



Department of
Building and Housing
Te Tari Kaupapa Whare

Mediation for standard claims under the Weathertight Homes Resolution Services Act 2006

INTRODUCTION

This information sheet provides information for parties about the mediation opportunity provided within the adjudication process at the Weathertight Homes Tribunal (the Tribunal). In this circumstance, mediation can only be undertaken with the consent of the Tribunal. Separate information is available for parties undertaking mediation within the Department of Building and Housing (the Department) lower-value claim dispute resolution process.

Mediation can help you clarify issues, resolve conflicts and reach agreement without needing to continue adjudication to a hearing. This information sheet provides a practical summary of the mediation process to help you participate in and prepare for mediation provided by the Department under the Weathertight Homes Resolution Services Act 2006 (the Act).

This booklet explains 'mediation' and other commonly used terms and shows how mediation sits within the framework of the Act. This guide also covers:

- whether mediation is right for you
- how you should prepare for mediation
- what happens on the mediation day
- what happens once the mediation process ends.

WHAT IS MEDIATION?

Mediation is a voluntary and informal process where an impartial person (the mediator) helps parties to isolate issues, develop options, consider alternatives and work together to find their own solution rather than having a decision imposed on them by the Tribunal. Mediators are independent, professional people and their focus is on solving the problem. You, together with the other people in the mediation, decide your own outcome.

The mediator will help the parties work out what the issues are, the positions of each party and possible options for resolution. The mediator will not make a decision for you or anyone else at the mediation, or give legal advice of any kind. Any agreed settlement is binding on those agreeing to it and can be enforced in the District Court.

Mediation is not necessarily the 'easy option'. You must be prepared to negotiate and possibly compromise with parties. Parties work together to find solutions by looking at their interests. Initial discussion at mediation meetings usually focuses on what people value and need rather than the position they hold or what they demand. By taking a step back from those positions, parties can share and gain an understanding of each other's views and the values that underlie their attitude to particular disputes.

The mediation meeting can be a long and stressful day. The claimant and parties put their views across and debate points of the claim and options for resolution. The mediation will only settle if the claimant and some or all of the parties can reach a mutually agreeable solution.

WHEN DOES MEDIATION HAPPEN?

Mediation can take place after a claimant has applied to the Weathertight Homes Tribunal (the Tribunal) for adjudication and before the claim has reached the hearing stage. The Tribunal Member, in discussion with all the parties, decides whether a mediation opportunity is appropriate and, if so, the Tribunal Member will issue an order referring the claim to mediation. The Ministry of Justice (Ministry) case manager then liaises with the Department to obtain an impartial mediator. The Ministry case manager will make the arrangements for the mediation and will inform the parties of all the details. The parties can contact the Department on 0800 324 477 with any queries about the mediation process.

WHAT ARE THE ADVANTAGES OF MEDIATION?

Mediation has several advantages.

- It requires a constructive, co-operative approach.
- Parties can develop and agree upon workable and mutually acceptable solutions – often outcomes that could not be achieved at adjudication or court.
- Parties can discuss matters outside the scope of the adjudication hearing.
- Confidentiality applies to anything disclosed or agreed to in mediation.
- Mediation is likely to be less expensive than adjudication or court action and the process is relatively quick compared with adjudication or the courts.
- Even if mediation does not result in agreement, the process of isolating issues and agreeing on facts can be of assistance if the claim continues to a hearing.
- The presence of the mediator can ensure power imbalances between parties are minimised.

There are statutory time limits to mediation that ensure the claim is not delayed without good reason. A stand-alone house claim is allowed 20 working days for mediation under the Act. A multi-unit complex or stand-alone complex is allowed 40 working days under the Act. The Tribunal can choose to reduce or extend this timeframe. The timeframe is taken from the date the Tribunal Member signs the referral to mediation document.

MEDIATION BASICS

Do I have to attend?

Mediation is voluntary so there is no requirement for you to enter into mediation. However, you should consider the cost and time involved in an adjudication hearing when making your decision. Many parties choose to participate in mediation so that they have some choice in the outcome. Mediation is about finding a solution that everyone can live with.

What is expected of me if I do attend?

Effective mediation is conducted face to face. Active participation with communication by all parties is essential if you are going to reach an agreement. Mediation requires good intentions and patience on the part of all parties.

Mediation assumes that all the parties are informed and able to reach agreements they will be able to live with. Control of the dispute and the terms of the settlement remain in the parties' hands. Parties must be fully authorised to participate and settle on the day. For example, if you represent a company or trust, you must make sure that you have authority to sign an agreement on their behalf.

