

THE KPK MEDIATION ACT

PROPOSED DRAFT

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THE MEDIATION ACT, 201__

An Act relating to mediation and the registration of mediators.

Whereas it is expedient to provide for the mediation and registration of mediators in the interest of litigants and to facilitate the courts;

And whereas such functioning of the mediation centre and mediators requires to be professional, service-oriented, and accountable to the courts refereeing to mediation centre;

It is hereby enacted as follow:

1. *Short title, application and commencement.-*

- (1) This Act may be called *the KPK Mediation Act, 20__*.
- (2) It shall extend to the whole of KPK.
- (3) It shall come into force at once.

2. *Definitions.-*

In this Act -

- (a) *Approved Mediation Centre-* means an entity that is declared under section 4 (4) to be an approved Mediation Centre;
- (b) *Mediation Session-* means a meeting between people in dispute and a registered mediator for the purpose of resolving the dispute by mediation, and includes anything done for the purpose of –
 - (i) Arranging the meeting (whether or not successfully); or
 - (ii) Following up anything raised in the meeting
- (c) *Party*, to a mediation session, does not include the registered mediator for the session;
- (d) *Registered Mediator-* means a neutral third person who is registered under section 5 as a mediator (Registration of mediators) and conducts mediation;
- (e) *Chief Justice-* means Chief Justice of High Court ;
- (f) *Mediation agreement-* means statement of agreement on which parties to the Mediation have signed with their consent;
- (g) *Court-* means any court who refer to a mediation in accordance with any law;
- (h) *Mediation -* means a process in which a Mediator facilitates and encourages communication and negotiation between the mediation parties, and seeks to assist the mediation parties in arriving at a voluntary agreement;
- (i) *Mediation party -* means a person who participates in mediation and whose consent is necessary to resolve the dispute;

- (j) **Mediation process** – includes the mediation session together with all administrative processes and procedures leading to and necessary for the conduct of such mediation session and all processes and procedures after the completion of the mediation session ending with the signing of the mediation agreement or if there is no agreement, when the mediation session is otherwise terminated;
- (k) **Conflict of Interest** – means direct or indirect financial personal interest in the outcome of the dispute or an existing or past financial, business, professional family or social relationship which is likely to affect the impartiality or reasonably create an appearance of partiality or bias;
- (l) **Impartiality** – means freedom from favouritism and bias either by words, action or by appearance and implies a commitment to serve all mediation parties as opposed to a single mediation party in moving towards or reaching agreement.

3. **Declarations about competency standards and approved Agencies**

(1) The Chief Justice, in addition to this Act, may declare standards of competency and qualification, in writing, required for the registration of a person as Mediator and any entity as Mediation Centre.

(2) The Chief Justice may, in writing, declare an entity to be an approved Mediation Centre for this Act.

4. **Qualification of Mediator and Standard for Mediation Centre.-**

(1) All the Mediation Centers shall maintain the district court and apex court Mediators Roster for public information about mediators who meet their qualifications so that the parties or judges may select them.

(2) Minimum Qualification for district court Mediators/roster would be:

- a) good character;
- b) Enrolled advocate and 4 years practice of law, or have served professionally as the mediator in 10 cases in preceding 2 years’;
- c) 48 hours of approved mediation training;
- d) Subscribe to Code of Ethics and rules;
- e) Provide 10 hours annual pro bono upon request;
- f) Substantive knowledge of relevant laws;
- g) Familiarity with trial court system;
- h) Non-directive mediation styles;
- i) Objectivity;
- j) Acceptance of individual differences;
- k) Ability to analyze;
- l) Ability to recognize and manage power;
- m) Strong verbal and communication skills;
- n) Active listening skills;
- o) Ability to control the mediation process without dominating the parties;
- p) Ability to generate movement in the discussion of dispute;
- q) Creativity/inventiveness and focus.
- r) Acceptable to court;
- s) Willing to assist with local development of Mediation programs; and
- t) Reside near local limit/jurisdiction.

(3) **Minimum Qualification for apex court Mediators/roster:**

- a) good character;
- b) Enrolled advocate and 10 years practice of law, or have served professionally as the mediator in 10 cases in preceding 2 years’;
- c) 48 hours of approved mediation training;
- d) Subscribe to Code of Ethics and rules;
- e) Provide 10 hours annual pro bono upon request;
- f) Substantive knowledge of relevant laws;
- g) Familiarity with trial and appellate court system;
- h) Non-directive mediation styles;
- i) Objectivity;
- j) Acceptance of individual differences;
- k) Ability to analyze;
- l) Ability to recognize and manage power;
- m) Strong verbal and communication skills;
- n) Active listening skills;
- o) Ability to control the mediation process without dominating the parties;
- p) Ability to generate movement in the discussion of dispute;
- q) Creativity/inventiveness and focus.
- r) Acceptable to court;
- s) Willing to assist with local development of Mediation programs; and
- t) Aware with best practices and procedure of Mediation.

