

### Introduction and Background

At the request of the Access to Justice Expert Group, a review of mediation services has been undertaken by Neville Benbow, Chief Executive Officer of The Law Society of Jersey, in consultation with Jersey Citizens Advice, Jersey Legal Information Board, Family Mediation Jersey and the Master of the Royal Court.

The purpose of the review is to define mediation (specifically in relation to its applicability and usage) and to examine (in respect of Jersey):

- Types of mediation available
- Usage of such mediation
- Access to mediation
- The cost of mediation
- Benefits of mediation

The report concludes with a number of steps (and areas of further exploration) for consideration to improve the accessibility and use of mediation in Jersey, so as to improve access to justice.

### What is mediation?

**Mediation** n. the attempt to settle a legal dispute through active participation of a third party (mediator) who works to find points of agreement and make those in conflict agree on a fair result. Mediation differs from arbitration, in which the third party (arbitrator) acts much like a judge in an out-of-court, less formal setting but does not actively participate in the discussion. Mediation has become very common in trying to resolve domestic and family disputes (divorce, child custody, contact) and is often proposed by the judge in such cases. Mediation also has become more frequent in contract and civil damage cases. The cost of mediation, even where professional mediators or lawyers are utilised, tends to be lower than the financial cost of court proceedings and may achieve early settlement and an end to anxiety. However, mediation does not always result in a settlement.

Exploring this further, mediation, as used in law, is a form of alternative dispute resolution (ADR), a way of resolving disputes between two or more parties with concrete effects. Typically, a third party, the mediator, assists the parties to negotiate a settlement. Most disputes – whether they are commercial, legal, employment, community or family matters – are capable of being resolved through mediation, provided that the parties to the mediation are willing to consider the issues and participate in a process overseen by a trained intermediary, who is independent of the parties and has no vested interest.

Mediation is the attempt to help parties in a disagreement to hear one another, to minimise the harm that can come from disagreement (e.g. hostility or ‘demonising’ of the other parties) to maximise any area of agreement, and to find a way of preventing the areas of disagreement from interfering with the process of seeking a compromise or mutually agreed outcome.

Mediation has a structure, timetable and dynamics that "ordinary" negotiation lacks. The process is private and confidential and will generally be covered by confidentiality agreements. While outcomes (agreements) are capable of being enforced by law, discussions and other evidence adduced during mediations are privileged and may not be used in court proceedings. Participation is typically voluntary. The mediator acts as a neutral third party and facilitates rather than directs the process. Mediation can be used to resolve disputes of any magnitude.

Mediators use various techniques to open, or improve, dialogue and empathy between parties in dispute, aiming to help the parties reach an agreement.

## Types of mediation

The principal types of mediation services in Jersey are as follows:

- Petty Debts Court mediation
- Community mediation
- Family mediation

In addition to these services, mediation is undertaken through lawyers or professional mediators in respect of civil and commercial disputes (as a means of alternative dispute resolution to avoid costly court proceedings). It is not proposed to include this discrete activity, which is confidential and in respect of which no information is publicly available, within the scope of this report.

It is noted, however, that the Royal Court of Jersey has the power to stay proceedings, in appropriate cases, to allow parties to undertake mediation to resolve issues, although it cannot compel parties to mediate, the key principle of mediation being that it is a voluntary rather than forced activity.

### 1. Petty Debts Court Mediation

Small claims mediation was first utilised in Jersey as a pilot in the Petty Debts Court (PDC) in 2003, before being formally introduced in 2004 by a combination of an amendment to the procedural rules of the PDC and a new Practice Direction.

Where a claim (currently limited to a monetary value of £10,000) is disputed in the PDC, the Court has the power, under Rule 28 of the Petty Debts Court Rules 2004 to adjourn the matter for mediation. In the period 2011-2014, 93% of disputed cases were referred to mediation. All mediations are undertaken by the Master of the Royal Court.

While the intention is that mediation is compulsory, if a party wishes to argue the claim before the Court and does not wish to attend mediation, it remains entitled to do so, with the right to litigate preserved. However, when a matter is referred to mediation, the parties are made aware that if a party does not appear at the mediation, then a claim may be dismissed or judgment given in default.

If a mediation does not result in a settlement, then the mediator will refer the matter back to the Court.

The success rate of PDC mediation is between 65-82% (82% in 2015) of cases referred to mediation. On average, around 150 mediations take place annually, which represents less than 5% of new claims issued in the PDC each year. Given that 3,500 new claims are lodged each year, it is evident that relatively few claims are disputed.

Significantly, the service is a free service. While parties can file in advance any documents upon which they wish to rely or refer to or to produce a written statement of their position, they do not have to do so. Mediations are generally an hour to an hour and a half in duration.

