
**AUSTRALIAN NATIONAL MEDIATOR
STANDARDS**

**COMMENTARY ON APPROVAL
STANDARDS**

SEPTEMBER 2007

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Commentary on Approval Standards

Introduction

A number of submissions addressed general issues in the Approval Standards. Most comments were positive and directed at small changes that were designed to ensure that the accreditation system could be implemented in an effective manner. The revisions to the Standards documents addressed many of these concerns.

For example, the Association of Dispute Resolvers (LEADR) submission stated that:

“LEADR strongly supports national accreditation of mediators. Our recommendations are for the standard to be more flexible, expanded requirements for organisations wishing to be RMABs and the greater use of discretion by RMABs.”

Both the Institute of Arbitrators and Mediators Australia (IAMA) and the Victorian Association for Dispute Resolution (VADR) indicated that in the long term they would like to have accreditation standards that were developed for specific areas. For example, VADR stated

“Our long term view is that we would like to see standards developed to accredit ADR Practitioners who would be educated, trained, qualified, assessed, and accredited to provide a broad range of defined ADR services.”

Both VADR and IAMA also indicated that they would like to see an overarching implementation or accreditation body. These comments are separately addressed in the Framework document that accompanies the Standards. Other bodies such as the Dispute Settlement Centre of Victoria (DSCV) also supported “the move to create nationally recognised minimum standards for mediators and ADR providers”.

1 Application

- 1) These Approval Standards apply to any person who voluntarily seeks to be accredited under the National Mediator Accreditation System (‘the system’) to act as a mediator and assist two or more participants to manage, settle or resolve disputes or to form a future plan of action through a process of mediation. Practitioners who act in these roles are referred to in these Approval Standards as mediators.
- 2) The Approval Standards:
 - a) specify requirements for mediators seeking to obtain approval under the voluntary national accreditation system; and
 - b) define minimum qualifications and training; and

- c) assist in informing participants, prospective participants and others what qualifications and competencies can be expected of mediators
- 3) As a condition of ongoing approval, mediators must comply with the Practice Standards and seek re-approval in accordance with these Approval Standards every two years. These Approval Standards should be read in conjunction with the Practice Standards that apply to mediators.
- 4) Mediation can take place in all areas where decisions are made. For example, mediation is used in relation to commercial, community, workplace, environmental, construction, family, building, health and educational decision making. Mediation may be used where there is conflict or may be used to support future decision making. Mediators are drawn from diverse backgrounds and disciplines. Mediation may take place as a result of Court or Tribunal referral, pre-litigation schemes, through industry schemes, community-based schemes as well as through private referral, agency, self or other referral. These Approval Standards set out minimum voluntary accreditation requirements and recognise that some mediators who practice in particular areas, and/or with particular models, may choose to develop or comply with additional standards or requirements. Mediators may practice as 'solo' mediators or may co-mediate with another mediator.

Commentary

Most submissions indicated that it was important that the system be voluntary and a few submissions expressed the concern that if government (State or Federal) decided only to use mediators accredited under the scheme then the 'pool' of mediators could be limited. The Law Society of NSW noted, for example, that

"The Committee remains of the view that any national scheme should be a truly voluntary one as mandatory dual accreditation requirements will deter many experienced mediators from seeking national accreditation and deprive the Commonwealth of skilled lawyer mediators."

Some submissions commented upon the two yearly re accreditation requirement. The revised standards documents address these concerns by ensuring that Registered Mediation Accreditation Bodies (RMABs) retain discretion in terms of evidence required for re approval.

In this context, LEADR noted that

"Re- approval every two years could become a time consuming administrative process, both for mediators and for RMABs, especially if mediators have to re-present all the evidence listed in 3. "

The Victorian Bar also noted that the requirement to see re -approval every two years may be too onerous. The Victorian Bar noted that

"Requirement 1 (3) [in the original draft Standards] - requires mediators to "seek re-approval... every two years". It is noted that the Boulle Report states that "while there was some support for a re-accreditation requirement... the more preponderant view was that this should be subsumed under the CPD requirements" (p10, footnote 12).

The revised Standard, in accordance with LEADR's suggestion, ensures that this is not too onerous.

2 Definition of a Mediation Process

- 1) A mediation process is a process in which the participants, with the support of a mediator, identify issues, develop options, consider alternatives and make decisions about future actions and outcomes. The mediator acts as a third party to support participants to reach their own decision.
- 2) The mediator[s] may assist the participants to:
 - a) communicate with each other; and
 - b) identify, clarify and explore disputed issues; and
 - c) generate and evaluate options; and
 - d) consider alternative processes for bringing any dispute or conflict to a conclusion; and
 - e) reach an agreement or make a decision about how to move forward and/or enhance their communication in a way that addresses participants' mutual needs with respect to their individual interests based upon the principle of self determination.
- 3) Mediation processes are primarily facilitative processes. The mediator provides assistance in managing a process which supports the participants to make decisions about future actions and outcomes.
- 4) Some mediators may also use a 'blended' process that involves mediation and incorporates an 'advisory' component, or a process that involves the provision of expert information and advice, where it enhances the decision-making of the participants provided that the participants agree that such advice can be provided. Such processes may be defined as 'conciliation' or 'evaluative mediation.' Practitioners who manage such processes and provide expert advice are required to have appropriate expertise (see Section 5 (4) below) and obtain clear consent from the participants in respect of undertaking any 'blended' advisory process.
- 5) Mediation processes are a complement to, not a substitute for, the need for participants to obtain individual legal or other expert advice and support. Mediation processes may not be appropriate for all individuals or all circumstances.

Commentary

A number of submissions considered that the original wording in the Standards relating to the definition of mediation should be changed. Some changes were relatively minor to ensure that the definition was flexible enough to apply to a range of models including narrative and transformative mediation. These changes are reflected in the revised Standards.

Many individual mediators supported a broader description of mediation. For example, Alan Wein stated:

"I consider a wider definition of mediation, within a facilitative model, to be preferable in order that some of the fields of facilitation and conciliation are captured within the standards and flow on requirements. I understand the time pressures and political fallout, but I feel that this process, if implemented will be set for 5 years minimum before any significant review - so we need to get it as comprehensive as possible and watering down some aspects would leave many aspects of the profession uncertain and not covered by any national standard. The many Court appointed and legislative

mandated mediations appointed may not be covered under a restrictive narrow interpretation. “

Similarly, the Transformative Mediation Interest Group (TMIG) commented that:

“TMIG applauds the definition of mediation as a process ‘designed to maximise participants’ own decision making’ and the general recognition that settlement is not the only, or even preferred, outcome of a mediative process.”

