



**2<sup>nd</sup> AMA CONFERENCE**  
**“REDISCOVERING MEDIATION IN THE 21<sup>ST</sup> CENTURY”**

**ACCREDITATION OF MEDIATORS AND MEDIATOR TRAINING**  
**- DEVELOPING A UNIFIED ASSESSMENT AND**  
**ACCREDITATION SYSTEM**

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## Introduction

The debate among mediators about the assessment and accreditation of mediators has been fermenting for some time. This paper looks at the arguments for and against, considers options available for credentialing of mediators and suggests that the best way forward is by encouraging adherence to a flexible voluntary accreditation system.

I have adopted Albert Einstein's advice to "Make everything as simple as possible but not simpler" (based on the principle, sometimes known as Okham's Razor). The writer suggests that the time for debate has now passed and we should be looking at what can be done to encourage a unified accreditation system. I conclude that we may do no better than to look at the possibilities of the model now in place in Australia known as the Australian National Mediation System. It is flexible, voluntary and has been in place for some years. Perhaps the time has come for mediators internationally to look to subscribing to this type of model.

My practical experience in mediation has been largely in New Zealand and the Pacific, therefore my views are largely based on developments in that part of the world. My colleagues will add their experiences and views from other jurisdictions

## Arguments For and Against Assessment and Accreditation Systems

Some mediators argue that mediation is an art form, based on intuitive skills, which cannot be taught or assessed. Any attempt to do so will lead to a loss of flexibility and a rigidity in style. In addition there is a fear of the professionalisation of mediation and concern that elitism will develop which will promote some mediators and discourage and disenfranchise others. This position is put eloquently by Dr Kenneth Cloke:

"Professionalism historically proceeds through a number of stages, starting with the discovery of useful techniques, creative development, and systematisation of skills. Next comes professional self-consciousness, the search for legitimacy, and the beginning of territoriality and proprietary behaviours. This is followed by a codification of rules and ethics, escalation of fees, formalisation by attorneys, legislators, and judges, and formal certification. Finally comes dismissal of the impecunious, grandfathering of the unqualified, marginalisation of the unorthodox, and promotion of the mediocre."<sup>1</sup>

Other voices in the debate call for mandatory licensing of mediators. These views are driven by consumer protection concerns and the need to maintain standards and quality among mediators. Most comments:

"Permitting 'a thousand flowers to bloom' has been mediation's history. Growing out of society's need for options to the legal system, you could hang (sic) a shingle to mediate without a state license – actually without training at all. The proliferation of

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<sup>1</sup> Cloke, K. *Mediating Dangerously: The Frontiers of Conflict Resolution* (2001). Jossey-Bass. San Francisco at p53.

different styles and backgrounds has been a blessing and a curse for consumers. There is an abundance of choice and virtually no accountability.<sup>2</sup>

In the last 10 years the debate has been particularly lively. During that time, mediation has moved to a mainstream alternative for dispute resolution. The arguments for and against are set out below by of background.<sup>3</sup>

Dr Cloke argues strongly against licensing the mediation profession on the grounds it will:<sup>4</sup>

- a) Exacerbate differences and encourage territoriality and competition;
- b) Reduce supply of mediators;
- c) Raise fees;
- d) Freeze ideas and techniques;
- e) Obstruct cross fertilisation.

Of these objections, the reduction in the supply of mediators and raising of fees are common to arguments all against professionalism and support the exclusivity arguments levelled against professions. These reoccur in the debate.<sup>5</sup> Less common, in the general debate on professions are Cloke's concerns about limiting the freedom and development of mediation.

The confidentiality of mediations coupled with the fact that most consumers are ill equipped to judge the good from the bad, makes it difficult to monitor mediations or their quality. The little information that is available indicates that there is cause for concern about the process and quality of some mediation services.<sup>6</sup> The New Zealand Law Commission in 2004 expressed concerns about private and state mediation services and made recommendation designed to promote a uniform highly skilled pool of mediators subject to a code of ethics and accountability framework.<sup>7</sup> The Government has taken no steps in this regard.<sup>8</sup>

Commentators agree that the key features of the mediation process: privacy, informality and adaptability carry with them a risk of harm unless mediators meet

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<sup>2</sup> Mosten, F.S. *The Evolving Field of Mediation in the United States*. (2001) 13 Bond LR 486 at 487. Bond University is based in Queensland, Australia.

<sup>3</sup> For more detail see Dr Fraser and C Grice: "The Dispute Resolution Practitioner Aiming for Professionalism in a Deregulated Environment" paper presented at the IAMA National Conference, Palm Cove, Australia 2006.

<sup>4</sup> Cloke, K. *The Cross Roads of Conflict: A Journey into the Heart of Dispute Resolution*. Janis Publications. 2006. Canada at p329.

