




NADRAC

NATIONAL ALTERNATIVE DISPUTE
RESOLUTION ADVISORY COUNCIL



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

The National ADR Advisory Council (NADRAC) is an independent body which provides advice on ADR to the Australian Attorney-General.

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Who says you're a mediator?

Towards a national system for accrediting mediators

This paper aims to obtain information and to stimulate discussion in the lead up to a workshop on mediator accreditation, which will be held at the National Mediation Conference in Darwin on 30 June to 2 July 2004.¹ NADRAC will convene the workshop with a view to encouraging mediation organisations and practitioners to work together to develop a viable and effective national system for mediator accreditation.

NADRAC notes that dispute resolution practitioners and organisations are already talking about various models of accreditation and that there may be significant developments prior to the June 2004 workshop. This paper is intended to support, not cut across, such discussions. NADRAC also emphasises that it sees itself as taking solely a facilitative role. As an advisory body to the Commonwealth Attorney-General, it has neither the mandate nor the wish to become an accreditation agency itself.

Underpinning NADRAC's interest in this area is its desire to ensure that any process to develop an accreditation system for mediators should be open and inclusive, and should support both the quality and the diversity of mediators and mediation practices.

NADRAC invites written responses to the questions raised below. These responses will be summarised for the 2004 Mediation Conference and included in the workshop materials. Note that any responses should be considered as public materials that could be published in whole or in part by NADRAC or by the National Mediation Conference. On request, the name or organisation of anyone making a response may be kept confidential.

Responses should be e-mailed to nadrac@ag.gov.au by 14 May 2004.

¹ see www.thebestevents.com.au for details about the conference.

Key questions

Information and opinions are sought on any or all of the following matters:

- 1) Any arguments, factors or considerations that either support or constrain the development of a national accreditation system for mediators. In particular, NADRAC would be interested in hearing of instances where an improved accreditation system would have helped to overcome problems such as:
 - a) inadequate standards of service and lack of consumer recourse for such service
 - b) lack of ‘market’ or referrer confidence in the quality of mediation services
 - c) difficulties for potential ADR practitioners in gaining recognition of their skills, and
 - d) other risks and problems (see page 2 for further examples).
- 2) Any current initiatives to:
 - a) develop an accreditation system for mediators
 - b) review or refine an existing system for mediators, or
 - c) build links of create greater consistency across different accreditation systems.

These initiatives could be at the agency or sector levels, or involve government initiatives at the State, Territory, Commonwealth or national levels. See page 5 for information about some of these initiatives.
- 3) Any comments on NADRAC’s proposal for a system to accredit bodies that in turn accredit mediators, including:
 - a) common standards for accreditation
 - b) the formation, structure, membership, funding and name for a body that would oversee the development of such standards.
- 4) Any other comments relevant to the issue of mediator accreditation.

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Introduction

Background

NADRAC's 2001 report on standards¹ recommended a framework in which ADR service providers develop their own standards which takes account of the elements of a code of practice. One of the elements specified that ADR service providers describe the knowledge skills and ethics required by practitioners, and the service providers' and practitioners' obligations to ensure the quality of the ADR process.

The report also suggested several principles for the accreditation of ADR practitioners, organisations or programs. NADRAC suggested that, as structures and benchmarks were developed, a broad-based accreditation scheme for ADR may be appropriate in the future.

Scope

The task of developing a national accreditation system for ADR is a challenging one. To make the task more achievable, NADRAC has narrowed the scope to what it sees as the area of greatest need, namely mediator accreditation, in other words, 'how individuals gain recognition as mediators'.

The paper does not address issues associated with the establishment of a peak body with functions broader than accreditation. These issues were canvassed in NADRAC's standards report. There have been calls over many years for the establishment of a peak body for ADR. There are, however, diverse views about the need for, and nature of, any peak body. There seems, however, to be broad agreement of the need to further develop accreditation and recognition processes for ADR practitioners.