Some organisations such as the Law Council of Australia considered as follows:

“The definition contains some recognition of the diversity of mediation processes with the inclusion of a reference to “blended” processes which involve the provision of advice. This recognition is essential for lawyer mediators who mediate in diverse areas of law, which may require the provision of advice, including some of the Family Dispute Resolution Programs provided by Legal Aid Commissions. While the Law Council suggests that most of the definition clauses be moved to the Practice Standard, it is important to recognise in the Approval Standard that some lawyer mediators seeking accreditation will be involved in “blended” processes.”

However, a concern that was expressed in many submissions related to what was perceived as the inclusion of an advisory model. For example, the Wollongong Mediators Forum Branch of the Community Justice Centres of NSW indicated that:

“Introducing a mediator ‘advisory’ role appears to move mediation:

- towards arbitration
- invokes loss of neutrality
- may assist one client to the detriment of the other.”

LEADR noted that:

“LEADR is very aware of the diversity of mediation practice. So while LEADR would prefer the definition of mediation to be as a facilitative process only, we understand the current need for acknowledgement of advisory processes. LEADR believes that “conciliation” is an existing label for processes in which the third party neutral both facilitates and advises and would support efforts to have these two processes better distinguished.”

For mediators, the inclusion of “advisory” processes may mean they are less rigorous in applying the discipline of facilitation. As well, those who are not qualified or are unwilling to offer advice may be perceived in the market as less suitable than their advising counterparts.

For clients a lack of clarity in nomenclature may result in confusion and lack of clarity about what to expect. This may lead to lower satisfaction with the process, and frustration by both clients and mediators as they negotiate the type of process to be used on a particular occasion.

For accrediting bodies, this definition adds an unnecessary layer of complexity. LEADR has been insistent in the past on accreditation being granted on the basis of demonstration of facilitative competencies. Under the new standard, it could be argued that mediators providing advice in “test” situations are justified to do so, because they are providing a type of mediation sanctioned by the Approval Standards. As well, the

assessment, record keeping and monitoring of competency to provide advice (see 4.A.4) will represent a significant additional cost burden.”

LEADR specifically recommended that:

“That future development of the national mediator standard target drawing clearer distinctions between mediation and conciliation; that mediation be the word used to describe facilitative processes and that conciliation be the term used to describe the combination of facilitative and advisory processes.”

VADR took a stronger view. VADR noted that:

“In the absence of national standards, a number of ADR practices have developed over 20 years. These have been loosely termed ‘mediation’ and include advisory, evaluative and blended processes. They differ from the facilitative, non-advisory models of mediation currently taught and assessed, and used as a basis for accreditation, under current systems.

We believe advisory and evaluative processes are better categorised as ‘conciliation’. We see these as a valid form of ADR, commonly practiced. However, they are distinct from mediation in the input into the content, and sometimes the outcome, by the person conducting the process.

Blended processes, in particular, can be based on quite different frameworks, for example, mediation/arbitration, which we see as equally valid, but requiring additional qualifications to that of a mediator.”

VADR also noted that:

“We note that advisory, evaluative and blended processes are named and included in parts of the current approval and practice Standards under discussion. We find this to be contradictory for the following reasons:

1. If advice giving, evaluation or blended processes are included during assessment by current national mediation training courses (of which we have consistent and considerable experience), the result will be an assessment of ‘not competent’.
2. It is inconsistent to provide education, training and assessment using one principle then accredit including another contradictory principle.
3. The current proposals effectively create 2 streams of mediators. One, those who practise facilitative mediation, and the second, those who use advice giving, evaluation or blended processes. The second stream of mediators must also fulfil additional educational requirements. This is inconsistent with the original proposal of a single stream of accreditation at this stage.
4. This dual stream accreditation will add to the current confusion for the public and referrers as to the nature of services provided by a particular practitioner. The differentiation may not be apparent until the requirements of Practice Standard 3, Agreement to Mediate, Section 2(a) are fulfilled.
5. It will be difficult in a complaints process to give a determination on a complaint if it exclusively or partially includes complaints about the nature of the advice or evaluation given. RMABs will not be required to be qualified to determine this, yet they will be required to determine if a member has breached standards.

It would seem then that the proposed standards are contradictory by not limiting themselves to facilitative mediation as taught and assessed.”

In view of these comments, the revised Standard has sought to distinguish more carefully between advisory and facilitative processes. At the same time, it is clear that the International Mediation Institute and many lawyer mediators consider that such blended processes can very usefully be used as an adjunct to mediation and need to be reflected in an inclusive Standard. The revised standard section notes this departure and also suggests that practitioners who use a combination of processes have particular expertise and additional obligations. The amended Standards reflect this 'blending' and yet note that this is a different process to 'mediation' as described.

Other suggestions concerned using different wording, for example, Micheline Dewdney noted that:

"Perhaps the heading could be "Features of a Mediation Process".
Certainly paragraphs 2.3-5 are features."

3 Approval Requirements for Mediators

- 1) A mediator manages processes aimed at maximising the participants' own decision making. The mediator must have personal qualities and appropriate life, social and work experience to conduct the process independently and professionally. To be accredited, the Recognised Mediation Accreditation Body (RMAB) requires a mediator to provide the following:
 - a) evidence of good character (see Section 3(2) below); and
 - b) an undertaking to comply with ongoing practice standards and compliance with any legislative and approval requirements (see Section 3(3) below); and
 - c) evidence of relevant insurance, statutory indemnity or employee status (see Section 3(4) below); and
 - d) evidence of membership or a relationship with an appropriate association or organisation that has appropriate and relevant ethical requirements, complaints and disciplinary processes as well as ongoing professional support (see Section 3(5) below); this may be the RMAB itself but may also include other relevant memberships or relationships; and
 - e) evidence of mediator competence by reference to education, training and experience (see Section 4 below).
- 2) RMABs require mediators who apply to be accredited to provide evidence of 'good character.' With respect to the requirement to be of 'good character', RMABs may, for example, request mediators to:
 - a) provide evidence that they are regarded as honest and fair, and that they are regarded as suited to practice mediation by reference to their life, social and work experience, for example, by seeking references from two members of their community who have known them for more than three years; and
 - b) show that they can meet the requirements of a police check in the State or States or Territory or Territories in which they practice; and