<sup>5</sup> See discussion in: *Who Says You're A Mediator? Towards a National System for Accrediting Mediators*. NADRAC. March 2004. ACT. P6. Australian proposal: National Mediator Accreditation System. Draft Proposal for Public Consultation. Accreditation Subcommittee of the National Mediation Conference Pty Ltd. November 2005. ACT. See [http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/\(960DF944D2AF105D4B7573C11018CFB4\)~accreditation+options+paper6+new.pdf/\\$file/accreditation+options+paper6+new.pdf](http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(960DF944D2AF105D4B7573C11018CFB4)~accreditation+options+paper6+new.pdf/$file/accreditation+options+paper6+new.pdf) downloaded 12Jan2011

<sup>6</sup> See below

<sup>7</sup> In the context of Court mandated mediation services. NZLC Report 85. *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*. March 2004. Wellington.

<sup>8</sup> Government Response to Law Commission Report on *Delivering Justice for All*; Presented to the House of Representatives August 2004, Crown Copyright, Wellington. See: [www.justice.govt.nz/pubs/reports/2004/delivering-justice-for-all](http://www.justice.govt.nz/pubs/reports/2004/delivering-justice-for-all)

appropriate standards of practice.<sup>9</sup> There seem to be few complaints about mediators.<sup>10</sup> Bayliss notes additional deterrents are the (contractual) immunity from suit of mediators which makes action difficult, and also lack of community knowledge of process of mediation means the parties don't recognise when they have got grounds for complaint. She considers there is a systemic bias in favour of not complaining.<sup>11</sup>

Astor and Chinkin also express concern that mediation may be seen as providing second class justice for poor people.<sup>12</sup> They also point to the danger of mediation being used to effect substantive change, which is not public. By way of example, they note the enthusiasm for shared parenting in family dispute mediation and resultant large numbers shared parenting outcomes in the United States, fuelled by mediators with the "shared parenting" agenda. Mediator neutrality and techniques to guard against loss of neutrality are therefore very important so as to deter the use of mediation for influencing non-transparent mediator driven ideological outcomes.<sup>13</sup>

Saville-Smith & Ors<sup>14</sup> also note that one of the critical issues for lawyers in referring disputes to mediation is the perceived quality and availability of services. All stakeholders that those researchers interviewed consider skilled mediation practitioners were a critical success factor in mediation and that experience and training were crucial. Those disputants and lawyers, who reported that Alternative Dispute Resolution (ADR) was not an effective dispute resolution mechanism, referred to poorly implemented and non-transparent processes and the competencies of the practitioner.<sup>15</sup> Saville-Smith<sup>16</sup> noted that some practitioners were undertaking practice without any formal training, or with only the 4-day LEADR entry-level workshop training. The report also highlighted concern among practitioners about an anti-ethical model of mediation (in Auckland, New Zealand) which allowed the disputants to be "bullied" and used "trading-off" approaches, particularly in employment and insurance disputes. Practitioners were concerned that this model could cause a backlash against mediation.<sup>17</sup> Regional variations in the use of, and interest in, mediation are also significant and the reasons complex. Uptake of mediation services depend on the local legal culture, court waiting times, industry adoption,<sup>18</sup> support by the judiciary and the availability of trusted, well-known and acceptable practitioners in the system.<sup>19</sup>

Other commentators have expressed concern that the lack of any standards and regulation of mediators which may lead to the devaluation of mediation as a process. Goldblatt asked in 2001 what could be done, and noted that the reputation of mediation as a valuable dispute resolution process depended on a supply of

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<sup>9</sup> Spiller, P(ed). *Dispute Resolution in New Zealand*. Oxford University Press 1999, Auckland, New Zealand.

<sup>10</sup> This observation is made based on the lack of complaints about mediators from the writer's experience on investigation panels of a mediator professional organisation. Similarly there is little NZ case law on liability of mediators and none have been successful. See Boule, Goldblatt & Green: *Mediation Principles, Process and Practice* at p318

<sup>11</sup> Bayliss, C. *Statutory Mediators and Conciliators: Towards a Principled Approach*. (2002) 20 NZULR 101.

<sup>12</sup> Astor, H and Chinkin, CM. *Dispute Resolution in Australia*. Butterworths. 1992. Australia at p15.

<sup>13</sup> Astor, H and Chinkin, CM. *Dispute Resolution in Australia*. Butterworths. 1992. Australia at p18.

