

# Who says you're a mediator?

**Report on NADRAC workshop on mediator accreditation at  
7<sup>th</sup> National Mediation Conference, Darwin 2 July 2004**

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## Introduction

NADRAC convened a workshop on mediator accreditation at the 7<sup>th</sup> National Mediation Conference. The aim of the workshop was to promote discussion among ADR practitioners and organisations about the development of systems for mediator accreditation.

Cognisant that many people with an interest in mediator accreditation would not be able to attend the Darwin conference, NADRAC invited written comments to its discussion paper, *Who says you're a Mediator? Towards a National System for Accrediting Mediators*, which was released in March 2004. The 32 responses to the paper were consolidated, placed on NADRAC's website prior to the conference and made available at the conference itself. An overview of the submissions was also provided to conference participants and subsequently placed on NADRAC's web-site. The chair of NADRAC, Justice Murray Kellam, reported on the issues raised in the responses to the discussion paper during the morning plenary session on 2 July.

At NADRAC's request, Professors Laurence Boule and Tania Sourdin facilitated an interactive session with conference participants on the final afternoon of the conference. The session was introduced and chaired by the convenor of NADRAC's quality and accreditation committee, John Spender QC.

It is estimated that 200-300 people attended the workshop.

The workshop at the conference was seen as only one part of an ongoing discussion about mediator accreditation. The Commonwealth Government has indicated its support for this process. Attorney-General Philip Ruddock announced, on the first day of the conference, a grant of \$30,000 to the National Mediation Conference Limited, which is the company that runs the mediation conferences every two years. The grant will enable the National Mediation Conference Limited (NMCL) to engage a facilitator acceptable to stakeholders who would conduct further consultations on the mediator accreditation issue. These consultations would build on NADRAC's workshop and paper. The NMCL is required to provide the Attorney-General's Department with a consultation plan by 30 September and to produce a report on the outcome of the consultations by the end of June 2005. It was envisaged that further developments would be discussed at the 8<sup>th</sup> National Mediation Conference in 2006.

## Who says you're a mediator

The first part of the workshop involved a facilitated discussion on the question of 'who says you're a mediator?' Matters to arise out of the discussion included:

There are many accrediting authorities and panels.

The parties say who is a mediator, as the mediator keeps getting work.

A training course does not make a person a mediator.

It is hard to say at what point one 'becomes a mediator', but it is possibly after hundreds of hours of experience.

Sometimes practitioners feel like 'mediators', other times not; and yet people continue to see themselves as lawyers, psychologists, etc..

A good mediator may well be 'invisible' as the parties own the outcome.

The question was also raised as to how someone complains about or gives a compliment about one's service. Options included direct feedback, surveys, formal channels and being removed from a list. The key to accreditation was as much about how one 'stops' being a mediator as how one 'becomes' a mediator. A mediator may be removed from one list on the grounds of incompetence or misconduct, but there was nothing to stop that same person joining another list.

## Small group exercise

Participants were invited to write down person responses to two key questions:

1. What do you do when you mediate?
2. How do you know if you are doing well?

Responses are grouped below.

## What are you doing when you mediate?

### *Client outcomes*

Assist clients achieve their stated aims

Assist people to work together with respect

In practice, try and help people find their own answers and keep them out of court, if possible

Help people communicate better

Make a happy and healthy person

Help people talk and, more importantly, listen

Assisting couples to [reach] agreement around family issues

Clients achieve outcomes they can live with and feel they own and can implement

### *The role of the mediator or the mediation process*

#### *Formal role*

Mediate

Conciliation

Problem solving

Process, ethics, skills, knowledge

Type of practice – commercial, family and child mediation, workplace, neighbourhood  
Employed as a mediator, paid as a mediator, have qualification that says so, demonstrate competencies  
Looking for paid work, try to make a living  
Working a second job

### *Models*

Diamond model/co-mediation  
Relationships Australia model  
Facilitative mediation model  
Co-mediation  
Follow model approved by our organisation  
LEADR model and psych training  
To socialise the model and test it; to launch as model for mediation at the Timor Centre

### *Intake/preparation; explanation of design of the process*

Determine with the parties the appropriate intervention  
Explain and promote mediation and benefits  
Ensure a thorough assessment is done  
Conflict coaching

### *Structure/space*

Act as the catalyst for safe, constructive dialogue between dissenting parties  
Make a space for communication  
A safe place and a clear process  
Create a space for communication  
Provide a structure to ensure discussion  
Create a frame

### *Communication*

Act as communication facilitators  
Guide disputants  
Dialogue – [enable clients] to tell their story  
Facilitative communication – client self-determination  
Spiritual conduit of subtle energy  
Destructive – constructive

### ***Mediator behaviours***

#### *Communication*

Reflect [what I see and hear]  
Listen  
Question  
Summarise  
Empathise  
Communicate when more than one party engages in discussion  
Yarn

### *Orientation to the parties*

- Support
- Stay non-judgemental
- Be humble and keep a sense of humour
- Meet the clients where they are at
- Be reflective and responsive to clients' needs
- Be respectful
- Help people
- Remain impartial
- We hang in there!
- Enjoy talking to people, enjoyment of rich tapestry

