



Overview of responses to:

**WHO SAYS YOU'RE A MEDIATOR?
Towards a National System for
Accrediting Mediators**

Overview of responses to mediator accreditation paper

In March 2004 NADRAC released a paper *Who says you're a mediator? Towards a National System for Accrediting Mediators*, which aimed to stimulate discussion and obtain information in the lead up to a session on mediator accreditation at the 7th National Mediation Conference in Darwin on 30 June to 2 July 2004.

Below is an overview of the issues raised in the 31 submissions which were provided in response to the paper. The full text of the submissions is available from NADRAC's website at www.nadrac.gov.au. The individuals or organisations that made submissions were:

Australian Branch of the Chartered Institute of Arbitrators
Australian Centre for International Commercial Arbitration (ACICA)
Australian Commercial Disputes Centre
Australian Family Mediation Association
Community Justice Centres
Community Mediation Services of South Australia (CMSSA)
Conflict Resolution Service (ACT)
Dr Yvonne Craig
Dispute Settlement Centre of Victoria
The Hon Chief Justice John Doyle
Family Services Australia
Federal Magistrates Court
David Hopkins
Human Rights and Equal Opportunity Commission
Institute of Arbitrators and Mediators Australia
International Conflict Resolution Centre
Law Institute of Victoria
Law Society of NSW
Law Society of SA
LEADR
Fiona Long
Marg Lothian
National Native Title Tribunal
National Network of Women's Legal Services
Carol O'Donnell
Relationships Australia
Joseph Sierra
Associate Professor Gregory Tillett
Trillium
Victorian Civil and Administrative Tribunal's mediators
Victorian Dispute Resolvers Forum

The need for a national accreditation system

The overwhelming majority of submissions supported the concept of a national accreditation system. Various reasons were advanced, which focused on the needs of consumers, referrers, prospective practitioners and the mediation field as a whole.

For consumers and referrers, an accreditation system could serve:

- to lift standards
- to improve services available to the public
- to improve feedback mechanisms
- to provide protection for consumers
- to reduce the number of less reliable or unscrupulous operators in the mediation industry
- to ensure that referrers can be confident of the skills, qualifications and practice framework of mediators
- to reduce confusion about what mediation is (and what it is not), and what competencies or qualifications a mediator is required to possess
- to clarify expectations and thus prevent conflict

For practitioners and prospective practitioners, an accreditation system could serve:

- to save costs in mediation training
- to provide a means to accredit 'sole traders' who otherwise have difficulties in gaining recognition of their skills
- to improve entry into the industry
- to overcome difficulties for potential ADR practitioners in gaining 'qualifications'
- to avoid having to undertake multiple training courses and meet multiple requirements to practice with more than one mediation provider

For the field as whole, an accreditation system could serve:

- to reduce rivalry and fragmentation concerning training and accreditation
- to provide consistency in training, assessment, practice and evaluation, and the competencies required to practice as a mediator
- to offer an opportunity for identifying and agreeing on commonality in processes
- to combine resources to more effectively promote ADR
- to improve the status of mediation and so overcome a self-perpetuating cycle that discourages improvement in the level of skill required of practitioners
- to offer broader acknowledgement and recognition of mediation services as well as potential for political protection
- to create an esprit de corps and enhance professional pride

Although there was general support for a national accreditation system, many were aware of the complexity of the task. Support was often qualified in words such as 'in the long term', 'in general', 'in principle', or 'broadly supportive'.