- c) show that they are without any serious conviction or impairment, that could influence their capacity to discharge their obligations in a competent, honest and appropriate manner; and
 - d) show that they are accredited with an existing scheme that has existing ‘good character’ requirements that they comply with (for example, by referring to existing Law Institute, Law Society, Bar or Family Dispute Resolution Practitioner accreditation where relevant); and
 - e) satisfy the RMAB that they do not come into the category of a ‘prohibited person’ (or its equivalent) as defined in a particular jurisdiction and also not be disqualified to practice by another professional association relating to any other profession (for example, a Law Society or a Medical Association) or must explain to the RMAB the circumstances under which they have previously been removed or suspended from acting as a mediator under these standards.
- 3) The mediator must undertake to the RMAB to comply with any relevant legislation, these Practice and Approval Standards and any other approval requirements that may relate to particular scheme.
- 4) In respect of the insurance, indemnity or employed status requirements, the mediator must provide the RMAB with evidence of their current status. This may be provided in a range of ways, for example, by a letter setting out any relevant employee status, or by showing how indemnity applies, or by showing proof of membership that incorporates insurance status, or by the mediator naming their insurer, providing an insurance policy number and its expiry date or, through some other relevant document. If a mediator wishes to practice using a ‘blended’ model and in an advisory manner, the mediator must hold additional insurance relating to the provision of expert advice or must indicate how existing insurance, statutory or other immunities apply.
- 5) An RMAB must have the following characteristics:
- a) more than ten mediator members; and
 - b) provision of a range of member services such as, an ability to provide access to or refer mediators to ongoing professional development workshops, seminars and other programs and debriefing, or mentoring programs; and
 - c) a complaints system that either meets Benchmarks for Industry-based Customer Dispute Resolution or be able to refer a complaint to a Scheme that has been established by Statute; and
 - d) sound governance structures, financial viability and appropriate administrative resources; and
 - e) sound record-keeping in respect of the approval of practitioners and the approval of any in-house, outsourced or relevant educational courses; and
 - f) the capacity and expertise to assess training and education that may be offered by a range of training providers in respect of the training and education requirements set out in these Standards.
- An RMAB can be a professional body, a mediation agency or Centre, a Court or Tribunal, or some other entity.

Commentary

In terms of the threshold approval requirements, different issues were raised. Some of these related to insurance and some related to ‘good character’ requirements.

Some concerns were expressed in respect of insurance. IAMA noted that:

“Evidence of insurances – the mediation industry does not yet have a peak insurance body which may have to “pick up the pieces” after a poorly conducted mediation; therefore a mediator’s levels of insurance and/or indemnity are a commercial matter for the mediator (except in circumstances where it becomes relevant to the parties to a mediation as to whether or not the mediator is indemnified, and to what extent)”.

At the same time it was apparent that relatively inexpensive insurance was readily available. For example, LEADR members currently can access insurance schemes at less than \$150.00 per annum. One practitioner noted that: “Insurance cover is now available fairly cheaply - something that was taken into account when immunity for practitioners was removed in the family sector.”

LEADR also noted that:

“LEADR promotes the value of professional indemnity insurance to its members.

For practical reasons, LEADR would prefer that mediators be required to quote the name of their insurer, their insurance policy number, and its expiry date rather than having to provide a certificate or other relevant document. If an RMAB has any doubt about the validity of such information, it can ask to cite the relevant documentation. Again, in an effort to control overall costs to the industry, LEADR is keen to encourage on-line transactions as much as possible, and to contain the costs associated with paper storage.

Our earlier comments about those wishing to provide advice being required to provide evidence to an RMAB of their continuing registration or equivalent within that profession (eg membership of a relevant professional association or industry association) obviates the need for the RMAB to track this additional insurance.”

This section of the draft standards document was amended to reflect these comments (see above).

A number of oral and written submissions commented in respect of the proposed ‘good character’ requirement. IAMA for example noted:

“Good character – two members of a mediator’s community may not have the expertise to provide a reference as to a person’s suitability to be a mediator.”

VADR commented that:

“It is suggested that community members are not qualified to judge whether people are suitable to practice mediation”

LEADR suggested that:

“LEADR does not disagree with the spirit of “good character” but we would prefer it to be simplified and more flexible. Potential mediators should be required on a once off basis to provide evidence of good character, but not whether they are suited to practice mediation. Those within their community may not have an understanding of mediation, so it is not reasonable to request that they provide such a recommendation. Suitability to practice mediation is evaluated better through a competency assessment process.”

The revised Standards provide considerably more flexibility in terms of how ‘good character’ can be assessed. Rather than prescribing a process, there is now considerable discretion provided to RMABs. There are examples of information that could be taken into account rather than set requirements. This approach also addresses concerns of the Victorian Bar, IAMA, DSCV and the National Dispute Resolution Network (NDRN) who also raised concerns about a police check requirement. This also addresses the concern of the Law Council who noted that:

“These requirements duplicate many of the requirements which lawyer mediators have to their relevant legal professional bodies. For example, solicitors in NSW are required to have Professional Indemnity Insurance and the Law Society of NSW Guidelines for Solicitors who act as Mediators provide that mediation is an activity that is covered by that insurance. The Law Council is concerned that under the proposed standard, lawyers may be required to hold two insurance policies.

The Law Council suggests that the Approval Standard specifically recognise lawyer mediators as a class and that their compliance with requirements of a legal professional body meets the requirements of a RMAB in respect of these matters.”

It should be noted that the requirements are not intended to duplicate existing requirements. The revised Standards recognise that existing arrangements are in place and that duplication is not required.

Another concern was raised about the procedural fairness requirements in relation to a mediator who was rejected by a RMAB. Chris Stevenson, for example, noted that there are some circumstances where a person, whom has been convicted of a serious offence – particularly where the conviction is several years old – should not be barred from practice. This concern has been specifically addressed in the new final section of the Approval Standards that deal with accreditation and removal of mediators from a RMAB list of accredited mediators.