(4) High Court may declare any entity of association of professionals duly registered with the Registrar Joint Stock Companies or Society registered with the Registrar Firms as approved Mediation Centre if it provides following facilities-

- (a) Facility to hold mediation sessions;
- (b) Maintain a list of registered mediators;
- (c) Maintain permanent supporting staff for running the day to day activities;
- (d) Observe minimum standards for mediation process as may be prescribed by the High Court from time to time;
- (e) Ensure code of conduct of the mediator;
- (f) Maintain prescribed procedure for running the Centre; and
- (g) Maintain a fee structure for mediation process.

(5) A mediation centre may prescribe any regulation to run the Centre however any regulation shall not be in contravention to this Act or any legislation made by the Provincial or Federal Government and by the High Court.

(6) All mediation centres shall engage an individual and designate him/her to be responsible for each mediation training programme and held accountable on behalf of the programme for -

- (a) keeping a list and resumes of all trainers and subject matter specialists who will be used during the programme.
- (b) ensuring proper facilities are secured and that appropriate equipment is provided.
- (c) ensuring that the training agenda is followed and that all content is covered.
- (d) ensuring that evaluation forms are completed and maintained;
- (e) ensuring that a certified trainer is in attendance at all times;

- (f) ensuring that no certificate is issued to a participants who fails to complete the requirements of attendance and participation.
- (7) All training programmes shall provide the participants with the required reading but time spent reading required material shall not count towards the required number of hours of training and shall be completed by participants at times when the training programmes is not being conducted.
- (8) Trainers shall incorporate some methods of ensuring that the required readings are completed and shall ensure that the current legislation and rules governing mediation are provided to the participants.
- (9) The training methodology shall be as follows:
- (a) Pedagogy-Training programmes shall include, but are not limited to the following: lectures, group discussions, written exercises, mediation simulations and role-plays.
 - (b) In addition, readings shall be provided by the trainer to supplement the training.
 - (c) Written Exercises-written exercises shall include the reducing of a mediation agreement to writing.
 - (d) Role-play Requirements – the objective of a role-play is for participants to develop confidence and experience. Each participant must have an opportunity to mediate in role-play.
- (10) A training programme shall require participants to complete their training requirements by attending one entire training programme in which the certified trainer is responsible for ensuring that the integrity of each portion of the programme is not compromised and any portion of training missed shall be made up as directed by the trainer. If a participant misses portions of the training programme which compromise the integrity of the programme, the training programme shall require the participant to repeat an entire programme.
- (11) In order to be accredited, each standard mediation training programme shall include the following topics:
- (a) Conflict Resolution Concepts –
 - (i) that define and understand the difference between non-litigation methods of dispute settlement, including negotiation, mediation and arbitration.
 - (ii) that identify criteria by which parties select a method of dispute settlement for resolving particular disputes and evaluate the strengths and weaknesses of any dispute settlement method;
 - (iii) that assist the participant to understand and demonstrate effective use of basic principles of negotiation and how mediation is an extension of negotiation; and
 - (iv) that contrast mediation with litigation and demonstrate an understanding of the difference in roles of judges, lawyers, experts, mediators, arbitrators;
 - (b) Court Process –
 - (i) explain the consequences of a mediated agreement as well as a failure to reach agreement;
 - (ii) identify the statutes, rules, local procedures and forms governing mediation.