Risks and constraints associated with an accreditation system

Despite the general support for accreditation, several risks and constraints were identified, depending on the type of system developed. These risks included:

Exclusion

- established practitioners could leave the profession
- membership of a specific organisation might be a condition of accreditation
- accreditation could act as a barrier to entry to practice as an ADR professional
- the potential exists for alienation of community-focussed service providers
- the development of a self-regulating group of accrediting bodies could prevent future entrants from entering the field

Resources

- if an inappropriate scheme was introduced, even more resources could be wasted
- accreditation has resource implications for organisations
- there may be human resource problems in rural and remote areas

Limitations

- accreditation may not overcome the current issues such as the general misinterpretation of mediation, unscrupulous operators and current patterns of referral
- if [an accreditation body] sets its standards too high, the majority will not support it, and the body will be considered elitist and isolated, but if it sets its standards too low, quality control and referrer/consumer confidence will not be enhanced
- there are dangers where accreditation by one agency could extend to other agencies with different supervision and quality control systems
- there is the risk of conflict of interest when an institution gains income from training or education and also accredits or sets standards
- accreditation may not be the best means to address the objectives referred to [in NADRAC's paper]

Legislative and policy issues

- there is no guarantee that there will be any legislative support for accreditation
- there are political, constitutional as well as funding issues at stake
- the relationship between any accreditation system and current statutory schemes needs to be examined

Terminology

- the term 'profession' may be inapplicable and unhelpful in the context of mediation
- ADR is not necessarily an 'industry'.

Principles

Several guiding principles were suggested for the development of an accreditation system, including:

Diversity and community base

- incorporate community focused mediators without ‘qualifications’ into any national accreditation
- consider issues of access and equity, cultural diversity and socio-economic factors
- avoid negative impact on indigenous or culturally and linguistically diverse (CALD) communities
- ensure accreditation is open to all, regardless of where training is undertaken

Relevance

- accreditation needs to be relevant to all levels of training and areas of practice
- [but] not undermine the quality benchmarks that have been developed for family mediation

Skills recognition

- recognise skills gained through means other than formal education
- recognise skilled and experienced practitioners and those with ‘native talent’ who may not meet new formal requirements, such as through some form of ‘grandfather’ clause
- include ‘Recognition of Prior Learning’ (‘RPL’)

Process issues

- ensure the process [to develop an accreditation system] is open and transparent
- define ADR, identify stakeholders, look at the role of courts as well as ADR and research the comparative outcomes of all forms of dispute resolution
- consider the advantages and disadvantages of various combinations of ‘hurdle’ and ‘maintenance’ requirements for accreditation
- some form of ongoing monitoring is necessary

Existing structures and systems

- ensure consistency with National Competition Principles
- accredit training through the Australian National Training Authority

Several submissions emphasised the need to recognise diverse areas and contexts of practice, and the desirability of a pluralistic system of accreditation, including:

- taking account of ‘hybrid’ processes, such as statutory conciliation
- deciding whether an accreditation system should apply to dispute resolution generally or focus specifically on mediation
- the importance of content knowledge in different types of disputes
- how accreditation would apply to the use of ‘generalist’ mediation skills in non-professional contexts

- recognising specific needs and skills in family mediation.

Various suggestions were made for a common core of standards contextualised to suit different areas of practice, for example, commercial, family etc.. One concept was to have base modules surrounding mediation skills, and electives surrounding the requirements of particular mediation markets.

Several submissions also pointed to the need for multiple levels of training or expertise ranging from, for example, basic entry level through to intermediate and advanced skills. Recognition of specialist areas, or strategic skills, such as dispute system design, was also suggested.

Accreditation structures

Many suggestions were made for a body or bodies that could oversee the accreditation of mediators. NADRAC's proposal for a system to accredit bodies that in turn accredit mediators was broadly supported. Submissions favoured a national, rather than a state-based structure. Suggestions ranged from systems with high levels of regulation or control through to self-regulated systems or looser groupings without any controlling or executive functions.

Specific concepts advanced included:

- accreditation of practitioners by the federal Government
- a 'Mediator Accreditation Council Of Australia (MACA)', with formal relationships to State or Regional Offices and Training Organisations and a Mediations Practitioners Act which may set standards for MACA
- an 'Australian Dispute Resolution Council' linked to an 'Australian Register of Professional Dispute Resolvers' that records decisions made elsewhere in the proposed structure, and the recognition through this process of 'Approved ADR Accreditation Organisations'
- registration of a new name, usable only by those with accreditation, eg 'Chartered Mediator'
- an expansion of, or change to, NADRAC in order for it to take on a formal accreditation function
- using an existing peak organisation or organisations
- an 'industry-based' structure
- a peak body to set and manage the standards for mediation training programs
- a loose federation of ADR organisations to develop and promulgate common ethical and practice standards
- the development of a structure or system, rather than the creation of a new body