The characteristics of a RMAB

The topic of RMAB characteristics was the subject of many comments in written submissions, yet there were few comments raised in relation to RMAB characteristics in the practitioner forums that were held.

Some submissions suggested that the threshold requirement of at least ‘10 accredited mediator members was too small.’ LEADR suggested that the number of members should be

50. The issue of 'size of membership' was the subject of comment from a range of different interest groups. Some who commented said that small and emergent organisations would be prevented from holding RMAB status if the threshold was higher. Others noted that smaller States and Territories could be disadvantaged if a higher threshold was required; one member of a Tribunal said "We have only 11 mediators – we would like the number to be 10." On balance and in view of these divergent views, the threshold has been left at 10 accredited mediators members. However, it may be that this is a topic that could be considered further by the Implementation Committee.

The NDRN and DSCV queried why membership of an RMAB was necessary. The question essentially asked was: whether such membership related to complaints handling only or were there other factors that were relevant in terms of the relationship between the RMAB and the mediator? The previous work that was the subject of consensus agreement at the National Medication Conference suggested that for a system to operate, an essential part of the framework involved RMABs that had a strong relationship with members.

Clearly, the role of RMABs is related to complaints handling, but the RMABs also play a central role in creating and formalising existing accreditation arrangements. In addition, RMABs under the Approval Standards play a central role in respect of all other aspects of the Approval and Practice Standards and in ensuring that accreditation processes are workable. For an RMAB to do this it needs to have a strong relationship with its mediators – either through membership or employment. Most comments in consultations and in submissions were supportive of the RMAB membership requirements.

The Australian Commercial Disputes Centre (ACDC) also stated that:

"Section 3.5 of the Draft National Mediator Approval Standards outlines that: 'A Recognised Mediation Accreditation Body (RMAB) must have the following characteristics: More than 10 members'. The Report and Proposal of Facilitation and Committee to the 8th National Mediation Conference Hobart outlined on page 8 that RMABs would include Membership Associations, Service Providers, Professional Associations, Courts and Tribunals and Not-for-profit associations.

The requirement of membership would necessarily exclude ACDC as a prospective RMAB.

Recommendation: That the phrase "More than 10 members" be excised from section 3.5."

It is clear that many organisations that are currently active in the mediation area will not seek to have RMAB status. Organisations which may not seek this status include Universities, current professional organisations, training providers and others. The new system does not mean that these organisations will not continue to have a strong and meaningful role into the future in terms of providing education and training, professional association and continuing education and in terms of research and other activities. Such organisations are expressly provided for in the new National Implementation Committee and have a capacity to further develop the system. In the writer's view, an RMAB must have a capacity to accredit and deal with accreditation issues on an ongoing basis; if there are no members or employees then, in the writer's view, the ongoing accreditation function cannot be exercised. In view of the

comments received relating to this issue and the strong support for the original proposal put forward, the original wording has been retained.

Other concerns related to characteristics. LEADR noted:

“The requirements for being an RMAB have shifted from those in the Report to the National Mediation Conference in 2006. The shift in itself is not the reason for LEADR’s concerns. Our concerns arise from the requirements being so broad that almost any organisation with any connection to mediation could become an RMAB. LEADR believes that this is going to make it difficult to achieve consistency in application of the national standard.

The previous report put an emphasis on RMABs offering training:

“RMABs will be recognised in terms of their capacity and facilities to:

1. To assess and accredit mediators in terms of the requirements of the System.
2. To provide education, training and assessment of mediators in terms of the System, or to have a relationship with bodies other than RMABs which provide the education, training and assessment required in terms of the System.”

(page 15, Report to the National Mediator Conference May 2006)”

The revised standard has inserted this important characteristic as a requirement of RMABs.

Many comments related to concerns relating to professional development and related programs. For example, the Law Society of New South Wales considered that the draft standard requirements were too onerous on relation to access to continuing professional development or professional support services:

“The Committee agreed with the view expressed by the NSW Bar Association, that these requirements are onerous; in particular “supervision, consultation and mentoring”. It is suggested that this point be reworded to remove these latter three requirements altogether, or in the alternative replace the phrase “or an ability to provide access to” with “provide a referral to”.”

The Law Council noted:

“It is also not clear whether legal professional bodies have all the required characteristics of a RMAB. Such requirements as debriefing, supervision and consultation programs are not defined. “Supervision” has a different meaning for clinical psychologists and lawyers and needs to be clearly defined. If “supervision” in the clinical psychologist sense is intended, then the Law Council suggests that the requirement be amended so that the RMAB provides referral to such a program.”

In terms of ‘supervision’ it would appear that this topic was a topic of considerable concern to some mediator groups. Most practitioners who attended practitioner forums appear to be relatively untroubled by the notion of clinical supervision and debriefing. However, some individuals found the concept of ‘supervision’ to be repugnant. This topic is further addressed in the Practice Standards, however it would appear that the comments stem in part from a concern about what ‘supervision’ could entail. In the revised Practice Standards and in The Approval Standards, ‘debriefing’ has been used rather than ‘supervision’. In other Commentary on Approval Standards

respects and in view of the difficulty that some potential RMABs would have in providing any debriefing, the Approval Standards have been amended to recognise that RMABs should consider offering referral to such services.

Many comments related to the supervision of RMABs and the approval of RMABs rather than the approval of mediators. In this regard some submissions and comments had been made without apparent access to the framework document which sets out a future pathway that involves RMABs and others working to establish their own regulatory framework. This is consistent with not only the National Mediation Conference consensus but also the views expressed by many practitioners and organisations during the consultation phase of the project. One practitioner, Mirek Fajerman, observed that:

“It is inappropriate not to have the RMAB not to be subject to requirements beyond those stipulated in clause 3, dot point 5 of the “Approval Standard” with out being subject to external scrutiny. Taking that both the mediator and the RMAB have a mutual interdependence an independent “entity” would need to be ensuring that all aspects are complied with to a minimum standard (maybe yet to be developed/established). There needs to be a recourse to non-complying RMABs incorporated into the current Standard. However the best outcome would be to develop a fourth document/standard to deal with the RMAB.”

