

Using mediation to resolve conflicts and disputes

Legal information for community organisations

This fact sheet covers:

- ▶ what is mediation?
- ▶ the benefits of mediation
- ▶ 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 happens if the dispute is not resolved at mediation



Note

This fact sheet provides general information about using mediation to resolve conflicts and disputes. This information is intended as a guide only and is not legal advice. If you or your organisation has a specific legal issue, you should seek legal advice before deciding what to do.

Please refer to [the full disclaimer](#) that applies to this fact sheet.

This fact sheet will help you understand how mediation can assist your organisation to resolve disputes (and avoid court unless it's absolutely necessary).

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 a process by which a neutral third party (the mediator) helps parties in a dispute to negotiate an agreement to resolve that dispute.

It is an alternative to going to court and is normally cheaper, quicker and less formal



Mediation is a common feature of the Australian dispute resolution landscape. Even if you start legal action in a court, the judge will sometimes refer the dispute to mediation before they hear the case.



Note

A key part of a successful mediation is that all parties approach it with an open, honest and genuine approach to settling their dispute through mediation.

Some organisations' rules or constitution require that parties attempt to settle the dispute 'in good faith'. This is a meaningful obligation for all parties and represents the minimum that a mediator is entitled to expect from parties attending a mediation. Simply attending a mediation without genuinely attempting to resolve the dispute, or ending the mediation as soon as it starts, would not be a 'good faith' attempt to resolve the dispute.

In mediation, the parties in dispute meet in the presence of the mediator, an independent and experienced individual, who assists the parties to:

- identify any common ground
- assess resolution options, and
- negotiate an agreement to resolve the dispute

The mediator guides the process and assists the parties but does not impose a resolution or outcome on the parties.

In guiding the mediation process, the mediator:

- facilitates respectful and constructive communication between the parties
- promotes an understanding of each party's interests
- assists the parties to identify the issues in dispute
- helps the parties avoid dwelling on any past issues
- assists the parties to explore the important issues in relation to their present and future needs
- helps the parties to make decisions about the future, and
- uses problem-solving techniques to help the parties reach their own agreement

The benefits of mediation

Mediation offers many benefits over traditional court processes, including:

- **time** – ordinarily disputes can be resolved more quickly and efficiently through mediation
- **cost** – mediation is a low-cost option when compared to going to court. The costs of preparing for and running even a simple trial in court can be significant, particularly as the unsuccessful party will often be ordered to pay the successful party's costs. Any costs of mediation are likely to be much lower.
- **flexibility** – courts have to follow certain procedural rules and can only make decisions that are consistent with the law, which means that one party will generally be happy with the outcome and the other will be dissatisfied. Mediation can be adapted to meet the specific needs of the parties and the characteristics of the dispute, which means the outcome can be acceptable to all parties.
- **confidentiality** – mediation is a private process and information disclosed by a party in the mediation is normally not able to be used by another party in court if mediation is unsuccessful
- **satisfaction** – because the parties decide and agree on the outcome of their dispute, they are more likely to be satisfied with the result and to comply with what has been agreed
- **finality** – often once an agreement is reached through mediation parties will enter a settlement agreement which can avoid future litigation of the same issue



Note

You might be worried that the information shared in mediation may 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'. If the parties cannot agree to an outcome at the mediation, a court case can start (or continue) without the parties worrying about having 'given away' anything that another party will use against them in court.

It is still important to be careful about what you say because once you tell the other party about something, they may be able to verify that information in another way, and they can then use that information in court if no resolution is reached at the mediation. However, they cannot say in court that you gave or verified the information during a mediation.

The only exception to this rule is that, in limited circumstances, the mediator is legally obliged to disclose certain matters that arise in the mediation. The mediator will tell you at the start what they can't keep confidential.

The timeframe for mediation

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

A court hearing before a judge usually takes more than a day and costs a lot of money. It can take months, or even years, to have a case heard and finalised in court.

The formality of mediation

Mediation is much less formal than going to court. There are no legal forms and in some circumstances there aren't even any fees.

Mediation is more flexible than the court processes. The mediator and parties can adapt the process to meet the parties' needs and the characteristics of the dispute. For example, if the parties feel uncomfortable being in the same room, the mediation can be structured so that each party has their own space and the mediator moves between the parties. It can also mean the parties and mediator work out times and places to mediate to suit everyone.

Courts can only resolve the dispute in front of them in accordance with the law, which limits the outcomes available to a court and usually means that while one party will be happy with the outcome, the other party won't be. By contrast, mediation aims to achieve an outcome that is acceptable to both parties and can provide outcomes that go beyond what is available under the law.

The cost of mediation

Some mediation services are free. If mediation isn't free, the parties usually share the costs of the mediation. The standard rates are between \$1,500 and \$5,500 per day.

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, consider 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, which doesn't include the costs of preparing for trial. A hearing often takes more than one day.

In contrast, one day is the standard length for mediation (although the cost and length of a mediation can vary depending on the complexity and subject matter of the dispute).



Suitable disputes for mediation

Because of its flexibility, almost all disputes are appropriate for mediation. This includes:

- manufacturer and supplier disputes
- business disputes
- employment and workplace conflict, including wrongful dismissal
- tort, personal injury and professional negligence disputes
- construction disputes
- contract disputes
- estate disputes
- corporate commercial disputes
- environmental disputes
- real property and real estate disputes
- class actions
- insurance disputes, and
- family disputes

Mediation may be unsuitable if:

- you do not feel safe when communicating with the other parties, or
- there is a power imbalance

Mediation is fair

Mediation is designed to create a level playing field for all parties.

