

MEDIATION

A practical guide to assist people to prepare for mediation, understand their rights and answer commonly asked questions about the mediation process.

*NB: This workbook is intended as general legal information only and does not constitute legal advice.

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Before You Start

This information booklet has been provided for your benefit and is not intended to be a substitute for legal advice. It is only intended to provide you with a guide to the issues that you should consider before you attempt Family Dispute Resolution (Mediation).

It is strongly recommended that before you sign any agreement in relation to the children that you obtain independent legal advice.

Women's Law Centre of WA Inc. accepts no responsibility for any loss suffered by any person who uses or relies on the information contained in this booklet, or for any loss which may arise due to error or omission in the information. Legal advice from a lawyer should be obtained.

This booklet was prepared by the Women's Law Centre of WA Inc.

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Introduction

This booklet is for people with children who have separated from their partner or are thinking of separating or for any parties in dispute over arrangements regarding children.

Many people feel unprepared and anxious about partaking in Family Dispute Resolution (mediation). In this booklet we seek to answer some commonly asked questions about mediation.

This booklet has information about:

- Who must attempt mediation;
- Who may not have to attempt mediations (exemptions from mediation);
- Situations of family and domestic violence and alternative services available;
- How mediation works;
- What is expected of you;
- How you can get the best out of mediation;
- Topics to help you consider the best interests of the child; and
- Where to get help in situations of family and domestic violence.

Social Media Warning

Beware!

We strongly recommend you **do not** use social media or internet sites, e.g. Facebook or Twitter, Instagram, Snapchat, Chatrooms etc. to discuss or comment on your separation, negotiations involving the child, any legal matters and/or anything the other party may have done.

You should also be careful about what you say in emails and text messages to the other parent, party or anyone else.

This information could potentially be used as evidence against you in court proceedings, for example by being attached to an affidavit filed in the Family Court.

It is also important to remember that this information could put a person's safety or that of a child at risk.

PART 1 – MEDIATION & FAMILY DISPUTE RESOLUTION

What is Mediation?

Mediation is used in all sorts of situations where people are unable to reach an agreement to resolve a dispute.

The people involved are called the 'parties'. In Family Law the 'parties' are usually the parents of the child(ren), but can also be a grandparent or other significant family member.

What is Family Dispute Resolution?

Family Dispute Resolution is a term used for services, such as mediation, that can help people who have separated to come to an agreement about arrangements concerning their child.

What does a Mediator do?

A Mediator, otherwise known as a Dispute Resolution Practitioner, is an independent and unbiased person who assists the parties to talk about their dispute. They help the parties to identify the issues and to work towards finding a way of resolving the dispute.

A Mediator is a neutral or unbiased person who assists in negotiations and conflict resolution. A Mediator does not take sides or make decisions for you. They are there to help you and the other party identify and work through the issues about which you disagree. The aim is to assist you and the other party to find solutions to those identified problems and to arrive at an agreement that is in the best interests of the child.

Where do I find a Mediator?

Mediation services for Family Law disputes involving children are provided by a range of organisations; for example Family Relationship Centres, Relationships Australia and Legal Aid. There are private providers who work in this area also. Under the *Family Law Act 1975 (Cth)*, only Mediators who are registered Family Dispute Resolution Practitioners can issue Mediation Certificates.

Before starting, you should ask the Mediator if they are registered. You can also search the Attorney General's website at www.familyrelationships.gov.au for a list of organisations and individuals that provide mediation services near you.

You can also get the same information by calling the Family Relationships Advice Line on 1800 050 321.

Costs of Mediation

Most services do charge fees for participating in Mediation.

For Government funded services the fee amounts are generally related to your income in that they cut in at a certain income level or the fee you pay is means tested and dependant on your level or income. In some cases, people with Commonwealth Healthcare Cards or people receiving Social Security benefits are entitled to 3 hours free.

Private providers set their own fees.

We recommend checking with the service provider about the fees and entitlements before engaging a Mediator.

Current Law about Mediation

Not all people with children who separate or divorce are able to agree about arrangements for their children, such as where they will live or the time they will spend with each parent or other family members.