(c) Mediation Process and Techniques –

- (i) identification of the stages and components of the mediation session;
- (ii) understand and demonstrate the role of the mediator in structuring the mediation session, such as conducting an opening statement, preparing a party to mediate, maintaining decorum, professionalism, control of the session, structuring and managing the discussion, building on partial agreements. Scheduling the time, location, number of sessions, establishing the format of each session and focusing discussion;
- (iii) understanding the importance of demonstrating empathy, building rapport, establishing trust, setting a co-operative tone, demonstrating neutrality and impartiality, demonstrating sympathetic listening and questioning, empowering parties, and remaining non-judgmental;
- (iv) identification and demonstration of the characteristics which enhance or undermine the effectiveness of the mediator, including language use, non-verbal communication and eye contact;
- (v) identification of the principles and functions which define the mediators role and distinguishes it from other forms of dispute resolution;
- (vi) identification of those procedural elements which must be satisfied prior to the entry of the parties into the mediation room, including seating of parties and set-up of the room;
- (vii) understanding that upon commencement of the mediation session, a mediator shall describe the mediation process and the role of the mediator shall inform the mediation participants that mediation is a consensual process; the mediator is an impartial facilitator without the authority to impose a resolution or adjudicate any aspect of the dispute; and communications made during the process are confidential except where disclosure is required by law;
- (viii) understanding and demonstrating the mediator's role in indentifying a full understanding of the parties' agenda;
- (ix) framing issues in neutral language and in such manner that the parties respective interests are identified and communicated;
- (x) differentiating between issues which are appropriate for mediation and those that are not appropriate.
- (xi) identification of individuals who are entitled to participate in the mediation session as well as those non-parties who may need to be present;
- (xii) identification of situations in which participation of non-parties, e.g., grand-parents, children, new spouses may be necessary in the mediation;
- (xiii) identification of and demonstration techniques to obtain closure;
- (xiv) identification of the circumstances in which issues are appropriate for discussion in joint session and those which should first be discussed in separate session;
- (xv) identification of appropriate techniques for mediating cases in which one or more parties are represented by advocates;
- (xvi) identification of appropriate techniques for handling difficult situations, e.g., a party walks out, a party makes personal attacks on another party or mediator, a party is not really engaged in the mediation, a party or advocate is very recalcitrant, a party or non-party is emotionally overwrought or a party appears to be physically ill.

(d) Communication Skills –

- (i) identification and demonstration of the essential elements for effective listening, questioning and note taking;
- (ii) identification of and demonstrate appropriate non-verbal communication;
- (iii) understanding that a mediator shall cause the terms of any agreement reached to be recorded appropriately and discuss with the parties and counsel, if any, the process for formalization and implementation of the agreement;
- (iv) development of an awareness that people differ in how they make decisions, how they process information and how they communicate;

- (e) Standards of Conduct/Ethics for Mediators –
 - (i) identify the mediator’s ethical dilemmas in the mediation context. Identify and demonstrate an appropriate course of action when confronted with an ethical dilemma;
 - (ii) understanding the mediator’s responsibility to the parties and to the courts;
 - (iii) understanding when a mediator shall adjourn, terminate, cancel or postpone a mediation session;
 - (iv) understanding that a mediator shall respect the roles of other professional disciplines and shall promote cooperate between mediators and other professionals;
 - (v) understanding that a mediator shall promote awareness by the parties of the interest of persons affected by actual or potential agreements who are not represented at mediation;

- (f) Diversity Issues –
 - (i) recognizing personal biases, prejudices, and styles which are the product of one’s background and personal experiences;
 - (ii) understanding socio-economic, cultural, racial, ethnic, age, gender, religious, and disability issues which may arise in mediation and/or affect the parties negotiation style, ability or willingness to engage in mediation;

- (g) Advocates and Mediation –
 - (i) understanding the role of litigants’ advocates in the mediation process and the potential for conflicts;
 - (ii) understanding the advocate-client relationship within the context of mediation;
 - (iii) understanding the need to establish credibility with advocates and parties.

5. Registration of mediators

- (1) Subject to subsection (6), a person may apply in writing to an approved Mediation Centre for registration under this section.

- (2) An approved Mediation Centre shall approve an application and register the applicant if –
 - (a) Any fee determined by the Mediation Centre to be payable to it in relation to an application under this section has been paid to it;
 - (b) It is satisfied that the applicant has achieved the standards of competency prescribed for section 4; and
 - (c) The applicant satisfies any requirements of the Mediation Centre that relate to mediators.

- (3) A person whose application under subsection (1) has been refused may, by written notice given to the Mediation Centre, require it to review the decision.

- (4) An approved Mediation Centre that receives a notice under subsection (3) shall review the relevant decision.

- (5) An approved Mediation Centre shall notify an applicant in writing within 7 days of determining an application under subsection (1) or a review under subsection (4) –
 - (a) Of its determination; and
 - (b) If the application has not been granted – of the grounds for not granting it.

(6) A person –

- (a) who has made an application under subsection (1) that has been refused; or
- (b) whose registration has been cancelled under section 8; is not eligible to make another application under subsection (1) to any approved Mediation Centre within 6 months of the refusal or cancellation.