In the writer’s view, it is essential that further work be done into the future that addresses issues relating to RMAB compliance and scrutiny. This should however be work that evolves at a committee level under the new proposed framework. An RMAB set of standards may assist to support the development of a quality framework, research and assist to develop practitioner competencies into the future.

A few submissions commented on the ‘complaints system criteria’. This defined characteristic was varied following input from the Law Council, the Queensland Law Society and the Law Institute of Victoria to ensure that existing complaints mechanisms could be used.

Boule Report presented at the National Mediation Conference on May 8 2007 in Hobart

RMABs will be recognised in terms of their capacity and facilities to:

1. To assess and accredit mediators in terms of the requirements of the System.
2. To provide education, training and assessment of mediators in terms of the System, or to have a relationship with bodies other than RMABs which provide the education, training and assessment required in terms of the System. (Bodies such as universities or small training organizations may not wish to become RMABs but provide their educational and training services to RMABs, which will be responsible for assessing the quality and standards of education and training.)
3. Organisations applying for RMAB status must provide the following information about the education, training and assessment which they provide or which they use on an out-sourced basis:
 - a. The qualifications and experience, as mediators and educators, of the principal course instructors responsible for conducting the education and training course and the assessment of participants;
 - b. The teaching and learning methodologies underlying the education and training courses;

- c. Course manuals or workbooks, lists of books or reading requirements, and other prescribed materials;
 - d. The course program, indicating the topics and time spent dealing with the different aspects of knowledge, skills and ethics required by mediators;
 - e. The Code of Mediator Practice used in the course as a basis for education and training on issues of mediator ethics and standards;
 - f. The methods of assessment used to examine the knowledge, skills and competence of trainees;
 - g. Assessment instruments used for assessing mediator skills and techniques;
 - h. The past involvement of the institution and/or its instructors in mediator education and training;
 - i. The ratio of instructors and coaches to participants in education and training courses;
 - j. Any other information which goes to establish the credentials of the institution as a mediator educational, training and assessment institution (for example course evaluations, testimonials, references).
4. Provide Continuing Professional Development for mediators as required in the System.
 5. Provide the infra-structure required to receive and process complaints and grievances against mediators and make decisions on sanctions, including de-accreditation.
 6. Have sound governance structures, financial viability and the administrative resources to contribute to the operation and development of the System.
 7. Undertake such other activities and functions required by the changing needs of the System.

4 Training And Education

- 1) Mediators must demonstrate to an RMAB that they have appropriate competence by reference to applicable practice standards, their qualifications, training and experience. It is not necessary for the RMAB to provide education and training to individual mediators (see Section 5 below). Training and education may be provided by organisations other than RMABs, such as, industry training providers, universities and other training providers.
- 2) A mediator is required to meet the threshold approval requirements detailed below (see Section 5 below), as well as ongoing professional education requirements. A mediator who uses a 'blended' process and provides information or advice in the context of a 'blended' process must be competent to do so and possess the appropriate skills, knowledge and expertise.

5 Threshold Training And Education Requirements

- 1) Unless 'experience qualified' (see Section 5 (3) below), from 1 January 2008, a mediator must have completed a mediation education and training course that:
 - a) is conducted by a training team comprised of at least two instructors where the principal instructor[s] has more than three years' experience as a mediator and has complied with the continuing accreditation requirements set out in Section 6 below for that period and has at least three years' experience as an instructor; and

- b) has assistant instructors or coaches with a ratio of one instructor or coach for every three course participants in the final coached simulation part of the training and where all coaches and instructors are accredited; and
 - c) is a program of a minimum of 38 hours in duration (which may be constituted by more than one mediation workshop provided not more than nine months has passed between workshops), excluding the assessment process referred to in Section 5(2) below; and
 - d) involves each course participant in at least nine simulated mediation sessions and in at least three simulations each course participant performs the role of mediator; and
 - e) provides written, debriefing coaching feedback in respect of two simulated mediations to each course participant by different members of the training team.
- 2) Unless 'experience qualified' (see Section 5(3) below), from 1 January 2008, a mediator must also have completed to a competent standard. a written skills assessment of mediator competence that has been undertaken in addition to the 38-hour training workshop referred to above , where mediator competence in at least one 1.5 hour simulation has been undertaken by either a different member of the training team or a person who is independent of the training team. The written assessment must reflect the core competency areas referred to in the Practice Standards. The final skills assessment mediation simulation may be undertaken in the form of a video or DVD assessment with role players, or as an assessed exercise with role players. The written report must detail:
- a) the outcome of the skills assessment (in terms of competent or not yet competent); and
 - b) relevant strengths and how they were evidenced; and
 - c) relevant weaknesses and how they were evidenced; and
 - d) relevant recommendations for further training and skills development.
- 3) 'Experience qualified' practitioners are those who have been assessed by an RMAB as demonstrating a level of competence by reference to the competencies expressed in the Practice Standards. An experience qualified mediator must either:
- a) be resident in a linguistically and culturally diverse community for which specialised skills and knowledge are needed and/or from a rural/or remote community where there is difficulty in attending a mediation course or attaining tertiary or similar qualifications; or
 - b) have worked as a mediator prior to 1 January 2008 and have experience, training, and education that satisfies an RMAB that the mediator is equipped with the skills, knowledge and understandings set out in the core competencies referred to in the Practice Standards, and who has met the continuing accreditation requirements set out in Section 6 below in the 24 months prior to making an application.
- 4) Practitioners who seek to offer advice through the use of a 'blended' process such as conciliation or advisory or evaluative mediation must also provide evidence to the RMAB of:
- a) their continuing registration, membership or equivalent within the professional area in which advice is to be given, and

- b) completion of an appropriate degree, or equivalent qualification in the area of their expertise from a university or former college of advanced education, of at least four years equivalent full-time duration, or a VET-approved organisation to a National Framework Level 6 standards; and
- c) a minimum of five years' experience in the professional field in which they seek to provide advice.

Commentary

The topic of training and education received a great deal of attention in the consultation process. Many submissions also commented upon threshold requirements in this area. As noted in the Report on the Consultation Process, often the views that were expressed were diametrically opposed. For example, VADR commented:

"We contend that the proposal of 40 hours as a threshold training and education requirement is insufficient to do this to a standard required of a professional.

We appreciate that our proposal of additional hours will add to the cost of training.