Family Law in Australia recognises that parents, rather than the courts, are often the best people to know what is best for their children. Therefore, before applying to the Family Court for parenting orders, most parents/parties are required to 'genuinely' try to sort out parenting arrangements through mediation.

Do I have to go to Mediation?

If you want to apply to the Family Court for parenting orders, or to change parenting orders, you will usually first need to get a Mediation Certificate which confirms that an attempt at mediation was made. In that sense, mediation is compulsory.

The purpose of the Mediation Certificate is to prove to the Court that a 'genuine effort' was made to come to an agreement. The Mediator is the person who issues the Mediation Certificate. However, in certain circumstances the Mediator may decide that mediation is not appropriate, for example in situations involving family and domestic violence.

Even if you are already in the Family Court, a Judge or Magistrate might still send you back to mediation.

In most circumstances it is best for the Court to be an option of last resort, except where a solicitor has recommended that you apply to the Court for an exemption.

Exemptions from Mediation

You can apply to the Family Court for an exemption from mediation if:

- there has been, or there is a risk of, abuse or family violence;
- the matter is very urgent, e.g. the child may be at immediate risk of abuse, they have been removed from your care or you may be having difficulty in getting the child back from a visit;
- you are unable to take part because of a disability or living in a remote area where services are not available; or
- you are applying for consent orders.

If your situation is urgent we recommend seeking legal advice to make an urgent application to the Court. This includes seeing the Duty Lawyer at the Family Court.

If you do not wish to attend mediation because of family and domestic violence or child abuse issues and you make an application to the Court, you will have to fill in a form which tells the Court that a Mediator has given you information about the services and options available to you, including alternatives to court.

When completing the exemption from mediation application form, you are not required to provide your home address. You can use a 'care of' address. The Court needs some way of contacting you and you must provide an address for service purposes.

What is a Mediation Certificate?

If parties do not reach an agreement, the Mediator will give you and the other party a Mediation Certificate. Some services will not automatically provide a Mediation Certificate, so you must ask them to send it to you. You only need to send a short letter or email giving them your name and address and asking that they send the Mediation Certificate to you.

It is important to keep the Mediation Certificate in a safe place because if you want to make an application to the Family Court you will need to attach this Mediation Certificate to your application. You can only file a Mediation Certificate that a Mediator has issued within 12 months of the date on the Mediation Certificate.

The purpose of the Mediation Certificate is to prove to the Court that a 'genuine effort' was made to try to come to an agreement through mediation.

What will the Mediation Certificate say?

The Mediation Certificate gives information to the Court about what happened at the mediation.

The Mediator will tick one of the following options on the certificate:

- both made a 'genuine effort' to come to an agreement;
- one or both did not make a genuine attempt to come to an agreement;
- the other person did not turn up or did not wish to participate;
- in the opinion of the Mediator, mediation is not appropriate; or
- the Mediator did not believe it was appropriate to continue.

If you are exempted from attending mediation because of family and domestic violence or child abuse, the Mediator must also advise you about the services and options available to you, including alternatives to court.

Importance of Mediation Certificates

The Judge or Magistrate will take special interest in the box that the Mediator has ticked on your Mediation Certificate.

If the ticked box says that your or the other party have not made a 'genuine effort' then a costs order may be made against whichever party has not made a genuine effort. This means the party that has not made a genuine effort may have to pay the other person's legal fees.

Not making a 'genuine effort' could also make it harder to get a grant of legal aid.

PART 2 – FAMILY & DOMESTIC VIOLENCE & MEDIATION

What is Family & Domestic Violence?

Family and domestic violence is not just about physical violence. Family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family, or causes the family member to be fearful. Many times, people do not realise that they live, or have been living, with family and domestic violence.

Examples of behaviour that may constitute family violence include (but are not limited to):

- an assault;
- a sexual assault or other sexually abusive behaviour;
- stalking;
- repeated derogatory taunts;
- intentionally damaging or destroying property;
- intentionally causing death or injury to an animal;
- unreasonably denying the family member the financial autonomy that he or she would otherwise have had;
- unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support;
- preventing the family member from making or keeping connections with his or her family, friends or culture; or
- unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.