The paper is concerned with accreditation of mediators and not with practitioners engaged in determinative and advisory processes, such as arbitration or expert appraisal. Although there are commonalities across diverse dispute resolution processes, different professional obligations apply to those giving advice, making determinations or helping parties to come their own agreements. The scope of 'mediator' accreditation may, however, encompass similar facilitative processes, such as facilitation and facilitated negotiation. The paper may also be relevant to the facilitative aspect of combined processes such as conciliation or mediation-arbitration.

¹ National Alternative Dispute Resolution Advisory Council (2001) *A Framework for ADR Standards*, available at <http://www.nadrac.gov.au/www/disputeresolutionHome.nsf/Web+Pages/6F10B734577A902DCA256B4C00030D1E?OpenDocument>

The need for accreditation

Risks and problems with the current situation

NADRAC acknowledges the excellent work done by the range of organisations that have developed comprehensive systems for accrediting mediators.

There is, however, no overall system for accreditation in mediation. Rather there is a plethora of accreditation systems which use different benchmarks or standards. There is little empirical data about the impact of this. Some hypotheses, based on anecdotal information follow:

- Users of mediation services are unclear as the quality and nature of the services offered. Nor do they have satisfactory avenues of recourse if dissatisfied with the level of service received.
- Referrers (such as courts and lawyers) similarly may not trust the quality of mediation services offered and so either (a) establish their own formal or informal systems of accreditation, (b) provide services in-house, (c) rely on word of mouth recommendations or (d) choose mediators on the basis of the mediators' personal status rather than their mediation skills.
- Prospective practitioners and students may need to meet multiple and inconsistent standards to enter the mediation field. Training efforts therefore may be directed to completing a series of similar entry level courses rather than a continuous upgrading of skills and knowledge development.
- Moreover, the reliance on word of mouth and informal accreditation can make it difficult for new mediators to gain work, thus preventing new ideas and energy from entering the mediation field.
- Fragmentation in accreditation and the often competing claims made by rival mediation organisations reduce community and government trust in the mediation movement.
- In the absence of a generally recognised accreditation system, inappropriate regulation may be introduced, such as the establishment of threshold academic or professional credentials that are not directly relevant to mediation competence. Such thresholds may eliminate highly capable mediators as well as those from specific social backgrounds, and so reduce both the overall skill level of mediators and the diversity of their backgrounds.
- As a result of the rivalry between organisations for the work available, mediation could become training and supplier driven rather than service and demand driven.
- Public and private resources are wasted as organisations establishing their own accreditation systems and individual practitioners seek to meet inconsistent criteria across different accreditation systems.

What we mean by ‘accreditation’

In its standards report NADRAC differentiated assessment and accreditation as follows:

‘Assessment’ is a process of collecting evidence and interpreting that evidence to make a decision. That decision may relate to personal, organisational or program performance or suitability. An assessment may serve different purposes, including selection, engagement, employment, the issuing of a qualification, review or disciplinary proceedings and accreditation. An assessing body or person has a responsibility for ensuring the appropriateness of the assessment process and of the evidence for making a decision.

‘Accreditation’ is a process of formal and public recognition and verification that an individual, (or organisation or program) meets, and continues to meet, defined criteria. An accrediting body or person is responsible for the validation of an assessment process or processes, for verifying the ongoing compliance with the criteria set through monitoring and review, and for providing processes for the removal of accreditation where criteria are no longer met.

There is a variety of terms used which fit either of the above definitions. These terms include ‘approval’, ‘registration’, ‘licensing’, ‘recognition’, ‘certification’ and ‘credentialing’.

What should accreditation aim to do?

NADRAC suggests that any accreditation system should promote the following objectives:

- enhance the quality and ethics of mediation practice
- protect consumers of mediation services
- build consumer confidence in mediation services, and
- build the capacity and coherence of the mediation field.