We believe the advantage will be that the additional training will result in:

- a higher standard of mediators;
- provide a higher benchmark and more valued qualification for those wishing to be accredited; and
- giving the public more confidence in engaging the services of a professional mediator.

Proposal: A program of a minimum number of 140 hours in duration, excluding the assessment process, provided that these hours may be reduced to a minimum of 60 hours where the trainee has completed an appropriate degree sufficient that the mediator can demonstrate a sound theoretical understanding of, and practical skills in, mediation."

In contrast many other submissions suggested that a considerably lower threshold was appropriate.

A number of those consulted considered that mediators should be required to conduct mediations (either supervised or not) prior to accreditation. For example, Chris Stevenson noted that:

"I would like to see a minimum number of mediations or mediation hours as a pre-condition to accreditation.

I appreciate the prescribed training will include "at least 9" simulations but in my opinion applicants should do "articles" (i.e. a period of practice after the theory has been learnt) before they are let loose on the public and entitled to hold themselves out as accredited.

A period of study does not mean that a person has the skills to put into practice what they have read and been taught. Once accredited everybody is in all respects equal, there is no distinction between those who have practical experience (i.e. done a mediation) and those who have not."

In my view this topic is worthy of further focus in terms of the National Mediator Accreditation Committee work. It should be noted however that many submissions indicated that the ‘threshold’ entry requirements should be kept at an achievable level so as not to prevent access to the Scheme.”

A large number of comments focused on the category of ‘experienced qualified’ mediators and a concern that advanced standing might not be recognised. The revised Standards now leave more discretion with the RMABs to set standards in this area.

Other comments related to the ‘training team’ requirements. Two submissions suggested that instructors should have achieved a Certificate IV in Workplace Training. Some of those consulted considered that this was neither achievable nor necessary. In one consultation, it was suggested that the instructor team should have at least one instructor who had completed postgraduate education in the area.

Other comments related to practical implementation issues, for example, the ratio of coaches to attendees at a workshop. This was a matter that was also discussed in meetings. The Standards were amended to reflect the consensus view that was expressed.

Some comment was also made on the number of simulations required during training. Two submissions indicated that nine simulations (three as a mediator) was too onerous. However, training organisations and those who commented in the consultations process considered that this level was appropriate.

The topic of the written ethics test which had appeared in the original proposal was the subject of a great deal of comment. The requirement was removed following the emergence of a consensus view. In particular, NDRN noted:

“With particular reference to the draft National Mediator Approval Standards NDRN would argue that the requirement for a written test could potentially discriminate against people from a CALD and A&TSI background. However;

- Given that a RMAB can assess what is an "experience qualified" mediator who will be exempt from the written test, that may deal with the problem itself but then the issue is whether the written test is necessary at all.”

We contend that the proposal of 40 hours as a threshold training and education requirement is insufficient to do this to a standard required of a professional.

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Proposal: A program of a minimum number of 140 hours in duration, excluding the assessment process, provided that these hours may be

reduced to a minimum of 60 hours where the trainee has completed an appropriate degree sufficient that the mediator can demonstrate a sound theoretical understanding of, and practical skills in, mediation. “

One practitioner noted that:

“If I had my rathers, I would see it offered through universities only, by educators only, using practitioners as guest lecturers. (It has always amazed me that people who have no training in education think they are good enough to be trainers, when if I as an educator decided I could build a bridge, or advise someone about law, or operated as a brain surgeon, they'd be rightly horrified!!)

The RMABs are thus a problem - I think [X's] point about quality control is a good one, although we are coming from different standpoints on this. I think she would be happy to see it as a Certificate IV offering - I'm not. I would like to see it as an undergrad or postgrad degree.”

VADR said that:

“There is a concern that a 40 hour program is insufficient for mediators lacking an appropriate degree.”

These views can be contrasted with some of the views that were expressed by some legal sector organisations who argued that a 24 hour course was sufficient. The Law Council noted for example that:

“The Law Council again submits that the Approval Standard does not give sufficient consideration to the position of lawyer mediators. The Law Council notes that lawyer mediators are often required to meet training and education requirements of their own legal professional bodies. For example, the Law Society of NSW Guidelines for Solicitors who act as Mediators state that no solicitor shall act as a sole mediator unless he/she has satisfactorily completed an approved course and has had appropriate mediation experience or such experience as may be approved by its Dispute Resolution Committee. The approved course is a minimum of twenty eight hours of skills based training and assessment. The Law Council understands that the NSW Bar Association, which has many highly experienced mediators, has made a separate submission that a course of twenty eight hours duration should meet the required standard; however the proposed Approval Standard is 40 hours.”

This requirement was the subject of discussion in almost every practitioner forum. The original National Mediation Conference proposal was accepted by the majority of those who talked about this issue. Many said that the Standards should operate in terms of a ‘minimum threshold’ and agreed that the minimum threshold should be a 5 day program (apart from the assessment component). Of those who contributed to practitioner forums, the clear majority considered that this was appropriate.

Training and education providers who gave input also considered that this requirement could be satisfied and noted that some providers already meet this Standard. The primary suggestion of active training groups was that the 40 hours should be reduced to 38 hours to enable a workshop to be conducted over a 5 day period.

It should be noted that there were however serious and significant differences amongst different mediators on this issue of ‘threshold training and education.’

In relation to the written examination in respect of mediator ethical understandings there was a clear view that this requirement should be deleted. The Law Society NSW noted that:

“It is submitted that the requirement to satisfactorily complete a written examination in addition to completion of a training course is unnecessary duplication as there is a written skills assessment of mediator competence during the training course. This should suffice. Moreover the examination and assessment process may be onerous for people working full-time.”

Experience qualified

The experience qualified category was the subject of many comments and has been amended (see above). The primary concerns related to whether the category should be expressed in terms of number of mediations or conciliations or in terms of hours. There was consensus that ‘hours’ rather than numbers should be used. There was also some work done in relation to what competencies could apply. In view of these comments, RMAB discretion has been supported and extended, however, RMABs must have due regard to the competencies expressed in the Practice Standards.