Generally, family and domestic violence is considered to be present when one person tries to gain or continue power or control over another person by one of more ways listed below:

- physical abuse or threatened physical abuse, including damage to property;
- verbal, emotional, psychological and spiritual abuse;
- social isolation;
- financial abuse, control or coercion; and
- sexual abuse.

Physical abuse can be suffered in many different ways, such as hair pulling, slapping, pushing and shoving, skin twisting, being hit, punched or kicked or being thrown against things or being hit with objects. You should see a doctor if you have been physically abused. A record of your injuries may be useful if you go to Court.

Property damage occurs when something you own, or the house, furniture or car is damaged or broken. It can also be breaking plates, punching holes in wall or cutting up your clothing or photographs.

Verbal and emotional abuse happens when the abuser's behaviour, criticism or comments make you feel useless or stupid or insane or generally damages your self-confidence. This type of behaviour can also result in you believing that everything which goes wrong is your fault.

Psychological abuse includes behaviour and comments designed to put you down and destroy your self-confidence. They might make you believe you are stupid, unattractive, mentally unwell or worthless. You may be blamed for everything that goes wrong. It also includes threats to physically harm or kill you, your family or family pets.

Spiritual abuse is where the other person damages your self-identity by behaviours such as criticism of your spiritual beliefs. It can also be by the abuser quoting religious text to justify abusive behaviour.

Social isolation is where the other person restricts your freedom by preventing you from freely mixing with friends and family or puts you down in front of them. It can also be where your case use is restricted or not allowed or you are prevented from going out to work or earn your own money. It also includes demands to account for all of your time and everything that you do.

Financial abuse includes instances where you do not have a say in how the family income is spent or you are not provided with enough money or access to money for family need, such as being expected to live off impossibly small amounts of money. You may be prevented from keeping any money that you earn or from having access to this money. It also includes always having to account for any money you spend.

Sexual abuse means any forces and/or unwanted sexual contact with the person or anyone else which you do not want, or do not consent to.

Family and domestic violence happens in all sections of the community and in all kinds of relationships. It is harmful not only to the person being abused but also to any children in the family.

Can I still attend Mediation?

It is very important you tell the mediation service and the Mediator if there has been family violence. It is also important you feel safe and are safe before, during and after mediation. If you make any agreement with the other party, it is important that the agreement is safe for you and the children.

You should also consider it may be in your best interests to get legal advice as you may qualify for an exemption from mediation.

Do Mediators screen for safety?

Your first appointment, sometimes called an 'intake' or 'intake interview' is always done with you individually (separate from the other party). Sometimes this might be done over the telephone.

At this first appointment, the Mediator will hear your story and ask you lots of questions to help them work out if mediation is suitable for your situation. Different Mediators have different ways of asking questions, but what they want to know is:

- whether there has been any family and domestic violence. If there is or has been, the Mediator also needs to know if there are any risks to you if you attend mediation.
- if you are able to stand up for your own or the child's needs when negotiating with the other party.
- what are the possible risks to the children or you and the children in the future.

This is the best time for you to speak up about anything at all that is worrying you or if you do not understand something. Do not be frightened or embarrassed to ask the Mediator any questions that you want answered.

The Mediator can give you a Mediation Certificate if they consider mediation to be unsafe or not the best way of resolving your dispute, or they can refer you to one of the other Family Dispute Resolutions Services.

However, there are instances where parties who have experienced family and domestic violence do attend mediation. This may be an option for you, or it may not. Some people have found the experience empowering and others find it destructive or unsafe.

There might be challenges involved in attending mediation when you have experience family and domestic violence. If your confidence has been damaged or you are physically afraid you

may not be able to say things that you want to say and as a result you may feel pressured to agree to things that:

- are not in the children's best interests;
- are unworkable or unreasonable;
- may expose you or the children to ongoing threats, harassment or violence.

In order for you to obtain the best and safest outcome for the children it is important you:

- seek legal advice before making an appointment;
- find out as much as you can about the mediation process;
- consider the best type of mediation to suit you;
- prepare for the mediation.

If mediation does take place, a Mediator can still stop the process if they feel it is inappropriate to continue.

What can I do if the idea of Mediation is distressing to me?

Safe and successful mediation requires both parties' involvement and cooperation in resolving the dispute about their children.