Although a move toward more consistent and meaningful accreditation is desirable, there are also dangers if accreditation is used as a means to stifle diversity, constrain practices or to put professional interests above client and community interests.

Accreditation does not necessarily mean standardisation of practices or practitioner qualifications. It is simply a way of saying that person A meets criteria X or Y. These criteria may vary widely according to the needs of the service, the users and the community. They may vary both in scope (eg type of disputes handled) or levels (eg entry level, advanced, etc).

Nor does accreditation of practitioners of itself guarantee service quality. Service providers need also to attend to aspects of service delivery, such as service design, monitoring and professional supervision, compliance, complaints handling and physical facilities.

Key elements of accreditation

Accreditation is a form of public recognition. An accrediting body has continuing responsibilities to the person being accredited, to others it accredits, to other accrediting bodies, to consumers and to the public at large. Accreditation processes therefore need to:

- clearly define the standards recognised through the accreditation
- be based on valid and reliable assessment
- include monitoring, review or audit processes
- provide fairness to those seeking accreditation
- be transparent and publicly available, and
- be consistent and comparable with similar accreditation regimes.

Factors to be considered in an accreditation system

Any accreditation system may need to take into account several important policy considerations:

- 1) Competition and regulatory reform policies have been adopted by Commonwealth and State and Territory Governments². These policies emphasise the need to ensure and promote a competitive environment that is consistent with public policy interests. A strong case needs to be made before government would attempt to control directly the provision of goods and services. It is also desirable to avoid the problem of compliance with separate regulatory regimes across different jurisdictions. The need for regulatory reform with respect to established professions, such as law and medicine, has also been raised. A new mediation ‘profession’ modelled on existing professional groups could face similar criticism.
- 2) Responsibility for policy and legislation affecting mediation is shared between the Commonwealth and the eight States and Territories. For example, while family mediation is a Commonwealth responsibility, neighbourhood or tenancy mediation is a State/Territory responsibility.
- 3) Professional standards legislation currently exists in two jurisdictions (WA and NSW) and consideration is being given to extending such legislation to other jurisdictions. An occupational association may apply to the Professional Standards Council for approval of a scheme to limit the common law liability of the association’s members (or a class of members)³. In order for a scheme to be approved by the Professional Standards Council the association must ensure that members have insurance to cover the relevant level of liability, have established a complaints-handling and disciplinary procedure for complaints

² See National Competition Council at www.ncc.gov.au

³ See Professional Standards Council at

http://www.lawlink.nsw.gov.au/lawlink/professional_standards_council/psc_ll.nsf/pages/PSC_index

against its members, and have established a risk management strategy to be implemented by its members.

Other accreditation initiatives

An important development at the national level is the Practitioner Approval Standards Project commissioned by the Attorney-General's Department⁴. The aim of the project is to develop draft standards for practitioners seeking to be approved under the *Family Law Act 1975* (Cth.). It will eventually cover 'all practitioners who engage directly as third parties in facilitative processes to manage, settle or resolve family conflict arising in connection with family separation'. This project is currently in progress and further details may be available by the time of the National Mediation Conference.

Any additional national accreditation system would need to consider whether it 'sat above', 'next to' or 'overlapped with' a system for accrediting family mediators. That is, a national accreditation system could:

- 1) include accreditation of family mediators as one of its components
- 2) create a separate accreditation system for areas of practice apart from family mediation, or
- 3) share common elements, for example, recognition of particular classes of practitioners or of training courses.

Any process of skills recognition for mediators would also need to consider the units of competency in mediation that have been approved recently by the Australian National Training Authority (ANTA)⁵. Such units would underpin accreditation of the training and assessment of mediators within the national Vocational Education and Training (VET) system.

NADRAC also understands that there are initiatives at the State and Territory level to implement or review processes for the accreditation of mediators. Further information on such initiatives is sought.