Are our discussions confidential?

All discussions and agreements that take place in mediation are completely confidential. All documents created for the purposes of mediation are also confidential.

The mediator may meet separately with any party or parties and may be provided with information that is to be kept confidential from other parties. The mediator is not able to be called as a witness or referred to or relied on in any other proceedings in the Tribunal.

How do I refer a claim to mediation?

The parties can refer the claim to mediation with the consent of the Tribunal, and the Tribunal Member may suggest mediation where they feel it is appropriate. A mediation date will usually be set by the Tribunal at the adjudication's preliminary conference. The Tribunal cannot force parties into mediation; it is a voluntary process. The Department provides mediation services at no cost to the parties.

What does the mediator do?

The mediator acts as a facilitator, communicator, motivator and scene-setter, creating the appropriate environment for the process to be effective. The mediator is independent of the parties and the Tribunal and will not make decisions, offer legal advice or coerce parties into an agreement. The mediator will make sure the parties understand what they are agreeing to.

How long do we have to get to mediation?

The Tribunal can set a specific time limit on the time it takes to hold a mediation. The Act allows 20 working days for stand-alone claims or 40 days for multi-unit complex claims. The time allowed by the Tribunal can only be extended by application to the Tribunal with the support of the mediator. It may only be allowed where it is evident that every effort was made by the claimant and parties to settle in the time provided and that a settlement will occur if further time is allowed.

It is important that claims are resolved as quickly as possible to ensure houses are repaired as quickly as possible, and parties can resolve their dispute. The time limits on mediation make sure the claim can be resolved in a reasonable timeframe.

What happens if we settle?

If a mediation settlement is reached, the mediator will have the claimant and parties sign a form withdrawing the adjudication claim against relevant parties. This will be passed on to the Tribunal and the adjudication will be terminated accordingly.

If the claimant has only settled with some parties then those parties may apply to the Tribunal to be struck out of the adjudication. The Tribunal makes the final decision on this and the adjudication can then continue with any remaining parties. Parties who have settled may still be required to be present at the adjudication to provide information.

What happens if we can't reach an agreement?

If you cannot reach a settlement in the allowed time and a time extension is not granted, the claim automatically refers back to the Tribunal.

If the mediator believes that you may be able to settle the matter with more time, the Tribunal can grant an extension of time to allow the matter to be settled.

Will the content of the mediation affect the hearing?

All verbal or written offers, any discussions that take place during the course of mediation and anything produced solely for the purpose of the mediation remain confidential. They do not affect your rights should issues remain unresolved and disputes proceed to the Tribunal or another court.

Is mediation right for me?

There are several things you should consider before deciding to go ahead with mediation. They are set out in the table below.

MEDIATION BENEFITS	MEDIATION LIMITATIONS
<ul style="list-style-type: none">• The process is confidential	<ul style="list-style-type: none">• Can be as stressful as a judicial process
<ul style="list-style-type: none">• The process is a lot more informal than a Tribunal hearing and allows discussion on a wider range of topics	<ul style="list-style-type: none">• It is not helpful where the parties do not participate with respect and in a rational way
<ul style="list-style-type: none">• Often cheaper than going to a Tribunal hearing or to court	<ul style="list-style-type: none">• There are no guarantees of a settlement and avoiding the Tribunal hearing or court action
<ul style="list-style-type: none">• Gives you control over resolving your dispute	<ul style="list-style-type: none">• Participation can be futile if you have not clearly identified your position and are not fully committed to the process

How should I prepare for mediation?

It is very important to be prepared for the mediation. It is difficult to get the best out of mediation if you just turn up on the day without any thought as to how you will present your point.

Before the mediation, make sure that you:

- understand the process
- have all the information you need to represent your interests
- have clarified the role of any support people with you, and you understand how they can help you in the mediation (see 'Should I have a representative?' below).

Some other things you may want to consider during your preparation are:

- what you want out of the mediation
- what are your needs and concerns
- what are the other parties' concerns
- any potential solutions (however, it may not be helpful to be locked into particular solutions at the beginning of the mediation).

For settlement to be achieved, parties will need to reach a point of common agreement as to settlement terms. It is helpful to be prepared to stand in the shoes of the other parties and consider matters from their points of view.

Should I have a representative or support person?