It is important you tell the Mediator why this may be distressing for you. If you feel unable to be in the same room with the other party, tell the Mediator as there are other ways of doing mediation.

Some of the other ways are:

- *Shuttle Mediation* – in this type of mediation the parties are in different rooms so you and the other party are not together at any time.
- *Staggered Mediation* – in this situation your appointment will be on a different day or time to the other party's appointment. This way neither of you will be present at the mediation service at the same time.
- *Telephone Mediation* – this is generally offered to you if you live in a remote area or one of the parties is in prison.
- *Alternative Dispute Resolution* – this service is available at Legal Aid WA and it involves each party having a lawyer attend the session with them.

PART 3 – OVERARCHING LEGAL CONSIDERATIONS

Mediation and Shared Parenting

The law recognises that it is best for children if parents can communicate and cooperate after separation.

The starting point for the Family Court is that parents have what is called ‘equal shared parental responsibility’ for the child. This means that both parents are responsible for the long term care and welfare of their child, including making important decisions about the child, e.g. health care, schooling, religion, etc. This term does not mean equal time.

What time is reasonable?

It may be reasonable for parents to share care and have equal time. ‘Equal time’ means that the children spend the same amount of time with both parents. The most common form of equal time is ‘week about’, e.g. one week with you and the next week with the other party.

If equal time is not reasonable and not practical, parties should consider ‘substantial and significant time’ which means children spending time with the parent they do not live with, at times that include more than just every second weekend and half of the school holidays. It should be times such as weekends, week days and holidays, as this allows that parent to be involved in the children’s daily routine and occasions and events of significance to both the other party and child.

There are many other creative ways of spending time but they must be ‘reasonable and practicable’, meaning they are in the best interests of the children.

Why is reasonable time important?

When the Family Court is considering what is in the best interests of the children, they will consider the benefit to the child of having a meaningful relationship with both parents, as well as the need to protect the children from physical or psychological harm.

The *Family Law Act* states the right of the child to safety and protection from physical or psychological harm is paramount.

Therefore, if you have any concerns about the safety of the child you need to consider what their best interests are. You should give greater weight to protecting children from physical or psychological harm over the benefits of having a relationship with the other parent.

The Family Court will also consider the extent to which a parent has taken or not taken the opportunity to:

- participate in making decisions about major long term issues in relation to the child;
- spend time and communicate with the child;
- the extent to which each of the child's parents has fulfilled, or failed to fulfil, the parent's obligations to maintain the child.

How do I know if my proposals are reasonable and practical?

In considering what may be reasonable and practical for now and in the future you should have regard for the following:

- the distance between the two homes and how it will affect the children, e.g. their friendships and school;
- the ability of the parties to make workable arrangements to deal with practical problems when children have two homes, e.g. school uniforms or homework left in the other's home;
- the ability of parties to communicate and resolve difficulties about methods of discipline, health or homework;
- the impact of any arrangements on the children;
- will disputes arise and if is it possible for you and the other party to sort out these problems;
- how will resolving disputes and any arguments that might arise affect the children;
- was there family and domestic violence previously and how that will affect any of the issues mentioned above.

PART 4 – ATTENDING MEDIATION

The Role of the Mediator

It is important to remember that the Mediator does not take sides in the dispute. Therefore, be careful not to confuse the information the Mediator gives you as being their personal view.

The Mediator will ask you if you have had any legal advice, checking you are aware that the current legislation says that if it is 'in the child's best interests and reasonable and practical' that each of you should consider the possibility of the child spending 'equal time' with each parent and if that is not appropriate then spending 'substantial and significant time' with you or the other parent.

Before you start mediation, your Mediator must tell you:

- they cannot give you legal advice unless they are also a legal practitioner;
- almost everything said by the parties in the mediation session is confidential, but explain the situations when it is not;
- about Mediation Certificates;
- about the mediation process;
- about your rights, including your right to complain about the service;
- their qualifications; and
- fees charged.

If you are trying to make parenting arrangements, the Mediator must give you information about parenting plans and other services.

Confidentiality & Privacy

Where the parties are engaged in shuttle mediation or telephone mediation, anything said by one party can be shared with the other party. This is because the process is conducted as if both parties are in the same room.