The process followed is no different from any other form of mediation, being a five-stage process: Preparation, Opening the mediation, Exploration, Negotiation and Conclusion. The attendees are generally without legal representation but may be accompanied by a friend and/or interpreter in some cases.

Most of the disputes subject to mediation are not complex. The key types of disputes that arise are as follows:

- Landlord and tenant disputes (usually over deposits and repairs, although disputes over deposits are expected to reduce following introduction of the Deposit Protection Scheme in November 2015)
- Minor road traffic claims

- Building disputes
- Claims for arrears of maintenance following a divorce settlement
- Unpaid loans
- Disputed bills
- Neighbour disputes
- Employment disputes

## 2. Community Mediation

Community mediation was first undertaken as an initiative between the Jersey Legal Information Board and Jersey Citizens Advice. The services commenced on 1 April 2009.

The purpose of community mediation is to resolve small scale disputes, which may or may not be of a financial nature, arising in the community between neighbours and friends and between those who do business together.

The key types of disputes that are subject to community mediation are as follows:

- Small financial disputes
- Discrimination law breaches
- Disputes between neighbours such as boundary disagreements
- Parking infringements
- Overhanging trees and hedges
- Disputes between landlords and tenants over tenancy agreements and deposits
- Other disagreements of a minor nature e.g. over the quality of workmanship and service

If a dispute involves a sum of money, then it must be an amount of less than £10,000.

Mediation sessions are confidential and take place at the offices of Jersey Citizens Advice by appointment. Sessions generally last no longer than 2 hours.

Trained mediators – who are not paid for their time and are selected from a panel of volunteer mediators – are available to help parties to a dispute to discuss their problems and help them to try and reach an agreement of their own making.

All parties to the dispute must agree to refer it to mediation.

If one of the parties involved in the dispute is a company it will only be possible to arrange a mediation if either the beneficial owner of the company or a representative of the company, who has the authority to make a decision and agree a settlement on behalf of the company, will be available to attend the mediation.

Some disputes may be referred to other appropriate authorities. Employment disputes may be referred to the Jersey Advisory and Conciliation Service while family disputes may be referred on to Family Mediation Jersey.

Community mediation provides an effective opportunity for disputes to be resolved, at limited cost, without having to go to Court or to engage a lawyer.

Mediators do not decide the outcome of the mediation. Their role is to help the parties reach their own agreement. If an agreement is reached, the mediator will write an Agreement document for both the parties to sign at the end of the mediation. Once signed, the Agreement is legally binding.

In the event that agreement is not reached, matters can generally only be resolved by reference to the Court (Petty Debts Court or Royal Court, depending on the nature of the matter).

### 3. Family Mediation

The purpose of Family Mediation Jersey (FMJ) is to provide a means of helping separating or divorced couples try to resolve issues surrounding childcare and contact, finances and property, without having to resort to the court process.

Couples work with trained mediators to discuss their problems and differences to try and find solutions through more effective communication and a joint decision making process.

FMJ mediators are professionally trained in family mediation and conflict resolution. All are affiliated to the National Family Mediation Service (NFM), one of the founding members of the Family Mediation Council. The Council regulates standards of practice in family mediation.

Family Mediation can assist the following groups of people:

- Couples, with or without children.
- Married or unmarried, same sex couples, whether or not in a civil partnership.
- Members of the extended family e.g. grandparents for example, may be finding it difficult to see their grandchildren.
- People who are finding it hard to talk to their ex-partner directly about their children or financial matters.

Typical issues discussed at mediations include:

- Where the children will live when parents separate.
- How the children will share their time between their parents.
- How much children will see of members of their extended family.
- How parents will communicate with one another in the future about their children.
- How property, pensions, other financial assets and debts are to be divided up.
- How child support is to be arranged.
- Whether any agreements reached will be formalised into a Separation Agreement or whether the Court will be asked to make a consent order in proceedings.

Referral to FMJ is often made (by the Family Court) even where court proceedings have commenced, to establish whether issues can be resolved through mediation, with mutual agreement between parties without the need for intervention by, and the imposition of decisions of, the court. In complex cases, family lawyers will often recommend lawyer-led mediation or Family Dispute Resolution (FDR), with the use of UK mediation specialist. Such mediations last up to a day and while they may be expensive, the costs are generally lower than the alternative of court proceedings.

#### Usage of mediation

##### 1. Petty Debts Court mediation

On average, around 150 PDC mediations take place annually, which represents less than 5% of new claims issued in the PDC each year. Given that 3,500 new claims are lodged each year, it is evident that relatively few claims are disputed.

##### 2. Community mediation

Use of community mediation is currently very low at around 8 mediations per annum. Take up is surprisingly low in light of the limited cost associated with the service and the benefits that arise.

The success rate of mediations undertaken is extremely high, with very few instances of agreement not being reached.