⁴ See Attorney-General's Department at <http://agnet.ag.gov.au/www/familylawHome.nsf/HeadingPagesDisplay/Primary+Dispute+Resolution+Unit?OpenDocument>

⁵ To view mediation competency units and qualifications go to National Training Information Service at www.ntis.gov.au and follow the search prompts.

Models for a national mediator accreditation system

There are many options for a mediation accreditation system. These were outlined in NADRAC's report on standards and have been raised by dispute resolution practitioners and organisations.

In general terms accreditation could apply to:

- the individual mediator, or
- the organisation that provides services and employs or accredits mediators.

Professional association

Mediators could form a professional association. The functions of such an association could include:

- setting rules for admission, including the approval of courses of study acceptable to the professional association
- setting standards of practice and ongoing professional development
- discipline of members (including expulsion)
- advocacy on behalf of the profession.

Such an association could seek special privileges from government and from industry – such as through legislation or preferred supplier status – so that non-members are restricted in their capacity to offer ADR services. This could be achieved by registration (or licensing) boards. Registration boards formally approve practitioners to enable them practice in a particular area, where government legislation or court rules restrict such practice to defined persons.

Examples of such professional bodies are the Law Societies and Bar Associations in each State and Territory, the Institution of Engineers Australia, the Australian Association of Social Work (AASW), and the Australian Psychological Society. Registration and licensing boards include nursing and psychologist registration boards.

It is noted that other professions have come under criticism in recent times for restrictive practices, lack of transparency and lack of recourse to independent complaints mechanisms. There could be strong resistance to setting up an exclusive body that restricted competition or gave special privileges to members of a specific group. There are also divergent views about the desirability of 'professionalising' ADR, especially where mediation is seen as a part time activity rather than a source of full time employment.

Industry body

An industry body brings together key stakeholders to define and advance practices in a particular sector or industry. An ADR industry body could comprise, for example, ADR organisations, courts and other referring agencies, allied professions, funding bodies, education and training providers and research organisations.

An industry body could create guidelines for accreditation, advise on (or set) service and quality standards, approve training courses and generally promote the interest of the industry.

Examples of industry bodies are the Pharmacy Guild, Telecommunications Industry Association and the Housing Industry Association.

A further example is industry training advisory bodies (ITABs). Such bodies develop competencies and training packages relevant to their own industries, which are then endorsed by the Australian National Training Authority (Community Services and Health Training Australia is such an ITAB. It has already developed competencies for mediators.)

Although mediation is sometimes referred to as an ‘industry’, it is unclear whether this is an appropriate term. Mediation is a small but highly diverse area of practice that falls within many ‘industries’. For many organisations and practitioners, mediation is an ‘add on’ area of activity rather than core business.

Government

Legislation may enable a minister, or a defined official or agency, to recognise or accredit practitioners.

Such a process already occurs in ADR. For example, the ‘minister’ (ie the NSW Attorney General) may ‘accredit’ mediators under the *Community Justice Centres Act 1983* (NSW). The chief executive may ‘accredit’ mediators under the *Dispute Resolution Centres Act 1990* (Qld). The *Evidence Act 1958* (Vic.) enables the Secretary to the Department of Justice to ‘gazette’ mediators with the Dispute Settlement Centres. The *Family Law Act 1975* (Cth) enable the Chief Justice of the Family Court to appoint court mediators. The *Farm Debt Mediation Act* (NSW) enables the Rural Assistance Authority to ‘institute arrangements’ to accredit mediators.

This form of accreditation requires a high level of government involvement and is usually introduced as part of a specific government initiative or reform. A national government scheme to accredit all mediators would be likely to encounter opposition from many quarters as it would be seen as direct and central government control. It would be inconsistent with the principle of self-regulation previously recommended by NADRAC and would be likely to give rise to a raft of jurisdictional problems.