In most cases mediation is confidential and private. This means the Mediator cannot share information about you or the other party with anybody not involved in the mediation process.

However, there are circumstances where confidentiality will not apply in any mediation process.

The Mediator must disclose anything said in a mediation session if they reasonably believe the disclosure is necessary for the purpose of complying with a law, e.g. mandatory disclosure of suspected child abuse.

The Mediator may disclose a communication made in mediation or family counselling if they reasonably believe the disclosure is necessary for the purpose of:

- protecting a child from the risk of physical or psychological harm;
- preventing or lessening a serious and imminent threat to the life or health of a person;
- reporting the commission, or preventing the likely commission, of an offence involving violence or a threat of violence to a person;
- preventing or lessening a serious and imminent threat to the property of a person;
- reporting the commission, or preventing the likely commission, of an offence involving intentional damage to the property of a person or a threat of damage to property; and
- assisting an Independent Children's Lawyer to properly represent a child's interests.

In addition, a Mediator or family counsellor may disclose a communication with the consent of the party who made the disclosure, where that person is an adult or where the disclosure was made by a child under 18 years if the parties consent. If agreement cannot be reached the matter may be referred to the Family Court for a decision.

In any of the above circumstances, the Mediator may report their concern to the relevant authorities. If child abuse or risk of child abuse is reported, that information may be used in Court.

What happens next?

If you are accepted as suitable for mediation, the other party will be sent an invitation letter and given a set number of days to respond. If there is no response and you still want to try mediation, a second letter can be sent.

Depending on your situation, you may be referred to other services before starting mediation.

Presenting yourself during Mediation

The best way to present yourself during mediation is to remember the following points:

- Be prepared. Get legal advice before you attend mediation so you know what would be a reasonable agreement in your situation;
- Approach the session in a child focused way, by putting the children first in any proposal you make;
- Remember the overriding principle under the *Family Law Act* is the best interests of the child;
- Think through what you are going to say when you are first asked to talk. The Mediator will always ask you to tell them what the issues are for you and how you see them being best resolved. You can prepare your answers beforehand;
- Stay calm. Nervousness is expected but keep your anger under check. If you feel yourself becoming upset or intimidated, ask for a break or private session.
- Remember your rights. You have the right to be heard, for your opinions to be respected and to ask for what you want. Be firm, clear, but respectful of the other person's perspective, even though it is likely to be different from yours;
- Just as you have the right to be heard, so does the other party. Be mindful not to talk over them or interrupt;
- Watch your negative body language, such as facial grimaces and eye rolling;
- Trust your own instincts. You are under no obligation to agree to any particular proposal put forward by the other party, particularly if you feel bullied or are unhappy with what is being proposed;
- Remember that you are expected to make a 'genuine effort' so be sure to raise alternative proposals by suggesting what you think would work for the children. Also explain why you think this would be in their best interests;
- It is okay to request legal advice before you finalise what you agree, give your consent or sign any documents. You should do this. You are allowed to request to come back for a further session; and
- Be careful what you sign. Only sign when you are sure what you have agreed is in the children's best interests and you are certain it will work now and in the future. You can check whether it will work by reality testing. Ask the Mediator to help you with this or you might ask specific questions about how it would work in different scenarios.

The First Mediation Session

You can expect the Mediator to speak first. This is to explain the process to you and the other party.

The Mediator will generally ask you and the other party to separately discuss what you think are the issues and what you would like the outcome to be.

The Mediator will try to assist you both to identify what the main issues are for each of you. A list of those issues can provide some structure for the mediation scheme.

The Mediator will go on to assist you both to work through each of the issues. It is okay to add issues as the session progresses. It is natural to be nervous at the beginning, causing you to sometimes forget important points that you would have otherwise put on the issues list.

It is okay to take notes during the mediation process and to bring notes that you have prepared beforehand.

You and the other party, in turn, then get to talk about how you each feel and express your points of view. The Mediator will try to get each of you to consider what is in the children's best interests.

You may find it hard to talk directly to the other party. This is normal. The Mediator will assist you, sometimes by saying what you have said in another way (called 'reframing') or by encouraging you to tell the other person directly how or why you feel a certain way.