In relation to the diversity category, IAMA noted that:

“Experience qualified” mediators – this specifies the criteria for people who can be accredited without completing the threshold training requirements. Two categories are included in one paragraph:

“Be resident in a linguistically and culturally diverse community, for which specialised skills and knowledge are needed and/or from a rural or remote community where there is difficulty in attending a mediation course or attaining tertiary or similar qualifications”

IAMA queries this exclusion on the grounds of discrimination: this para could be read as proposing that linguistically and culturally diverse or rural/remote communities do not need to have access to well-trained and properly accredited mediators. IAMA would prefer to see a proposal that recognises the potential difficulties in accessing training and accreditation, and requires RMABs to have procedures designed to overcome such difficulties.”

In the writer’s view this is a worthwhile aspiration, however there are questions about how this can be achieved at least in the short term.

Advisory processes

Some submissions addressed the questions raised by those who use other processes in conjunction with mediation processes. The Victorian Bar said, for example:

“Requirement 4 (A)(4) – contains onerous provisions restricting the giving of advice in mediations. For example, it provides that in order to give advice in a mediation, a mediator must have completed a degree (or equivalent) in the relevant area and have a minimum of five years experience in the professional field in which they seek to give advice. This is unreasonable, inappropriate and unachievable in the context, for example, of conciliation conferences performed in minor commercial matters at the Magistrates’ court by registrars or by conciliators at the small business commission.”

The proposal was amended to attend to some of these concerns, however it retains the requirement that if a practitioner wishes to use an advisory processes as an adjunct to a mediation process, then the practitioner must be suitably qualified and experienced. The Mediator Standards do not seek to accredit conciliators but are focused on mediation.

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1. A training team comprising principal instructors, and assistant instructors or coaches, with suitable qualifications and experience as educators and mediators.
2. A ratio of one instructor or coach for every three participants in the simulation part of the training.
3. An education and training program of a minimum of 40 hours in duration, excluding the assessment period. (It was noted during the public consultations that in some overseas countries the education and training requirements range between 150 and 600 hours in duration.)
4. Involvement by each course participant in at least six simulated mediation sessions, in at least two of which they perform the role of mediator. Assessment of mediator competence in the two simulations will be undertaken by different members of the training team, and will be recorded in written form in an assessment instrument and will be provided to the participant.
5. Completion by each course participant of written debriefing evaluations of two simulated mediations, one in which they were a disputant and the other a mediator, in a prescribed evaluation form.
6. Completion of a written examination of between 45 and 60 minutes in duration in which participants are assessed on their theoretical knowledge and understanding of mediation practice and asked to suggest appropriate or preferred ways of dealing with specific ethical dilemmas, tactical issues or difficult scenarios which can arise in mediation.
7. The overall assessment of participants for Accreditation will be based on competence displayed in mediation simulations, awareness displayed in the written debriefings, performance in the examination, and general course participation such as contributions to the discussions on ethical or critical issues. A written report will be provided to each participant detailing:
 - a. The outcome of the skills assessment (in terms of competent or not yet competent);
 - b. Relevant strengths and how they were evidenced;
 - c. Relevant weaknesses and how they were evidenced;
 - d. Relevant recommendations for further training and skills development.

6 Continuing Accreditation Requirements

- 1) Mediators who seek to be reaccredited must satisfy their RMAB that they continue to meet the approval requirements set out in Section 3 of this document. In addition mediators seeking re accreditation must, within each two-year cycle, provide evidence to the RMAB that they have:
 - a) sufficient practice experience by showing that they have either:
 - i) conducted at least 25 hours of mediation, co-mediation or conciliation (in total duration) within the two-year cycle; or,
 - ii) where a mediator is unable to provide such evidence for reasons such as, a lack of work opportunities (in respect of newly qualified mediators); a focus on work undertaken as a dispute manager,

facilitator, conflict coach or related area; a family, career or study break; illness or injury, an RMAB may require the mediator to have completed no less than 10 hours of mediation, co-mediation or conciliation work per two-year cycle and may require that the mediator attend ‘top up’ training or reassessment;

and,

- b) have completed at least 20 hours of continuing professional development in every two-year cycle that can be made up as follows:
 - i) attendance at continuing professional development courses, educational programs, seminars or workshops on mediation or related skill areas as referred to in the competencies (see the Practice Standards) (up to 20 hours);
 - ii) external supervision or auditing of their clinical practice (up to 15 hours);
 - iii) presentations at mediation or ADR seminars or workshops including two hours of preparation time for each hour delivered (up to 16 hours);
 - iv) representing clients in four mediations (up to a maximum of 8 hours);
 - v) coaching, instructing or mentoring of trainee and/or less experienced mediators (up to 10 hours);
 - vi) role playing for trainee mediators and candidates for mediation assessment or observing mediations (up to 8 hours);
 - vii) mentoring of less experienced mediators and enabling observational opportunities (up to 10 hours).
- 2) Ongoing accreditation as a mediator requires the mediator to meet the practice standards and competencies described in the Practice Standards. An RMAB has discretion to remove or suspend a mediator in circumstances where it believes, on the balance of probabilities, that there has been non compliance with the Practice Standards, other relevant ethical guidelines or professional requirements, or these Approval Standards. In relation to any removal or suspension, a mediator must be informed within 14 days of the concerns of the RMAB and provided with an opportunity to respond to the RMAB. The RMAB must have a process in place to deal with removal and suspension or must be able to provide access to a process where such decisions can be made in a procedurally fair manner.

Commentary

Continuing education

There were many comments made about the continuing education category. For example, the Queensland Law Society stated:

“Section B “Continuing Education Requirements” requires a mediator to conduct 10 mediations or co-mediations and 20 hours of continuing education every 2 years. Again, we submit that those requirements are too onerous on the basis that:

- (i) most QLS accredited mediators are part-time mediators;

(ii) QLS mediators located in regional areas in particular have more limited opportunities to conduct mediations and attend continuing education courses relating specifically to mediation;

(iii) QLS members have annual continuing education requirements as a requirement for holding a practising certificate so they already have considerable continuing education obligations.

Accordingly, we submit that Section B be amended so that the requirements are:

- (i) 5 mediations or co-mediations; or
- (ii) 10 conciliations of no less than 12 hours in total duration; and
- (iii) at least 10 hours continuing education, every 2 years.