<sup>14</sup> Saville-Smith, K and Fraser, R. *Alternative Dispute Resolution: General Civil Cases*. Centre for Research Evaluation Social Assessment. Ministry of Justice. Wellington. June 2004

<sup>15</sup> Saville-Smith, K and Fraser, R. *Ibid* at para. 3.6

<sup>16</sup> Saville-Smith, K and Fraser, R. *Ibid* at para. 3.6

<sup>17</sup> Saville-Smith, K and Fraser, R. *Ibid* at para. 4.2

<sup>18</sup> Such as insurers who take over the conduct of claims or defences by subgration in respect of the rights of their insured.

<sup>19</sup> Saville-Smith, K and Fraser, R. (*ibid*) identified Auckland, Hamilton and Bay of Plenty/Rotorua regions were identified as high use regions of ADR.

sufficient competent professional mediators.<sup>20</sup> Singer<sup>21</sup> expresses her disappointment at the devaluation of mediators by underfunding, and evolution of mediation as part of the state process but not funded commensurate with the funding provided for the judicial system. She also expresses concern about “volunteer” mediators creating an underclass of mediators. She also notes the confusion in the market place for consumers who experience significant differences in skill levels and process, depending on who they select as a mediator.<sup>22</sup> In other commentary she notes that this is exacerbated by the large number of practitioners facilitating mediations, using an equal number of different processes some of which are evaluative/determinative but all are generically described as mediation.<sup>23</sup> She urges a national standard be developed with agreed methods of assessment of competence.

Mediation is now used in the New Zealand courts and tribunal system extensively. In New Zealand the District Court deals with civil disputes involving amounts up to \$200,000 (NZ). New District Court rules were introduced in 2009, with a focus on early settlement and mediation. This has led to a substantial reduction in the number of cases that reach a hearing in the courtroom.<sup>24</sup>

In Australia there are over 30 statutes which regulate matters such nomination, accreditation and appointment of mediators, mediation confidentiality and mediator immunity.<sup>25</sup> In the United States, the uniform Mediation Act, promulgated in 2001, with the objectives of promoting confidentiality and fairness whilst maintaining creativity and diversity of mediation, provides a model regulation and is not binding on practitioners.<sup>26</sup>

However, while the debate will continue, the reality is that with the widespread use of mediators, its incorporation into state schemes and movement toward mandatory mediation in many jurisdictions, consumer protection and quality issues are to the fore. The preponderance of opinion is that the time for debate is over – some form of accreditation and assessment must be put in place for mediators.

## **The Debate Moves On**

Most mediators now agree that an accreditation system of some description is necessary, at least on a national, if not global, basis.

The mainstreaming of mediation has led to the increase in practitioners seeking careers as mediators and high demand for training and a call for opportunities for experience by neophyte mediators. The multi-disciplinary nature of mediation leads to mediators being drawn from every professional field. The different types and

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<sup>20</sup> Goldblatt, V. The Mediation Market Demanding the Supply. (2001) NZLJ 273

<sup>21</sup> Singer, Linda. Interview on mediate.com. See <http://mediate.com/articles/singerdvd06.cfm>. Linda Singer video, retrieved 12Jan2011.

<sup>22</sup> Powell, C. Establishing Mediator Assessment Criteria. (2003) NZLJ 329

<sup>23</sup> Powell, C. Confusion in the Mediator Marketplace. (2004) NZLR 486

<sup>24</sup> In New Zealand the District Court deals with civil disputes of a monetary value up to \$200,000. New District Court rules came into force on the 1<sup>st</sup> November 2009. These embodied a philosophical seachange to the litigation process, which had no New Zealand precedent to note / clear parallel in the common-law world. The object of the new rules is to secure the just, speedy and inexpensive determination of proceedings (rule 1.3). A review of the operation of rules is due in 2011. Consideration has been given to the extension of the processes to the High Court.

<sup>25</sup> Boule, Goldblatt, Green. Mediation Principles, Process, Practise. 2<sup>nd</sup> New Zealand edition. Lexus, Wellington 2008, at p287 citing NADRAC 'A Framework for ADR Standards 2001, p44'.

<sup>26</sup> Boule, Goldblatt, Green, at p288

processes of mediation are adopted according to the nature of the dispute, the cultural context, and the expectations of the parties. The eclectic nature of mediators and mediation would not fit with a uniform mandatory accreditation and assessment system.

In New Zealand anyone can call themselves a “mediator”. The use of the practitioner label “mediator” is unrestricted.<sup>27</sup> No general legislation exists to prescribe rules for conducting mediations.<sup>28</sup> There are some statutory provisions concerning mediations. Three professional organisations in New Zealand cater for mediators and offer mediation accreditation and training – LEADR ([www.leadrnz.co.nz](http://www.leadrnz.co.nz)); The Arbitrators and Mediators Institute of New Zealand (AMINZ) ([www.aminz.org.nz](http://www.aminz.org.nz)) and the New Zealand Law Society (Specialist Family Mediation Panel). These organisations each promulgate codes of ethics and disciplinary processes.

