

# Using mediation to resolve conflicts and disputes

Legal information for NSW community organisations

## This fact sheet covers:

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- mediation and its benefits
  - the kinds of disputes that can be mediated
  - how to find and choose a mediator
  - how to prepare for mediation
  - what happens during mediation, and
  - what to do if mediation doesn't work.
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**This fact sheet will help you understand how mediation can assist your organisation to resolve disputes and avoid court unless it's absolutely necessary.**

Disputes arise for many organisations. For example, a dispute might be between:

- members of your organisation
- members and the committee or board
- your organisation and a supplier, or
- your organisation and a member of the community.

## What is mediation?

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Mediation is the guided negotiation of a dispute between two or more participants.

In mediation, the people in dispute (participants) meet in the presence of an unbiased, independent person (the mediator) to try to resolve their problems in a confidential, safe atmosphere. The mediator controls the process, but the participants decide on any outcomes that are agreed.

The mediator doesn't try to force the participants to agree and cannot impose an outcome on them. Instead the mediator:

- facilitates communication (which should be respectful and constructive)
- promotes understanding
- assists the participants to identify their needs, interests and the issues in dispute
- helps the participants explore the important issues and their present and future needs without dwelling on who was right or wrong in the past
- helps the participants with options, alternatives and decisions about the future, and

- uses creative problem solving techniques to help the participants reach their own agreement.

## Common questions about mediation

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### Is mediation confidential?

Everything said in mediation is confidential unless it is specifically agreed otherwise before the mediation begins. The mediator will tell you at the start what they cannot keep confidential – eg, the abuse of a child must be reported.

#### NOTE

You (or your organisation) might be worried that information shared in mediation can be used against you later in court. However because the mediation process is confidential, that cannot happen.

The whole process of mediation is confidential and 'without prejudice'. So if you can't agree to an outcome at the mediation, a court case can start (or continue) without the participants worrying about having 'given away' anything that another participant will use against them in court.

However, be careful about what you say because once you tell the other side about something, they may be able to verify that information another way (other than you having told them) and they can then use that information in court if no resolution is reached at the mediation. They cannot, however, say in court that you gave or verified the information during a mediation.



If you are worried that another participant won't keep your information confidential, have a private session with the mediator and tell them what you're worried about. That information can't be provided to the other participant unless you agree.

### Is mediation quick?

Yes, mediation is usually much quicker than going court. You usually need to set aside a full day for a mediation. Hopefully by the end of that day, you will have reached an agreement about your dispute.

That might seem like a long time, but it can take months, or even years, to have a case heard and finalised in court. A hearing before a judge usually takes more than a day and usually costs a lot of money. Significant and costly preparation of your side of the dispute is required before a hearing takes place in a court case, whereas a mediation can be held at any time during a dispute.

### Is mediation formal (like court)?

No – mediation is much less formal than going to court. There are no legal forms and sometimes there aren't even any fees. You can also work out times and places to mediate to suit everyone, unlike when you go to court.

### Does mediation usually work?

Yes, organisations which offer mediation services report that the majority of disputes are resolved at mediation. For example, Community Justice Centres NSW report that about 80% of the disputes that

come to them are resolved at mediation and the NSW Small Business Commissioner reports that about 94% of matters referred to it for mediation are resolved before a court or tribunal decision.

Mediation is effective because people find their own solutions – they don't leave decisions in the hands of a judge (which will cost them time, money and stress, and it's possible no one will be satisfied with the result!).

It is important that any agreement reached at a mediation be recorded in writing and signed by everyone on the day if possible. This is to ensure everyone is clear on the agreement, and makes the agreement more likely to work. It also means that people who have the authority to sign such an agreement should be at the mediation.

#### TIP

Community Justice Centres provide free mediation services in NSW. Other providers of mediation services in NSW include the Law Society of NSW, BarADR offered by the Bar Association of NSW and private organisations.



## Who pays for mediation and what does it cost?

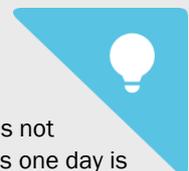
If you are eligible for mediation through Community Justice Centres in NSW, then mediation can be free.

If not, then usually the participants share the costs of the mediation. The standard rates are between \$1500 and \$3500 per day (divide this in half if you're sharing with one other participant).

You should talk to the mediator about costs and fees associated with the process. Then make sure the mediator puts this in writing.