6. *Duration of registration*

Subject to section 8, the registration of a registered mediator ends 3 years after the day when he or she was registered or when his or her registration was last renewed, as the case requires.

7. *Renewal of registration*

(1) A registered mediator may, before the end of his or her registration, apply to the approved Mediation Centre by which he or she has been registered or to another approved Mediation Centre for renewal of the registration.

(2) The approved Mediation Centre shall renew the registration of the mediator if any fee determined by the Mediation Centre to be payable to it in relation to an application under this section has been paid and the Mediation Centre is satisfied that the mediator –

- (a) Would, if he or she were an applicant under section 5 (1), be eligible for registration; and
- (b) Has, since his or her registration or last renewal, whichever last occurred, undertaken the further education in matters relating to mediation that is approved by the Mediation Centre.

8. *Cancellation of registration*

The approved Mediation Centre by which a registered mediator has been registered may cancel the registration if satisfied that –

- (a) if the mediator were an applicant under section 5 (1), he or she would not be eligible for registration; or
- (b) the mediator has made a disclosure in breach of section 10 and the circumstances are such that his or her registration should be cancelled.

9. *Admissibility of evidence*

Evidence of –

- (a) A communication made in a mediation session; or
- (b) A document, whether delivered or not, prepared –
 - (i) For the purposes of; or
 - (ii) In the course of; or
 - (iii) Pursuant to a decision taken or undertaking given in; a mediation session; is not admissible in any proceedings.

10. *Secrecy:*

- (1) A person who is or has been a registered mediator shall not disclose any information obtained in a mediation session.
- (2) This section does not apply if –
 - (a) The disclosure is required by or under an ACT; or
 - (b) The disclosure is made with the consent of the mediation parties; or
 - (c) The disclosure is made with the consent of the person who gave the confidential information; or
 - (d) The person referred to in subsection (1) believes on reasonable grounds that –
 - (i) A person’s life, health or property is under serious and imminent threat and the disclosure is necessary to avert, or mitigate the consequences of its realization; or
 - (ii) The disclosure is necessary to report to the appropriate authority the commission of an offence or prevent the likely commission of an offence.

11. Ethical Conduct of Mediators

(a) This section shall apply to registered mediators and is intended to assist and guide registered mediators in their conduct and to provide a framework within which mediation is conducted and regulated.

(b) Registered mediators shall –

(i) conduct themselves in a manner which will instill confidence in the mediation process, confidence in their integrity and confidence that disputes entrusted to them are handled in accordance with the highest ethical standards;

(ii) be responsible to the parties, to the profession, to the public and to themselves, and accordingly shall be honest and unbiased, act in good faith, be diligent, and not seek to advance their own interest, but rather the needs and interest of the mediation parties;

(iii) act fairly in dealing with the mediation parties, have no personal interests in the terms of the settlement, show no bias towards individuals or parties involved in the disputes and be certain that the mediation parties are informed of the process in which they are involved.

(c) The primary role of the mediator is to facilitate the voluntary resolution of a dispute.

(d) The primary responsibility for the resolution of the dispute and the shaping of a settlement rests with the mediation parties.

(e) A mediator shall recognize that mediation is based on the principle of self-determination by the mediation parties and upon the ability of the mediation parties to reach a voluntary uncoerced agreement.

(f) A mediator shall request and encourage self-determination by the mediation parties in their decision whether, and on what terms, to resolve their dispute and shall refrain from being directive or judgmental regarding the issues in dispute and options for settlement.

(g) A mediator shall encourage mutual respect between the mediation parties, and shall take reasonable steps, subject to the principle of self-determination, to limit abuses of the mediation process.

