

# Using mediation to resolve conflicts and disputes

Legal information for community organisations

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## This fact sheet covers:

- ▶ what mediation is 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?

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

### 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 (for example, 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 can't 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, it's still important to 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 can't, 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 to 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, time-consuming 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 75% of the disputes that come to them are resolved at mediation and the NSW Small Business Commissioner reports that almost 94% of matters referred to it for mediation are resolved before a court or tribunal decision.

In Victoria, the Victorian Dispute Resolution Settlement Centre reports that 85% of the disputes that come to them are resolved at mediation, and that 86% of their clients are very satisfied with their services.



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 that no one will be satisfied with the result).

It's 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 that everyone is clear on the agreement, and makes the agreement more likely to work. You need to ensure that people who have the authority to sign such an agreement on behalf of your organisation are at the mediation.

**We have set out details of where you can locate mediation services in your state or territory in the resources section at the end of this fact sheet.**

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

Mediation can be free in certain circumstances (see the table above for some examples of when free mediation may be available).

If not, then the participants usually share the costs of the mediation. The standard rates are between \$1,500 and \$5,500 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 and make sure the mediator puts this in writing before the mediation begins.



### Tip

If you think this sounds expensive, think about how much more it will cost to go to court.

In a lower court, a party's costs can be around \$6,000 - \$15,000 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. In contrast, one day is the standard length for mediation (and sometimes less), although the cost and length of a mediation can vary depending on the complexity and subject matter of the dispute.

## What kinds of disputes can be mediated?

Almost all disputes are appropriate for mediation.

Even if you decide to bypass mediation and start 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 before mediation begins.

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 to a mediation, can end the mediation at any time if they think it is no longer a useful process. However, it's important to bring an honest and genuine approach when trying to settle the dispute through mediation. In particular, where your rules or constitution require that the parties attempt to settle the dispute 'in good faith', simply attending a mediation without genuinely attempting to resolve the matter, or ending the mediation as soon as it commences, would not satisfy this requirement.

## 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 an incorporated association or company limited by guarantee, read and follow your organisation's rules or constitution (as well as any relevant policies and procedures) – there may be requirements about choosing a mediator in these circumstances
- if the dispute involves terms of employment or a volunteer, check your policies and procedures and the relevant terms of any employment contract or volunteer agreement (if any), or
- if your organisation is arguing over the terms of a contract (for example, a lease), read the contract and find the dispute resolution clause, then follow what it says about choosing a mediator



## Examples

When you are checking what the rules or agreement say, you might find words like this

### **(from the New South Wales 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.’

### **(from the Victorian model rules for incorporated associations) –**

‘The parties to a dispute must attempt to resolve the dispute between themselves within 14 days of the dispute coming to the attention of each party.... If the parties to a dispute are unable to resolve the dispute between themselves within the time required ... the parties must within 10 days —

- (a) notify the [Association’s] Committee of the dispute; and
- (b) agree to or request the appointment of a mediator; and
- (c) attempt in good faith to settle the dispute by mediation.’

There are organisations listed under the resources section at the end of this fact sheet that can help you 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 under the National Mediator Accreditation System and do you comply with the Practice Standards and Approval Standards of the Australian National Mediator Standards?
- what is your background, areas of expertise and experience?
- what are your fees?



## Tip

It’s recommended that you choose a mediator accredited under the National Mediator Accreditation System. The Australian National Mediator 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, ‘resolving the dispute’ is 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 (for example, make sure you don't have children to collect, you have more than three 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 (for example, do you need figures from an 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?

### 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 National Mediator Accreditation System Approval and 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?

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 an incorporated association, go to [our webpage on internal conflict](#).

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 arbitration process is private and can be confidential (if the parties agree). The arbitrator decides the outcome and their decision is binding, like a judge's decision.

It's 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

Further information on a range of other ADR approaches can be found on the [Attorney-General's department website](#).



# Resources

## Not-for-profit Law resources

### ► [Disputes and Conflict](#)

This section features information on internal conflict, mediation, going to court, external conflict and criminal conduct.

### ► [Rules and Constitution](#)

This webpage has information on organisational rules and changing constitutions.