### 3. Family mediation

In 2015, 165 individuals explored (in individual sessions) the potential to undertake mediation through Family Mediation Jersey, with 56 families (113 individuals) ultimately proceeding with mediation to resolve differences; 60% for both finance issues and child contact, 30% for child contact issues only and 10% for financial issues. 136 mediation sessions (excluding the 165 exploratory intake sessions) were conducted in 2015. While the decision whether to proceed with mediation generally rests with the individuals concerned, in a small number of cases, individuals are not considered suitable for mediation.

#### Access to mediation

It is suggested that mediation services, which are applicable to a wide variety of circumstances and needs, are already in place, with sufficient capacity to meet current demand. There is no evidence to suggest that individuals are currently unable to access, or afford access to, mediation services in Jersey.

Indeed, it is felt that there is sufficient capacity (based on available resources, including voluntary mediators) to meet estimated latent demand in respect of family and community mediation.

In relation to PDC mediation, it is noted that there are proposals in place to consider raising the PDC threshold to £30,000 (from the current level of £10,000). Given the expected increase in volumes and an increase in the complexity of issues which are subject to mediation (with an expectation that each 'higher value' mediation will take longer than the current time allocation of 1- 1.5 hours), it is not expected that the current time allocation by the Master of the Royal Court (40 days per annum) for mediations, will be sufficient. As such, an additional mediator may be required for Petty Debt Court mediations, although it is difficult to determine, at this stage, the extent of the resource requirement.

However, it is considered that, notwithstanding the availability of mediation services, in key areas, public awareness in relation to mediation (including the benefits) is relatively low, particularly in respect of the use of Community Mediation and the potential ability of the general public, at minimal cost, to resolve generally low value, but often highly emotional, issues. It is clear that significant benefit would be derived from increasing such public awareness. In this regard, an awareness programme in relation to Community Mediation has been developed and is in the process of being implemented.

Family Mediation Jersey currently has sufficient capacity to potentially double the number of referrals it receives. It is noted that the Same-Sex Marriage, Divorce and Dissolution Proposal (P77/2015), lodged by the Chief Minister on 14 July 2015 and approved by the States Assembly on 22 September 2015, included provision that "new legislation should be brought forward for approval to allow for the introduction of a system of divorce and dissolution making it a legal requirement to access and use mediation services subject to appropriate safeguards and human rights considerations".

While introduction of legislation to effectively make mediation in relation to divorce compulsory would have the effect of increasing the use of family mediation services at a stroke, it needs to be recognised that a fundamental principle of mediation is the voluntary nature of the process, such that, unless appropriately positioned, the propensity of family mediation to lead to a successful outcome may be reduced significantly. However, given the benefits of mediation at the appropriate stage of a divorce or family break-up, the promotion of family mediation services should, arguably, be increasingly explored by family lawyers, the family court and other stakeholders as part of an overall 'package' to reduce the financial and emotional impact (particularly in relation to children) associated with divorce.

## Cost of mediation

The cost of mediation varies considerably. It is not proposed to consider the cost of commercial mediation undertaken by lawyers or professional mediators, largely in relation to civil disputes, but to focus on the primary areas of mediation detailed in the report (i.e. Petty Debts Court Mediation, Community Mediation and Family Mediation).

### Petty Debts Court Mediation

PDC Mediation is a free service, with no costs payable by any party.

### Community Mediation

Community mediation is subject to a £20 charge per party to the dispute. The fee is non-refundable, even if the parties fail to reach an agreement. No additional fees are payable. Parties wishing to produce copies of any documents for a mediation will be responsible for their own costs.

### Family Mediation

Payment for mediation is on a sliding scale, according to income. Anyone earning less than £15,000 per annum or on income support will not be charged fees.

Fees are charged on a session basis, each session other than the intake session (for which no charge is made and at which the mediator will seek to understand the issues in dispute and determine suitability for mediation) are for up to an hour and a half.

Parties to family mediation will be assessed individually based on their individual net income with payment on the following basis:

Net income (after statutory deductions)	Percentage payable	Fee payable per person
Under £15,000 per annum	No charge	£0.00
£15,001 to £20,000	25%	£43.75
£20,001 to £30,000	50%	£87.50
£30,001 to £40,000	75%	£131.25
Over £40,000	100%	£175.00

As such, a couple who both earn £25,000 will each be liable for a fee of £87.50 per session. Mediations generally take between 1- 5 sessions.

Mediators are employed by Family Mediation Jersey on a zero hours contract basis and are paid a fee for undertaking mediations, irrespective of whether fees are paid by the parties to mediation.

Family Mediation Jersey is a not for profit organisation. It receives some financial support by way of grant from the Judicial Greffe and Health and Social Services Department.