It is important that you attend the mediation in person. Only you can discuss your needs and priorities and reach agreements. If you do wish to have a representative attend in your place, make sure that they have full authority to settle and that you have fully discussed the claim with them beforehand. Settlement proposals can be of an unexpected and unpredictable nature. If representatives are restricted to settling within strict guidelines determined in advance, settlement might not be reached on the day.

If you need a representative (eg, for multi-unit complex claims), they should have the authority to make on-the-spot decisions and formulate agreements on behalf of the parties they represent. Any pre-determined limits on authority may deny the representative the opportunity to fully explore options for resolution.

You are able to take a legal representative, building expert or other support person if you wish, but please make sure the Ministry case manager is aware of how many people you will have with you on the day or supporting you. You will also need to introduce them to the mediator on the day. Please note that people cannot just wander in and out of the mediation. The Ministry case manager will be able to tell you which other parties have indicated they have support people.

While it is not necessary to have legal representation at the mediation, you are able to. You may also wish to consult a legal representative to prepare you for mediation or have a legal representative available by fax or phone to provide advice on any proposed settlement.

What will the Ministry and Department of Building and Housing do?

Your Ministry case manager will arrange the venue and notify you of all relevant details. The Department provides an independent, professional mediator and can arrange for the Department assessor to attend if requested.

The Department and the Ministry are not parties to the claim and have no part to play in the mediation negotiations. Matters are entirely in the hands of the parties, with the facilitation of the mediator. It is up to the parties whether they wish to be part of any settlement agreement.

What happens at the mediation?

The following is how a typical mediation may run but, as mediation is a flexible process, it may be run slightly differently according to the style and preferences of parties and the mediator.

The mediation usually starts with an introduction by the mediator about what the aim of the day is and how the mediation will progress. They will also set some ground rules that will help the day move smoothly.

The mediator will then invite all the parties to introduce themselves and give a brief statement on what they feel the main issues are for the day. This will give an opportunity for each party to hear the others' perspective.

The mediator will confirm the issues that are agreed on and help parties to identify the issues that need to be discussed. They will ensure all the issues are fully discussed so everyone understands each other's views.

Once the issues have been discussed, the mediation will move on to exploring options. These will be evaluated by the parties so a solution can be found that will satisfy as many people as possible. From these discussions a settlement can be written up.

You will have the opportunity to discuss matters privately during break-out sessions. The sessions can be with you and your representative, with the mediator or with other parties. The mediator will keep anything discussed in confidence. While these private meetings are taking place, the mediation will be suspended. Everyone will have the same access to the mediator if they require it.

All parties will receive a copy of the signed settlement agreement at the end of the mediation. This way everyone knows what has been agreed to and what each party needs to do to meet any obligations in the agreement. A statutory declaration will also be signed by the mediator that enables the agreement to be directly enforced through the District Court.

How can I get the most out of the mediation?

- Turn off your mobile phone and pager.
- Try to understand the other parties and make sure they understand you.
- Try to work from agreed sets of information and facts.
- Actively participate rather than just reacting to other parties' actions.
- Remember that the other parties are likely to be feeling the same pressure and frustrations as you.
- Allow everyone to speak without interruption and be aware of how long you speak so everyone can participate in the discussion.
- Make sure that you are speaking for yourself rather than dictating what other parties should be saying.
- Clarify any point you are unsure about with the parties or the mediator.
- Stay to the end unless you wish to formally leave the mediation.

How long will the mediation take?

You will need to be present at the mediation on an uninterrupted basis, into the evening if necessary. The mediation is intended to be finished on that day where possible.

How much notice do I give if I am not attending?

If, for any reason, you will not be attending the mediation you should contact your Ministry case manager at least 72 hours in advance of the mediation. This allows all the parties to know who will be attending in advance and makes sure the process is fair for all.

What is the role of the assessor's report?

The assessor's report is a neutral document. Any party can agree or disagree with the report in whole or in part. The assessor will be available, if requested by the parties, by phone or in person to answer questions and provide clarification on their report. Any questions for the assessor should be formulated before the mediation.

Is the mediation confidential?

Any statement, admission or document made or supplied for the purposes of mediation proceedings must be kept confidential under section 84 of the Weathertight Homes Resolution Services Act 2006. All attendees at the mediation, including support people, will be asked to sign a document confirming this confidentiality.

What happens to the settlement agreement?

The mediator is required to retain a copy of the settlement agreement for forwarding to the Department for confidential storage after the mediation. Please note that under section 86(2)(a) of the Weathertight Homes Resolution Services Act 2006, information may be gathered from settlement agreements for research or educational purposes so long as the parties and specific matters in issue are not identifiable.