- (h) A mediator shall make the mediation parties aware, where appropriate, of the option and importance of consulting other professionals to assist the mediation parties in the making of informed decisions.
- (i) When a mediator believes a mediation party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the mediation parties to seek independent professional advice.
- (j) While a mediator may point out possible outcomes of a case, the mediator shall not offer a personal or professional opinion as to how the Court in which the case has been filed will resolve the dispute.
- (k) A mediator shall not use during the mediation process any title or honorific to which he may be entitled.
- (l) A mediator shall mediate only when the mediator has the necessary qualifications, training and experience to enable him to satisfy the reasonable expectation of the mediation parties.
- (m) A mediator shall acquire and maintain professional competence in mediation, and shall at all times strive to improve his professional skills and abilities by participating in relevant continuing education programmes.
- (n) A mediator shall have information regarding his relevant training, education and experience available to the mediation parties.
- (o) A mediator shall provide mediation services only for those disputes in which he can be impartial with respect to all the mediation parties and the subject matter of the dispute.
- (p) A mediator shall in words and action, maintain impartiality towards the mediation parties and where his impartiality is in question, shall decline to serve or shall withdraw from serving as a mediator.
- (q) Where at any time prior to, or during, the mediation process the mediator is unable to conduct the mediation process in an impartial manner, the mediator shall so inform the mediation parties and shall withdraw from providing services, even if the mediation parties express no objection to the continuation of the mediator's services.
- (r) A mediator shall discuss issues of confidentiality with the mediation parties before beginning of the mediation process including, limitations on the scope of confidentiality and the extent of confidentiality provided in any private session that the Mediator holds with a mediation party.
- (s) All proceedings shall be confidential and the mediator shall not voluntarily disclose to anyone who is not a mediation party to the mediation process, any information obtained through the mediation process except, with the written consent of the mediation parties, or when the information discloses an actual or potential threat to human life or safety.
- (t) In the cases referred to in paragraph (s) hereinabove, the mediator shall advise the mediation parties, when appropriate to the mediation process, that the confidentiality of the mediation proceedings cannot necessarily be guaranteed.
- (u) A mediator shall structure the mediation process so that the mediation parties make decisions based on sufficient information and knowledge.
- (v) The mediator has an obligation to ensure that all mediation parties understand the nature of the process, the procedures, the particular role of the mediator and the mediation parties' relationship to the mediator.

(w) Where at any time the mediator believes that any mediation party is unable to understand the mediation process or participate fully in it for a justifiable reason, the mediator shall limit the scope of the mediation process in a manner consistent with the mediation party's ability to participate, and/or recommend that the mediation party obtain appropriate assistance in order to continue with the mediation process or shall terminate the mediation process.

(x) A mediator shall disclose all actual and potential conflict of interest known to him and thereafter shall withdraw from the mediation, if any mediation party objects to him continuing as mediator. The duty to disclose conflict of interest shall be a continuing obligation throughout the mediation process.

(y) Where the mediator determines that the conflict is so significant as to cast doubt on the integrity of the mediation process, the mediator shall withdraw from the process even if the mediation parties express no objection to the continuation of the mediator's services.

(z) Save with the consent of the mediation parties, and for a reasonable time under the particular circumstances, a mediator who also practices in another profession shall not establish a professional relationship in that other profession with one of the mediation parties, or any person or entity, in a substantially factually related matter.

(aa) In family mediation, the mediator has a responsibility to promote the mediation parties' consideration of the interest of children in relation to the issues being mediated. The mediator also has a duty to assist the mediation parties to examine, apart from their own desires, the separate and individual needs of such children.

(ab) A mediator shall not make untruthful or exaggerated claims about the mediation process, its costs and benefits, its outcome or the mediator's qualifications and abilities.

(ac) No commission, rebates, or other similar forms of remuneration shall be given or received by a mediator for the referral of clients.

11. *Protection from defamation*

The same privilege in relation to defamation as exists in relation to judicial proceedings exists in relation to –

(a) A mediation session; or

(b) A document or other material –

(i) Produced at a mediation session; or

(ii) Given to a registered mediator for the purpose of arranging or conducting a mediation session.

12. *Protection of mediators*

(1) A registered mediator has, in the exercise in good faith of his or her functions as mediator, the same protection and immunity as a judge of the apex Court.

(2) No legal proceeding may be commenced against a registered mediator or any person or official involved in the mediation process for any act done or omitted to be done in the course of the performance of his functions, in reference to such mediation process.

(3) Notwithstanding subsection (1) hereinabove, if a person suffers loss or damage as a result of the wrongful disclosure of confidential information by a registered mediator or by any person who in the course of his employment or training gained access to such confidential information, that person shall be entitled to bring suit for damages.

(4) Subject to sub-section (3) hereinabove, the registered mediator or any other person involved in the mediation process in the mediation process is not compellable as a witness, to give evidence of any matter which occurred during the mediation session or any confidential information which came to his knowledge during the mediation process.

13. *Regulation-making power*

(1) The High Court may make rules for this Act.

(2) The rules may prescribe requirements to be complied with by an approved Mediation Centre.

(3) The rules may also prescribe offences for contraventions of the rules and prescribe minimum and maximum penalties.