The issues of 'equal time' and 'substantial and significant time' might be raised by the Mediator.

Sometimes the Mediator may stop the session so they can talk to you away from the other party in a 'private session'. They will also speak to the other party separate from you. They might do this to check how you are going. This is also an opportunity for you to tell the Mediator about any concerns you have, either about the process or about the behaviour of the other person.

During the 'private sessions' the Mediator might also seek to challenge your thinking or provide different options for you to consider. This does not mean the Mediator does not agree with you or is siding with the other person. What they are doing is using a technique to change the energy of the session and help find a resolution.

Generally sessions run for two hours. Sometimes several sessions are required before an agreement can be finalised. You can also ask for a break at any time during a session if you need to.

Legal Representation at Mediation

You should seek legal advice before and after mediation and before signing any written agreements. Generally lawyers do not take part in mediation.

However, both parties and their representation can take part in Alternative Dispute Resolution through Legal Aid WA.

Other Support at Mediation

In general, only the parents, full time carers or other significant family members that are a party to the dispute are present at mediation sessions. Arrangements can be made to include other people such as grandparents if an agreement is reached for this to happen.

Including Children

Generally children will not be included in mediation. However, a Mediator or Family Counsellor may talk with the children when you and the other party are attending mediation. This will only happen with parental consent from both parents or parties.

Successful Mediation

If you have reached an agreement during mediation, the Mediator can help you to make a 'Parenting Plan'.

A Parenting Plan is an agreement that is signed and dated by you and the other party which sets out how the children will be care for and supported. It is not a legal document and so is not legally enforceable in the same way Court Orders are. However, it can be used as evidence in Court if you need to go to Court to get the matter resolved.

You should not be expected to and do not have to sign anything at the time of mediation. You have the right to go away and think about the agreement before signing it. You can come back to the Mediation with changes to put forward.

You can ask a lawyer to look over the written agreement and we do recommend getting independent legal advice before signing anything.

Unsuccessful Mediation

If mediation has not worked or is not suitable for you, you may be able to seek the assistance of a lawyer to directly negotiate arrangements. Or you can apply to the Family Court for assistance in resolving your dispute. You will need the original Mediation Certificate to be able to file a Court application.

Existing Family Court Orders

If you have existing Family Court Orders and you later sign a Parenting Plan, it can have the effect of changing the terms of your Court Orders, even though you have not filed this with the Court.

It is a good idea to get further legal advice before signing any of these agreements also.

Legally Binding Agreements

An agreement reached in mediation is usually written up as a Parenting Plan. To be legally binding and enforceable it needs to be filed with the Family Court as 'Consent Orders.'

It is recommended you get legal advice or the assistance of a lawyer to make this application because it is important that the agreement you send to the Court is written into the correct legal format.

Consent Orders versus Parenting Plans

'Consent Orders' once filed and accepted by the Family Court become a legally binding and enforceable Court Order. Parties can then apply to the Court to intervene if the Orders are not being followed.

A 'Parenting Plan' is not a Court Order. It is a voluntary written agreement that sets out your intentions regarding the children. There are no penalties for breaching a 'Parenting Plan'.

However, should the Court need to make a decision about the children in the future, it will give consideration to your parenting plan.

PART 5 – INFORMATION SOURCES

You can get additional information from the following sources:

Anglicare WA	1300 114 446 www.anglicarewa.org.au
Aboriginal Legal Service of WA	(08) 9265 6666 www.als.org.au
Community Legal Centres WA	(08) 9221 9322 www.communitylaw.net
Family Court of WA	(08) 9224 8222 www.familycourt.wa.gov.au
Family Relationship Advice Line	1800 050 321
Family Relationships Online	www.familyrelationships.gov.au
Family Law Courts	www.familylawcourts.gov.au
Legal Aid Western Australia	1300 650 579 www.legalaid.wa.gov.au
Relationships Australia	1300 364 277 www.relationships.com.au
Women’s Law Centre of WA	445 Hay Street, Perth (08) 9272 8800 www.wlcwa.org.au
Djinda Services (WLCWA)	(08) 9200 2202 djinda@wlcwa.org.au