Commercial enterprise

A further option is the creation of a commercial enterprise which offered a range of services on a fee for service basis. Such services could include training and referral to a panel of mediators. Several Australian ADR bodies already operate on this basis. An enterprise could

also provide direct services and accredit the practitioners that it used. Or it could have a narrower focus and concentrate solely on assessment and accreditation, such as occurs with the National Accreditation Authority for Translators and Interpreters Ltd. (NAATI).

An enterprise able to guarantee the quality of its services could gain credibility with government and with purchasers of mediation services, and could market its services through ‘trust marking’.

Internal tensions may arise between the commercial and service goals of a private organisation. For example, pressures to bring in income by running training for new practitioners may undermine the need to support existing practitioners or to meet other goals of the organisation.

Accreditation of organisations that accredit individuals

Instead of accrediting individual practitioners, it would be possible to establish a system to accredit (or approve) organisations which, in turn, engage (or accredit) individual practitioners. The body which accredits organisations could itself be a professional association, industry body, government agency or private enterprise.

There are several current accreditation systems that operate on this basis.

- The *Mediation Act 1997* (ACT) enables the ACT Attorney-General to approve mediation agencies to accredit individual mediators according to the ACT Mediation Competencies. (This situation may need to be reviewed as competencies have now been endorsed at the national level.)
- The *Family Law Act 1975* (Cth.) enables the Australian Attorney-General to approve organisations that provide counselling or mediation services. Funded bodies need to satisfy the standards of a quality accreditation system (FAMQIS) that include the entry and ongoing training of practitioners. (The requirements for mediators, however, are defined by the Family Law Regulations. This arrangement is currently under review, see page 5.)
- In the health system, the Quality Improvement Council set standards for the accreditation of health services through a quality assurance system. As with FAMQIS, accredited services need to have appropriately qualified staff.
- In the vocational education and training system, State and Territory training authorities register (ie accredit) training organisations that undertake a quality assurance process, which also require trainers and assessors to be appropriately qualified and trained.

It is noted that many of these schemes include ‘accreditation’ (ie engagement) of practitioners as part of an overall organisational quality accreditation process. As noted in NADRAC standards report, such a process may well be unwieldy for organisations that do not themselves provide direct mediation services to the public and those that have mediation as one part of their operations. Standards applying to the accreditation process alone could be more limited than the overall quality assurance systems applying to organisations engaged directly in service delivery. (However, organisations that provide direct services could include reference to mediator accreditation standards within their overall service standards).

NADRAC's proposal

The following preliminary proposal is put forward to further stimulate discussion and reflects the current thinking of NADRAC members.

NADRAC believes that a simple, achievable and credible system for accrediting mediators is needed to advance the quality and acceptance of mediation in Australia.

It is not feasible to establish a single body to accredit each mediator on an individual basis. As well as being unwieldy such a body would cut across the many existing arrangements that currently exist.

Instead a system is required to approve (ie accredit) organisations which in turn accredit mediators. The approval of such organisations would require the development of common standards for initial assessment, as well as ongoing monitoring, review and disciplinary processes for mediators. Standards for the accreditation of mediators could be expressed in an agreed code of practice or similar document.

Such a system would need the support of existing accrediting organisations. It would need to recognise current efforts to promote quality practice and provide an open and transparent process whereby existing and new bodies could comply with accreditation standards.

The process for approving mediator accreditation organisations needs to be overseen by a national body developed on a consensual basis. Issues to be considered in the creation of such a body include:

- formation, for example, a federation of bodies created at the State and Territory level, or the formation of a single national body
- structure, for example, sections or divisions with specific interest and functions, or State and Territory branches or chapters
- membership, for example, mediators, mediation organisations, courts, consumer groups, other professions, government
- funding, for example, government, membership subscriptions, fee for service
- what the organisation is to be called, for example, 'Australian Mediation Accreditation Council' or the 'Association for Mediation Accreditation'.

NADRAC welcomes comment on the proposal above and any views about common standards for the accreditation of mediators.