.

Practical tip

Prepare thoroughly and provide whatever information possible.

Two useful indicators of whether mediation will 'settle' or not are the amount of preparation the parties have done prior to the session and their desire to settle at mediation.

A feature of the best mediations is either or both parties' ability to understand the other side's perspective as well as their own.

4.7 Setting up the mediation

Provide information about the mediation process and the mediator's commitment to try and settle the dispute to the other parties. If a direct approach is unlikely to be positively received, engage a broker such as a mediation agency to facilitate the mediation.

The person setting up the mediation should:

- emphasise the voluntary nature of the process
- give assurances that if no settlement is reached, the mediation negotiations are without prejudice
- furnish a formal agreement to mediate or confidentiality agreement for consideration by the parties (see examples at the end of this chapter).

The appointed mediator may wish to hold a preliminary conference to deal with any questions about the process and clarify any concerns, if necessary.

It is important to ensure all parties fully understand the effect of 'without prejudice' negotiations and the extent to which they operate. For example, such an assurance cannot bind a third party who may wish to raise evidence of a mediation in legal proceedings. Parties may need to obtain legal advice on this point in contentious cases.

4.8 Agreement to mediate

The parties, and the mediator, may wish to sign an 'Agreement to Mediate'. This should cover the features and underlying principles and the manner in which the proposed mediation will be conducted. An agreement may include, but is not limited to, the following features:

- voluntary participation by the parties
- the mediator's neutrality and non-determinative role
- preparedness to engage in full and frank negotiations
- declaration of each party's level of authority to settle
- commitment to confidentiality during the process and declaration of any exceptions
- commitment to courteous and respectful conduct
- agreements to limit admissibility of comments or documents
- agreement to limit the mediator's liability, and
- extent of public disclosure permitted after successful mediation to meet public sector accountability requirements (undue restraint should be avoided).

By agreement, any or all clauses may be eliminated.

4.9 Ensuring accountability

Public interest requires that ADR be used wherever possible to achieve best value for money results. The process also needs to meet ordinary standards of public accountability. This means that:

- the public's 'best interest' should be the chief guide in choosing mediation
 - resource implications, as well as likely outcomes, ie settlements, should be considered
- agreements should be consistent with level of authority, delegation and government policy
- mediation should not be used to create or modify major existing policy unless authorised
- the nature and requirements of public accountability should be disclosed to all parties
 - in particular, it should be disclosed that these requirements may override any confidentiality agreement reached
- there should be no presumption that full confidentiality holds in the event that an agreed settlement is reached
- agreements arising from mediations should be documented and become part of the agency's records
- the agency representative should complete a mediated settlement certificate for the agency's records in settled matters (see example at the end of this chapter).

4.10 If mediation fails

Agency representatives should briefly document the non-settlement outcome and recommend options for the future. However, where mediation is conducted on a confidential, 'without prejudice' basis, details of offers, admissions or comments should not be documented.

Even if litigation or other action follows, consideration should be given to further mediation, as reflecting on the initial experience may open up options for negotiation and creative solution. If litigation does ensue, the mediation may have narrowed the issues allowing a significant reduction in the time to court hearing.

4.11 Mediation panels

A number of private sector bodies and other agencies maintain panels of trained and experienced mediators.

The public sector agencies offering a mediation service are:

<i>NSW Ombudsman</i>	<i>Phone:</i>	<i>02 9286 1000</i>
<i>Level 24</i>	<i>Freecall:</i>	<i>1800 451 524</i>
<i>580 George St</i>	<i>TTY:</i>	<i>02 9264 8050</i>
<i>Sydney NSW 2000</i>	<i>Fax:</i>	<i>02 9283 2911</i>
	<i>Email:</i>	<i>nswombo@ombo.nsw.gov.au</i>
	<i>Website:</i>	<i>www.ombo.nsw.gov.au</i>

<i>Community Justice Centre</i>	<i>Phone:</i>	<i>02 9790 0656</i>
<i>Ground Floor, Civic Tower</i>	<i>Fax:</i>	<i>02 9796 3258</i>
<i>66-72 Rickard Road</i>	<i>Website:</i>	<i>www.cjc.nsw.gov.au</i>
<i>Bankstown NSW 2200</i>		

(also at Campbelltown, Dubbo, Newcastle, Penrith, Wagga Wagga and Wollongong).

Details of agencies providing mediation and other ADR services can be found in the Yellow Pages under 'mediators'. They can be requested to furnish names of several mediators and advise on the basis on which these practitioners were recommended. A number can provide mediators in country areas.

Annexure 4A: Agreement to mediate

Date.....
..... of
.....
..... of
.....
..... of
..... (the parties)

agree to take part in a mediation and cooperate and work with the mediator(s):
..... and.....

in good faith to try and reach an agreement on all issues in dispute between us.

Voluntary process

The parties may withdraw from mediation at any time. The mediator(s) may also terminate the mediation at any time.

Respect for all participants

All participants have the right to speak for themselves and to be treated with respect during the mediation sessions.

Mediator's neutrality

The parties will make their own decisions in the course of the mediation. The mediator(s) is (are) impartial and will not support the interests of one party over the other. The mediator(s) will assist the parties to explore options and, if possible, achieve the expeditious resolution of the dispute by agreement between them. The mediator(s) will not impose a solution on the parties, nor offer legal or other advice.

Authority to settle

Each party will either attend in person or be represented at the mediation conference by someone with full authority to make agreements binding on that party.

Representation and participation of others

Subject to the agreement of all parties:

- each party may appoint other people including legally qualified people to assist and advise in the mediation
- other people having an interest in the outcome of the mediation may participate in mediation sessions.

Confidentiality

Mediation is a confidential process. The parties and the mediator(s) agree that anything discussed in the mediation session or any confidential information which is disclosed will not be repeated and will remain confidential, unless required by law or where the parties agree.

Admissibility

Evidence of anything said or admitted during the mediation (or attempted mediation) and any document prepared for the purposes of any such mediation are not admissible in any proceedings in a court or before a person or body authorised to hear and receive evidence, or in any other proceeding. The mediator(s) will not be required to give evidence nor produce documents in any subsequent proceedings.

Communication between mediators and parties

During the mediation conference the mediator(s) will meet with the parties in joint session and may meet with each party separately in a private session. Information, whether oral or written, given to the mediator(s) in the private session will not be disclosed by the mediator(s) to the other party without permission.

Settlement terms

If settlement is reached at the mediation conference, the terms of the settlement will be written down and signed by both parties or their representatives, and the mediators. The agreement should make clear whether or not it is to bind the parties.

Exclusion of liability and indemnity

The mediator(s) will not be liable to a party except in the case of bad faith by the mediator(s) for any act or omission, whether negligent or otherwise, by them in the performance of their obligations under this agreement.

Signed by

Signed by

Name

Name

Title

Title

Signed by

Signed by

Name

Name

Title

Title

Signed by

Signed by

Name

Name

Title

Title

Signed by mediator(s)

.....

Annexure 4B: Mediated settlement certificate

I/we(agency representative)

and(agency representative)

certify that the mediation between:

..... (public sector agency)

and

held on resulted in settlement.

In the conduct of this mediation, full regard has been given to the public sector mediation guidelines including issues of public interest.

In my/our opinion:

- the negotiations were not restricted by legislative duties or obligations
- the settlement was not likely to set an unacceptable precedent, policy, rule or law, and
- the confidential negotiations did not subvert a regulatory function or otherwise appear to be improper.

Signed Date.....

Signed Date.....