### *Intervention/management of process*

- Facilitate
- Intervene
- Provide information
- Suggest
- Advise (oops!)
- Assist communication
- Provide opportunities to listen
- When parties are ready, or need to move on in the process, direct discussion to future options
- Caucusing, shuttle, private session
- Use creativity
- Reframe
- Manipulate – creates omniscience, omnidistance
- Explore options
- Reality checking
- Discuss outcomes and possible impact on all parties
- Clarify the resolution/settlement
- Hold, let go

### *Change*

- Change agents
- Trying to influence policy and tradition

## **How do you know you have done it well?**

### *Feedback from clients – informal/immediate*

- Direct and indirect client feedback at stages of the mediation
- When the clients tell me I've done it well
- [or say] 'it was so calming'
- Strong, positive client feedback
- Post-mediation party said, 'Boy, you're good'
- A kiss on the cheek
- A bag of avocados
- Thank you from client

***Feedback from clients– formal/follow up***

Client satisfaction  
Parties feel positive, three months on  
Feedback evaluation sheets  
Client feedback forms  
Testimonials  
Client surveys (including online)  
Ask/elicite clients for feedback [and] use feedback received for training and improving processes

***Feedback from supervisors***

[Clinical] supervision  
Supervision discussion  
Feedback from coordinator  
Performance appraisal by employer

***Feedback from peers***

Debrief with peer; feedback during debriefing  
Co-mediation feedback; co-mediators honest and frank, summaries and drafts – scrutinised thoroughly  
Positive feedback from panel surveys  
I rely on competent others (colleagues) to inform my practice

***Feedback from self***

*Subjective assessment*

My sense of what has happened  
Personal sense/observation  
Just a sense it worked  
Own assessment  
Self-reflection  
My own sense of success/failure  
Magic moment  
It's a matter of constant, critical and demanding self-critique

***Behavioural indicators***

[I] see the shift in the individuals – the parties, also mine as mediator  
I'm not doing well when I'm taking responsibility to fix the situation

***Learning***

Reflection  
New tools  
Building complementary ADR networks  
Video  
Ongoing training  
Learning widely and often

### ***Feedback from the market***

Word of mouth  
Market says [I am doing well]  
Credibility  
Referrals  
Return/repeat business  
Still in business – referrals keep coming in!  
The customers keep coming  
'I do it a lot'  
Making money  
Insurers tell me they respect the process  
Are we respected by clients?

### ***Feedback from the outcomes of mediation***

#### *Behavioural indicators*

Parties listen and acknowledge  
When parties both say they are happy with the process, the way I've managed it and feel they have a greater understanding of the other  
When people are able to share their stories  
Subjective impressions – body language, spoken language  
Clients become happy  
Clients tell us, 'We could have done this ourselves' [and] don't come back  
People report that they are able to open up opportunities for shared understanding and not have to 'reach agreement' as this may come later

#### *Assessment of outcomes*

Peace breaks out  
People are empowered by the process  
[There is an] improved relationship between parties  
Parties are satisfied and moving on  
Parties agree to a fair outcome  
An outcome, or outcomes, that the parties can live with

#### *Formal indicators*

Increased number of settlements  
Monitor outcomes, full/partial/no agreement  
Longitudinal monitoring of agreements

#### *The absence of the negative*

Not being sued  
No stalkers  
Do we get paid?

## Issues raised in plenary discussion

Issues were also raised by participants in plenary discussions at the workshop, as well as in the morning plenary session. These issues included:

- How should the needs of remote locations be taken into account?
- How do we ensure recruitment of people from culturally and linguistically diverse and Aboriginal and Torres Strait Islander communities?
- How do we maintain collegiality among mediators?
- How can we get feedback from consumer groups?
- How do accountability and immunity overlap?
- How flexible should the requirements be for professional education?
- An over-arching system is needed.
- There are shifting definitions of mediation and ADR practice.
- People do not need standards to get work.
- It is not possible to remove inappropriate operators without legislation. The franchise industry is a case in point.

## Process from here

Suggestions and comments were raised about the process for further discussion, in light of the grant to the NMCL. Some written and oral comments were also provided at the conclusion of the workshop. These suggestions included:

- Any system needs to promote diversity. It is crucial to recognise other cultural models and to recognise Indigenous groups and practices. The recognition and accreditation of Indigenous practitioners is a critical issue that cannot be ignored.
- What is needed is a 'mediators' mediator'.
- We need to bring people together and ensure stakeholders are represented.
- Identify the interests of stakeholders.
- Gather information on options.
- Test options against criteria.
- Tangible results are needed: a project methodology needs to be developed; a staged sequential approach is needed.
- We need decision-making, not just consultation.
- There needs to be segmentation to recognise different areas of practice.
- In the commercial arena, there are repeat users and sophisticated advisers.
- Therefore the need for accreditation is different.
- We need to create a small 'p' profession.
- Don't limit accreditation to those with degrees and post-nominals.
- We need to avoid re-inventing the wheel; other groups have developed standards; we need to examine the models developed by others. Overseas models could also be considered; for example, Austria.
- In looking at accreditation and examining different models, we need to be careful not to over-regulate ourselves to the point of stifling the practice, for example, the Migration Agents Registration Agency.
- The process needs to be taken up again at the next National Mediation Conference.