### Benefits of mediation

The benefits of mediation include:

- a. Cost
- b. Confidentiality
- c. Control
- d. Compliance
- e. Mutuality
- f. Support

a. Cost

Mediation is generally completed at much lower cost – and much quicker – than the alternative of court proceedings. While a case in the hands of a lawyer or a court may take months or years to resolve, mediation usually achieves a resolution in a matter of hours. Taking less time means expending less money on hourly fees and costs. There is, however, no guarantee that mediation will lead to the resolution of issues which are subject to dispute.

b. Confidentiality

While court hearings are public, mediation remains strictly confidential. No one but the parties to the dispute and the mediator or mediators know what happened. Confidentiality in mediation has such importance that, in most cases, the legal system cannot force a mediator to testify in court as to the content or progress of mediation. Many mediators destroy their notes taken during a mediation once that mediation has finished. The only exceptions to such strict confidentiality usually involve child abuse or actual or threatened criminal acts.

c. Control

Mediation increases the control the parties have over the resolution. In a court case, the parties obtain a resolution, but control resides with the judge and the court. Often, a court cannot legally provide solutions that emerge in mediation. Thus, mediation is more likely to produce a result that is mutually agreeable for the parties.

d. Compliance

Because the result is attained by the parties working together and is mutually agreeable, compliance with the mediated agreement is usually high. This further reduces costs, because the parties do not have to employ a lawyer to force compliance with the agreement. The mediated agreement is, however, fully enforceable in a court of law.

e. Mutuality

Parties to mediation are typically ready to work mutually toward a resolution. In most circumstances the mere fact that parties are willing to mediate means that they are ready to "move" their position. The parties thus are more amenable to understanding the other party's side and work on underlying issues to the dispute. This has the added benefit of often preserving the relationship the parties had before the dispute.

f. Support

Mediators are trained in working with difficult situations. The mediator acts as a neutral facilitator and guides the parties through the process. The mediator helps the parties think "outside of the box" for possible solutions to the dispute, broadening the range of possible solutions.

## Summary and Recommendations

- While effective mediation services are available in Jersey to meet the core needs of the local community, the use of mediation, other than in respect of disputes dealt with in the Petty Debts Court, is relatively low.
- There is considered to be sufficient capacity within the mediation services that are currently available to meet the perceived latent demand across all types of disputes which are suitable for mediation, although an increase in the jurisdiction of the Petty Debts Court may result in some pressure on resources in that area.
- The availability of mediation, as an effective means of dispute resolution, particularly in relation to issues which are suitable for community mediation, is not well known. Improved public knowledge in relation to mediation is likely to improve public perception in relation to access to justice.
- Mediation, more often than not, leads to a successful conclusion, with individuals generally more satisfied with the outcome than resorting to court proceedings (particularly given the time delays in matters being considered, the stress associated with appearing in court and the costs incurred which, even in the event of a successful outcome, are not fully recoverable).
- The use of mediation is beneficial in reducing the impact (time and cost) on the court service.
- The cost of mediation services (other than commercial or lawyer-led mediation) is low and considered, generally, to be affordable, particularly when compared to the cost of court proceedings. (While not reviewed within the context of this report, although commercial or lawyer-led mediation costs may be significant, they are likely to be considerably lower than the costs associated with contested litigation.)
- Consideration should be given to aligning the cost of mediation services to create a level-playing field (albeit that access to mediation is not generally beyond the means of private individuals in Jersey). This may involve subsidy of family mediation services (replacing the Judicial Greffe grant with a formal subsidy on usage). It should be noted that, in England and Wales, family mediation is available, for eligible individuals, under the Legal Aid Scheme. As the Legal Aid Scheme is not publicly funded in Jersey, public money would be required to achieve parity with the approach in England and Wales.
- Greater use of mediation in Jersey should be advocated and promoted to enhance access to justice.
- Key stakeholders – Lawyers and other professionals, Jersey Advisory and Conciliation Service, Jersey Citizens Advice, Jersey Consumer Council and other agencies – should seek to promote the use of mediation as a cost-effective and timely means of alternative dispute resolution as a first step before consideration is given to referring a matter to the Court. Care does, however, need to be exercised to ensure that such an approach does not result in deadlines for certain actions (e.g. lodging an unfair dismissal claim) being missed or other steps compromised.
- A co-ordinated approach to the promotion of mediation across the various mediation channels is advocated (noting the proposals in train for promoting the use of Community Mediation).
- Compulsory mediation is not supported or recommended. Individuals should not be compelled to undertake mediation, although its use should be presented and recommended as an effective alternative to court proceedings. While the use of mediation in the Petty Debts Court is ostensibly compulsory, there are sufficient safeguards in place through which a dissenting party may insist that the matter be heard in court without reference to mediation. In relation to family matters, it may be feasible to require that consideration be given to mediation, perhaps as a condition before Legal Aid is granted, although care needs to be exercised (supported by effective safeguards) such that the voluntary nature of mediation is not compromised.