#### TIP

If you think this sounds expensive, think about how much more it will cost to go to court. In the Local Court, a party's costs can be around \$6,000 for each day of hearing and this does not include the costs of preparing for trial. A hearing often takes a lot more than one day whereas one day is the standard length for mediation (and sometimes less).



## What kinds of disputes can be mediated?

Almost all disputes are appropriate for mediation.

Even if you decide to 'bypass' mediation and commence legal action in a court, the judge will usually send you and the other parties to mediation before they will hear the case.

### What if it feels like the other participant has all the power?

Sometimes a participant is concerned that they will not be able to negotiate effectively with the other participant and that they will 'lose'. Often this is how one participant feels if the other is more experienced at negotiation, has greater resources, better education or language abilities, or is 'in control' of the dispute.

Mediation is designed to create a level playing field for all participants. It is part of the mediator's job to:

- protect each of the participants in the process
- make sure each participant can understand the issues
- make sure the participants understand the available options and the pros and cons of each option
- make sure all the participants have a say, and
- make sure that one participant is not taking advantage of another.

### CAUTION

If there is a history of violence or intimidation between participants in a mediation, this should be disclosed to the mediator.

Mediation is not appropriate where it could make a potentially dangerous situation worse. The mediator will be guided by the idea that they should 'do no harm'.

The mediator may terminate mediation if the power imbalance can't be redressed through the process. You can withdraw from or terminate mediation at any time without legal sanctions.



## Who controls the mediation?

The mediator controls the process (although this can be flexible and the participants can provide input into this), while the participants control any outcomes of the process, including the resolution of their own dispute. The mediator or any of the parties can end a mediation at any time if they think it is no longer a useful process.

## How do we find and choose a mediator?

Choosing a mediator is really important – a mediator who manages the process well and understands the issues is going to be most likely to help you agree to something that works for everyone.

How you choose a mediator can depend on the type of dispute you are involved with. You may find guidance in the following places:

- if the dispute is between members of a NSW incorporated association, read and follow your organisation's rules – there will probably be requirements about choosing a mediator in your grievance procedures. Go to our Not-for-profit Law Information Hub page on Disputes and Conflict at [www.nfplaw.org.au/disputes](http://www.nfplaw.org.au/disputes)
- if the dispute is between members of a company limited by guarantee, read and follow your constitution – it may have requirements about choosing a mediator
- if the dispute involves terms of employment or a volunteer, check your policies and procedures, or
- if your organisation is arguing over the terms of a contract (eg a lease), read the contract and find the dispute resolution clause (if any), then follow what it says about choosing a mediator.

## EXAMPLE

When you are checking what the rules or agreement say, you might find words like this (i.e., the model rules for incorporated associations):

“A dispute between a member and another member (in their capacity as members) of the association, or a dispute between a member or members and the association, are to be referred to a community justice centre for mediation under the Community Justice Centres Act 1983.”



There are organisations listed under ‘Resources’ (below) that can help you to find a mediator.

Before you engage anyone to mediate your dispute, speak to some potential mediators and ask them questions, such as:

- are you accredited and do you comply with the Australian National Practice Standards?
- what is your background and experience?, and
- what are your fees?

## TIP

It is recommended that you choose a mediator accredited under the National Mediator Accreditation System. Those standards were developed to provide a base level of accreditation for all mediators irrespective of their field of work.

You should also make sure the mediator you choose has training and experience relevant to your dispute.



# How do we prepare for mediation?

To prepare, you need to think about what’s really important to your organisation. Usually that has ‘resolving the dispute’ somewhere near the top of the list!

When you are preparing, think about:

- what you think this conflict is really about
- what could you compromise on, if it meant that the dispute would be over at the end of the mediation and no longer hanging over your organisation?
- what is the ‘worst case scenario’ for your organisation? How bad could this get for your organisation and its members?
- what is the ‘best case scenario’ for your organisation? What is the likelihood of your organisation getting everything it wants if it goes to court? and
- the personal and financial costs to those involved (you may need to get information from a lawyer about the likely costs of going to court and how long that might take).

## TIPS FOR ATTENDING MEDIATION

1. Set aside time to see the mediation through (eg, make sure you don't have children to collect, you have more than 3 hours of parking, you have the whole day available and you are prepared to turn off your mobile phone).
2. Have all the information to make an informed decision (eg, do you need figures from the accountant or details from another expert? Get those details before mediation or make sure the expert is available on the phone).
3. Have authority to make a final decision on the organisation's behalf, or bring along someone who does.