Further in relation to section B "Continuing Education Requirement", we consider that mediators should be able to obtain some credit towards continuing education by attending mediations as observers with experienced mediators. We recognise that the observer should have some "active" involvement in the mediation, such as de-briefing with the experienced mediator. Accordingly, we submit that a new sub-paragraph (vi) be added which reads:

"(vi) Attendance as an observer or co-mediator with an experienced mediator, including active participation or debriefing (up to 10 hours).

VADR noted that:

"We propose a method to enable mediators who are not currently practicing but have been accredited, that is those who are unable to meet eligibility as they have not completed 10 mediations over a two year period. It is suggested that mediators who have completed an insufficient number of mediation sessions may attend one-day mediator refresher training conducted by one of the RMABs or submit a video in order to meet the eligibility criteria."

Other submissions were more focused. For example, Micheline Dewdney said:

"I agree with Robert Angyal about retrospective requirements to have completed 10 mediations in the last 2 years and 20 hours of continuing education: many experienced mediators and active ones as well will not have done that, at least the continuing education part of it and many new mediators do not have the opportunity to mediate.

I agree with Robert Angyal that requirements should be alternatives i.e. either 10 mediations or co-mediations or 20 conciliations or 20 hours of continuing education or both.

I also agree that representing clients in mediation is very valuable and should satisfy

15 of the 20 hours required for continuing education."

TMIG noted that:

"We are concerned that practitioners who only mediate occasionally or part-time will find it hard to meet the practice requirements and alternatives will need to be considered."

ACDC stated that:

“The requirements for 10 mediations or 20 conciliations within a two-year period may be an excessive amount for mediators/conciliators employed in various professions who may conduct mediations/conciliations within their industry on a relatively infrequent basis. The requirements for 20 conciliations may be particularly prohibitive to those whose industries require the process of conciliation, but however do not have the volume of conciliations taking place to maintain 20 [sic] per year per accredited conciliator. Some mediators/conciliators in these industries have expertise and training that may make them the most suitable candidates to mediate/conciliate these disputes.

The requirements may be restrictive to mediators new to the industry who do not have the contacts to engage them in the required amount of mediations/conciliations .

The requirements may place a burden on some mediators who may have retired from full time practice who may wish to continue to conduct mediations or coach in mediation courses on an infrequent basis. “

IAMA stated that:

“IAMA notes that mediators are to have at least 10 mediations or co-mediations within each two-calendar year cycle – or 20 conciliations. While 10 mediations may be an achievable figure for mediators who work in some specialised areas, we consider it to be unrealistic for the majority of mediators in private practice, such as are IAMA’s members. We refer you to the requirements of the ACT’s Mediation Act 1997, under which registered mediators are required to have conducted a minimum of three mediations over three years. IAMA’s view is that an accredited mediator must be participating in sufficient members of mediations to maintain a skills base, but that minimal practice can be augmented by appropriate on-going educational sessions.”

LIV stated that:

“Under the Approval Standards, mediators must provide evidence to the RMAB that they have conducted at least 10 mediations or co-mediations or twenty conciliations of no less than 25 hours in total duration within each two calendar year cycle.

While the LIV agrees that ongoing accreditation and education of mediators is important, it is concerned that some mediators, particularly “non-experienced qualified” mediators – who are or will be building their mediation practices - will not be able to meet this requirement.”

The Victorian Bar said:

“Requirement 4(B)(1) - contains an ongoing requirement to perform at least 10 mediations or co-mediations or 20 conciliations in each two year cycle in addition to significant continuing educational requirements. On one view, this is inappropriate, as once a person has demonstrated sufficient skills and knowledge to be accredited as a mediator, he or she should not lose that accreditation simply because he or she is not performing sufficient mediations in any period. Other professionals, (for example doctors, lawyers or engineers), are not de-registered if they do not work as doctors, lawyers or engineers, in any period as long as they attend sufficient CPD events.

In any event, the number of mediations (or conciliations) a mediator is required to perform in each two year period is unreasonable for entry level mediators. Further, many occasional mediators may also be unable to meet this requirement – thus bringing reality to the types of concerns expressed in submissions and consultative forums of “exclusivity and exclusion...over-professionalisation” (referred to above and p3 Boulle Report). It is also noted that this is a significant increase, without explanation, from the six mediations in a two year period, that was contemplated in the Boulle Report (p18 Annexure D).”

In view of all these comments, the Standards were amended to reflect additional categories of mediators (see above) who may not be able to attain the necessary number of hours for a range of reasons. Under such circumstances, an RMAB will have discretion to reaccredit (see above). It should be noted, however, that many who gave oral submissions considered that to be accredited under the minimum threshold, accredited mediators should be working in the field on a regular basis. Others indicated that in their view the continuing practice requirement threshold was ‘low.’ There was also a view that to be a mediator accredited under the Scheme, regular practice was essential.

In terms of other requirements, additional categories were added to the Standards to reflect the comments that were made (see above). In this context, it was also suggested that some mediators would be required to ‘double up’ – that is, complete additional training – under some circumstances.

For example, the Law Council of Australia stated:

“The Law Council submits that the qualification training and education requirements of legal professional bodies should be acknowledged in the Approval Standard as an alternative for the class of lawyer mediators. The Law Council also submits that it is unnecessary duplication and onerous to require lawyer mediators to undertake the proposed training and education in addition to that required by their professional bodies.”

This topic was also the subject of discussion in forums. It is clear that if a mediator completes continuing education in the areas set out then such training will be relevant for re accreditation purposes. Such training may also meet CPD requirements for lawyers provided that it meets with relevant guidelines. The continuing education requirements should not in this way be regarded as ‘additional’ for many practitioners. Of those who attended forums many noted that they would already meet these requirements under existing other scheme professional development requirements.

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The following model will guide the Implementation Body in the finalisation of the CPD requirements for mediators Accredited to the NMS:

Within each two-year cycle mediators will have to obtain at least 50 CPD points, comprising 20 points from category 1 and 30 points from at least two of the other four categories:

1. The conduct of six mediations or co-mediations (20 points);
2. Representation of clients in four mediations (10 points);
3. Attendance at CPD courses or workshops on mediation or ADR for 20 hours; (20 points);
4. External supervision or auditing of their clinical practice (10 points);
5. Presentations at mediation or ADR seminars or workshops (10 points);
6. Other relevant experience as a practitioner or consultant in dispute resolution and conflict management (10 points).