It is part of the mediator's job to:

- protect each party in the process
- make sure each party understands the issues
- make sure each party understands the available options and the pros and cons of each option
- make sure each party has a say, and
- make sure that one party doesn't take advantage of another



Caution

If there is a history of violence or intimidation between parties 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.



The mediator

The mediator controls the process, while the parties control the 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.

Choosing a mediator is 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 in.

The mediator should not:

- take sides
- provide you with legal advice — even if the mediator is a lawyer experienced in the area
- pressure you to accept any proposed outcome, or
- pressure you to make a particular decision

Things to consider when selecting a mediator:

- 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), and
- 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 constitution for incorporated associations) –**

The following disputes must be referred to a Community Justice Centre within the meaning of the *Community Justice Centres Act 1983* for mediation:

- a dispute between two or more members of the association, but only if the dispute is between the members in their capacity as members, or
- a dispute between 1 or more members and the association

(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:

- notify the [Association's] Committee of the dispute
- agree to or request the appointment of a mediator, and
- attempt in good faith to settle the dispute by mediation

We have listed organisations at the end of this fact sheet that can help you find a mediator.

Before you engage someone 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?
- what is your approach to mediation?



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.

Also make sure the mediator you choose has training and experience relevant to your dispute.

If English is not your and the other party to the dispute's first language, consider whether you can find a mediator who can communicate with you in your first language.

Preparing for mediation

To prepare, think about what's important to your organisation. Usually, 'resolving the dispute' is near the top of the list!

When you are preparing, think about:

- what you think the dispute 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?
- 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

- Set aside time to see the mediation through and expect to stay for the full length of the mediation (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).
- 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).
- Have authority to make a final decision on the organisation's behalf, or bring along someone who does.

The mediation process

Before mediation

Usually the mediator speaks to each party separately and:

- outlines the process for the mediation and their role as mediator
- talks about costs (if any) and how these will be paid
- explains how mediation can be suspended or terminated
- talks about confidentiality and explains any limits on confidentiality
- provides a copy of the [National Mediator Accreditation System Approval and Practice Standards](#)



- provides a copy of a mediation agreement which all parties to the mediation will be required to sign, and
- discusses the venue and timing for the day

Sometimes, the parties may exchange 'mediation papers', which set out the background to the dispute and the key issues, before the mediation.

During mediation

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

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

The success rate of mediation

Organisations that offer mediation services report that most disputes are resolved at mediation.

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). For example, [Community Justice Centres NSW](#) report that about 80% of the disputes that are referred to them are resolved at mediation.

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 that everyone is clear on the agreement, which 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.

If the parties are in court proceedings, but the dispute is resolved by mediation, the parties should formally notify the Court that the matter does not need to proceed to a hearing.

If a dispute remains unresolved

If mediation does not resolve the dispute, it can still assist to narrow the issues between the parties. For example, the parties could agree to resolve four out of five issues in dispute at mediation, which would mean that there would only be one outstanding issue to resolve in court proceedings. This will save time and money in the court proceedings.

However, if the mediation does not fully resolve the dispute, you may need to obtain legal advice about further options, including going to court. The mediator will advise the Court that the dispute was unable to be settled.

One issue to consider is that there are other types of alternative dispute resolution (**ADR**) processes that may be suitable in relation to your dispute. These include:

- conciliation, and
- arbitration



For more information, see

- the [Attorney-General's department website](#) (a range of other ADR approaches are provided)
- the [Resolution Institute](#) website. The Resolution Institute (formerly the merged organisations – 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

If your dispute is within an incorporated association, go to [our webpage on disputes with members](#).



Initial contact points for mediation services

Details of contact points for mediation services are provided in the table below.

State or territory	Mediation services
New South Wales	<p>Community Justice Centres provide free mediation services in NSW.</p> <p>Other providers of mediation services in NSW include the Law Society of NSW, BarADR offered by the Bar Association of NSW, Relationships Australia NSW, Anglicare, Catholic Care and Uniting</p>
Victoria	<p>The Dispute Settlement Centre of Victoria provides free mediation services for many Victorian not-for-profit community organisations.</p> <p>The service is funded by the Victorian Government and its role specifically includes helping to resolve disputes within committees, clubs or incorporated associations. The Victorian Bar association and Victoria Legal Aid also provide mediation services in Victoria.</p>
ACT	<p>The Conflict Resolution Service is Canberra's leading provider of community dispute resolution services in the ACT. The service is free for low-income earners. Other providers of mediation services in the ACT include ACT Legal Aid, ACT Law Society and the ACT Bar Association.</p>
Queensland	<p>The Dispute Resolution Branch (DRB) 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 Queensland Law Society, Legal Aid Queensland and the Bar Association of Queensland also offer mediation services.</p>
South Australia	<p>Uniting Communities supports South Australians in providing mediation services to assist with disputes at an early stage. This service is free if one of the parties has a low income or no income.</p> <p>The Law Society of South Australia and the Legal Services Commission of South Australia also offer mediation resources.</p>
Tasmania	<p>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 Tasmanian Government's Department of Justice website.</p> <p>The Legal Aid Commission of Tasmania also offers a free walk in legal advice service while the Law Society of Tasmania provides details of members who provide mediation services.</p>
NT	<p>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.</p> <p>Other mediation service providers include Northern Territory Legal Aid Commission, the Law Society of NT and Northern Territory Bar Association.</p>
Western Australia	<p>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.</p> <p>The Law Society of Western Australia also offers mediation resources.</p>



Details of lower courts (where mediation services are available) are provided in the table below.

State	Court
New South Wales	District Court mediation
Victoria	Magistrates' Court of Victoria civil mediation program
ACT	Magistrates Court
Queensland	Queensland courts
South Australia	Magistrates Court Mediation
Tasmania	Magistrates Court mediation
Western Australia	District Court mediation