# What happens during the mediation?

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## Before mediation

Usually the mediator telephones each party separately and:

- outlines the process for the mediation and the mediator's role
- talks to you about costs (if any) and how these will be paid
- explains how mediation can be suspended or terminated
- talks to you about confidentiality and explains any limits on confidentiality
- gives you a copy of the Australian National Mediator Practice Standards
- gives you a copy of a mediation agreement which all parties to the mediation will be required to sign, and
- discusses the venue and rough timing for the day.

## During mediation

Usually, the mediator meets briefly with the participants separately and then brings them together to:

- give participants a chance to explain their side of the dispute, and
- guide participants through discussions about the issues.

The mediator will not:

- advise you – even if the mediator is a lawyer experienced in the area
- pressure you to accept any proposed outcome, or
- pressure you to make any particular decision.

# What if mediation doesn't work?

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If mediation doesn't result in an agreement, your dispute continues. If you don't already have it, you might need legal advice about further options, including going to court.

If your dispute is within a NSW incorporated association, go to our fact sheet: 'Going to court about an internal dispute' at [www.nfplaw.org.au/internalconflict](http://www.nfplaw.org.au/internalconflict).

Other types of alternative dispute resolution (**ADR**) may be worth considering, depending on your dispute.

## Conciliation

In conciliation the participants identify the disputed issues, develop options, consider alternatives and try to reach agreement with the assistance of an impartial conciliator.

Unlike in mediation, the conciliator may advise on the content of the dispute or how to resolve it and make suggestions for terms of agreement, give expert advice on the agreement, and actively encourage the participants to agree.

## Arbitration

In arbitration two or more participants refer their dispute to an independent third person (the arbitrator). The arbitrator decides the outcome and their decision is binding, like a judge's decision. It is important to understand that if you do not agree with the arbitrator's decision, there are only very limited ways that you can appeal it to a Court. An arbitrator's decision is usually reached much more quickly than a judge will deliver it.

A small arbitration might be heard just on the basis of written submissions but a bigger case might involve evidence and cross-examination.

In arbitration, the parties pay for the arbitrator and usually also the costs of the venue at which the arbitration occurs.

## Other kinds of ADR

The National Alternative Dispute Resolution Advisory Council has information on a range of other ADR approaches – go to the [National Alternative Dispute Resolution Advisory Council \(NADRAC\) website](#).

# Resources

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## Related Not-for-profit Law Resources

The Not-for-profit Law Information Hub has further resources on the following topics:

- ✔ [Disputes](#)
- ✔ [Secretary's Guide](#)

## NSW Government

- ✔ [Community Justice Centres NSW](#)

A free dispute resolution service funded by the NSW Government.

## Related Resources

- ✔ [LEADR & Institute of Arbitrators and Mediators Australia](#) (IAMA)

The Institute of Arbitrators and Mediators Australia, now joined with LEADR, is a national, independent arbitration and mediation service. Ph: (02) 9251 3366 or 1800 651 650.

- ✔ [District Court of NSW](#)

This website explains ADR processes used in District Court proceedings.

- ✔ [Law Society of NSW](#)

The Law Society of NSW is the professional membership association for NSW solicitors and offers a mediation program to assist people wishing to resolve a dispute by participating in mediation. The Law Society appoints an independent and experienced solicitor to mediate disputes. The Law Society's website also lists some other organisations that offer mediation services.

- ✔ [Bar Association of NSW](#)

The Bar Association of NSW is the professional membership association for NSW barristers and offers members of the public access to barristers trained in mediation and other ADR processes who can be engaged to act as a mediator.

- ✔ [National Alternative Dispute Resolution Advisory Council](#) (NADRAC)

NADRAC is an independent body that provides policy advice to the Australian Attorney-General on the development of ADR. The Council also promotes the use of dispute resolution in Australia. Ph: (02) 6141 3222.

- ✔ [NSW Law Access](#)

NSW Law Access is a free, government service that provides legal information, referrals and in some cases advice for people who have a legal problem in NSW. Its website contains links to free publications that may help you resolve common disputes. Ph: 1300 888 529.

A Not-for-profit Law Information Hub resource. Access more resources at [www.nfplaw.org.au](http://www.nfplaw.org.au)

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