Composition and membership

The suggested composition of the various bodies suggested included representatives of:

- consumers
- community
- courts
- business
- the providers of services
- ADR organisations representing business/commercial, legal and community-based mediators and ADR practitioners
- individual mediators and ADR practitioners
- office holders accountable for the 'public good'
- governments, including NADRAC and a representative of the Federal Attorney-General
- Professional Standards Council/s
- relevant professional bodies, including those which have completed a similar exercise

Accountability and separation of functions

Several submissions emphasised the need to separate functions and responsibilities, especially with regard to training versus accrediting organisations, due to the possible conflicts of interest that arise. The need to differentiate accrediting organisations from service providers and employing agencies was also expressed.

One submission advocated that accrediting organisations be accountable to a national body and that there be broadness in the allocation of work to their members. Another argued that a national body should be able to accredit individuals and not just organisations, in order to avoid a 'closed shop'.

Funding

Various suggestions were received about funding such a body or bodies. Most saw that Government funding would be required at least in the short term as a 'seed' grant or to enable further consultations. Suggestions were also made for later funding by way of membership fees and a fee for service for accreditation.

Legislation

Several comments were received about legislation covering mediators, including immunity for mediators, the value of national legislation to overcome the problems of different statutes in each State and Territory, and the need to take account of current legislative provisions, such as the Family Law Act 1975 (Cth.), the Community Justice Centres Act 1983 (NSW), the Mediation Act 1997 (ACT), the Evidence Act 1958 (Victoria) and the Native Title Act 1993 (Cth).

Training and training providers

Comments were also made about the training of mediators, including content of training, the appropriate provider of training and training models.

Many submissions referred to competency-based training under the Vocational Education and Training system administered by the Australian National Training Authority, although some doubts were expressed about the mechanistic nature of these competencies and the lack of relevance of some of the units developed to date.

The need for both practical and theoretical content was raised, with concern expressed both about the difficulties of putting into practice what may have been learnt and, conversely, the lack of theoretical/knowledge base to much current skills-based mediation training.

Also raised was the issue of who can deliver training or professional education of mediators, including the need for training providers to have qualifications in both education/training and in ADR. A comment was made that once basic criteria were established, mediation training could be undertaken by a range of providers, including, but not limited to, academic providers.

Client evaluation, feedback and complaints

The need was expressed for system to review and monitor mediation practice, including:

- client evaluation
- an external independent body to conduct regular research into mediations conducted by accredited/registered mediators
- a peak body to implement a complaints reporting and management system
- complaints-handling processes by individual organisations.

Ethics and practices

Submissions also referred to the need for both over-arching and organisation specific ethics and practice standards for mediators. Some elements of mediation practice mentioned were party responsibility for outcome, mediator control of the process of communication, an opportunity for parties to express their concerns and to listen, neutrality (or balance), and a non-adversarial process. In public policy matters preserving confidentiality and openness at the same time was raised, while in family matters, issues were raised about screening and exclusion processes, violence and abuse and the best interests of children.

Process, next steps

A concern was expressed that the process needs to move forward, otherwise the accreditation issue could 'fall off the agenda'. It was suggested that NADRAC needs to 'drive' the issue and that the Standing Committee of Attorneys-General (SCAG) could establish a national consultation.

Suggestions were received for further processes of consultation. It was suggested that an indication of commitment to the development of a national accreditation system could be gained at the National Mediation Conference. Facilitated discussions could follow at a later stage, such as a gathering or 'think tank' meeting to focus on accreditation principles and standards. Such a gathering could then appoint an interim group to finalise the accepted standards and form an accrediting body. It was suggested that such a process be facilitated by NADRAC, the Attorney-General's Department, one of the major ADR organisations or a person of high national standing.