## Initial contact points for mediation services

State or territory	Mediation services
<b>New South Wales</b>	<a href="#">Community Justice Centres</a> provide free mediation services in NSW. Other providers of mediation services in NSW include the <a href="#">Law Society of NSW</a> and <a href="#">BarADR</a> offered by the Bar Association of <a href="#">NSW</a> .
<b>Victoria</b>	The <a href="#">Dispute Settlement Centre of Victoria</a> provides free mediation services for many Victorian not-for-profit community organisations.  The service is funded by the Victorian Government and its role specifically includes helping to resolve disputes within committees, clubs or incorporated associations. Another provider of mediation services in Victoria is the <a href="#">Victorian Bar association</a> . The <a href="#">Law Institute of Victoria</a> also offers mediation resources.
<b>ACT</b>	The <a href="#">Conflict Resolution Service</a> is Canberra's leading provider of community dispute resolution services in the ACT. The service is free for low-income earners.
<b>Queensland</b>	The <a href="#">Dispute Resolution Branch (DRB)</a> of the Queensland Department of Justice offers a mediation service. In most cases, it is free to take part in mediation although the DRB charges a fee for workplace mediations. The <a href="#">Queensland Law Society</a> also offers mediation services.
<b>South Australia</b>	The <a href="#">Southern Community Justice Centre</a> , incorporating Community Mediation Services, provides a number of different legal and Alternative Dispute Resolution (ADR) services to people, families and communities throughout South Australia.  Community Mediation Services specialises in neighbourhood, community and other civil disputes through the application of ADR processes and is the only service in South Australia which provides free ADR services specialising in neighbourhood and community disputes. The <a href="#">Law Society of South Australia</a> also offers mediation resources.
<b>Tasmania</b>	The <a href="#">Legal Aid Commission of Tasmania</a> provides a comprehensive list of private, non-government and government mediation services. Mediation and dispute resolution resources relating to building and construction, energy, fair trading, retail tenancies and neighbourhood disputes about plants (among other things) can be found at the <a href="#">Tasmanian Government's Department of Justice website</a> .





The Legal Aid Commission of Tasmania also offers a free walk in legal advice service while the [Law Society of Tasmania](#) offers mediation services.

**NT**

The [Community Justice Centre](#) was established to provide all Northern Territorians with a confidential, timely and cost-effective means of addressing conflict outside the more formal justice system. Services provided by the Centre include providing conflict resolution processes for the early resolution of disputes and empowering clients to identify and actively resolve conflict across a range of dispute areas.

**Western Australia**

The [Citizen Advice Bureau \(CAB\)](#) offers a low-cost Community Mediation Service where parties in a dispute can meet with trained mediators to negotiate a fair, workable solution. The CAB can deal with the following categories of community disputes: dividing fences; encroaching roots and branches; dog ownership; harassment and public nuisance disputes. The [Law Society of Western Australia](#) also offers mediation resources.

## Related Resources

### ► [Resolution Institute](#)

The Resolution Institute (formerly the merged organisations known as the Institute of Arbitrators and Mediators Australia and LEADR) is a national, independent community of mediators, arbitrators, adjudicators, restorative justice practitioners and other dispute resolution professionals.

### ► Lower Courts (where mediation services are available)

State	Court
New South Wales	• <a href="#">District Court mediation</a>
Victoria	• <a href="#">Magistrates' Court of Victoria civil mediation program</a>
ACT	• <a href="#">Magistrates Court</a>
Queensland	• <a href="#">Queensland courts</a>
South Australia	• <a href="#">Magistrates Court mediation</a>
Tasmania	• <a href="#">Magistrates Court mediation</a>
Western Australia	• <a href="#">District Court mediation</a>

### ► Free Legal Resources for the other states and territories

State	Court
New South Wales	• <a href="#">NSW Law Access</a>
Victoria	• <a href="#">Victoria Law Foundation</a>
South Australia	• <a href="#">Legal Services Commission of South Australia</a>
Western Australia	• <a href="#">Legal Aid WA</a>



<b>Queensland</b>	<ul style="list-style-type: none"><li>• <a href="#">LawRight</a></li></ul>
<b>Tasmania</b>	<ul style="list-style-type: none"><li>• <a href="#">Legal Aid Tasmania</a></li></ul>
<b>ACT</b>	<ul style="list-style-type: none"><li>• <a href="#">ACT Law Society</a></li><li>• <a href="#">Legal Aid ACT</a></li></ul>
<b>NT</b>	<ul style="list-style-type: none"><li>• <a href="#">LawInfo Northern Territory</a></li><li>• <a href="#">Northern Territory Legal Aid Commission</a></li><li>• <a href="#">Law Society Northern Territory</a></li></ul>