The New Zealand Law Society developed an accreditation system for family mediators. It recognised the importance of quality training options and the specialized nature of family disputes. The Society offers training courses for mediators, through the legal education organisation, NZLS CLE Ltd ([www.lawyerseducation.co.nz](http://www.lawyerseducation.co.nz)). That company entered into a venture with an academic institution Massey University<sup>29</sup> to provide the course and assessments. Massey University, through its Centre of Dispute Resolution is a well-established provider of dispute resolution training. The university offers higher academic degrees in dispute resolution. The present director of the Centre, Virginia Goldblatt<sup>30</sup>, has considerable experience and expertise in education / training and assessment. The Society will only accredit family mediators who are members of the NZLS Family Law Section which provides specialist support and tools for family practitioners. The Law Society’s involvement as an accreditor and a provider of training is relatively recent and a direct response to demand created by a family mediation project put in place by the Ministry of Justice and the Chief Family Court Judge. A copy of the guidelines for counsel led family mediation in the New Zealand Family Court is available.<sup>31</sup>

The issues raised in the debate provide an important background for the next step. The variety of contexts and uses of mediation, and of the backgrounds and approaches of mediators, make it obvious that if there is to be success in establishing some form of credentialing, it will need to be flexible to accommodate that diversity.

## Forms of Credentialing

Accreditation and assessment systems are a form of credentialing. Credentialing encompasses specific forms of professional regulation such as accreditation, certification and licensing.

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<sup>27</sup> While the title of “arbitrator” is also not protected, legislation governs the conduct of arbitrations and regulates procedure for arbitral proceedings. Arbitration Act 1996 (NZ).

<sup>28</sup> In the case of Government Services such as the Employment Relations Service (Employment Relations Act 2000) and Weathertight Homes Dispute (Weathertight Homes Resolution Services Act 2006)

<sup>29</sup> See <http://www.massey.ac.nz/massey/about-massey/news/article.cfm?marticle=law-society-partners-with-massey-to-provide-mediation-training-27-10-2010> retrieved 14Jan2011

<sup>30</sup> Virginia Goldblatt is delivering a paper at the AMA Conference. *Mediating Employment Conflicts:- Preserving, Nurturing & Harnessing Human Capital in Organisations*.

<sup>31</sup> available at: <http://www.justice.govt.nz/courts/family-court/practice-and-procedure/guidelines/Counsel-led%20mediation%20PACK%20March%202010.pdf>



Any form of credentialing defines the expectations and boundaries, core values and specific bodies of knowledge.<sup>32</sup> There are five common credentialing options. From options with the weakest form of oversight and control, to the strongest, they are:

1. Written statements of standards: they are aspirational and reactive:
2. Registers or Rosters: held by the state or a profession organisation;
3. Accreditation and/or certification by a professional association: a regulatory authority (professional or government) certifies that the practitioner has skills, training and expertise to a certain standard and meets any personal integrity standards and is entitled to be so recognised. A person may still practise in the area without such a certificate.
4. A licensing regime imposed by the state: licensing applies to professions such as lawyers. No one may practise in the scope of work licensed to the profession.

A discussion of the credentialing options and their strengths and weaknesses follows:

#### I. Statements of Standards

This entails a mere setting out of standards. While it may allow for grievances, the process is slow and usually follows the facts of practise.<sup>33</sup>

#### II. Registers and Rosters held by a state or professional association

Rosters and registers are a stronger method of control than standards, but they too have substantial weaknesses. Public lists enhance visibility and improve access, but are not very restrictive. They are relatively easy to create and maintain but may not define a threshold for inclusion. Inexperienced clients may assume a level of oversight that is not warranted.

#### III. Accreditation and/or certification

At its most basic level accreditation is a formal recognition of individuals, organisations or programs in terms of specified objective standards relating to qualification, competence and performance.<sup>34</sup> It usually also involves ongoing monitoring and de-accreditation when the criteria are no longer satisfied. It is usually accompanied by Codes of Conduct, service delivery compliance mechanisms and a complaints procedure.<sup>35</sup> In Australia the consultation and discussion undertaken on a national mediation system<sup>36</sup> considered options for direct accreditation by a professional association, industry body government, commercial enterprise or a scheme to accredit organisations, which in turn, accredit individuals. It settled on the last option.<sup>37</sup>

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<sup>32</sup> Herman, M.S., Eaker, D.G., Gale, J. and Foster, M. *Supporting Accountability in the Field of Mediations*. (2002) 18 Negotiation Journal. New York. [www.wkap.nl/journalhome.htm/0748-4526](http://www.wkap.nl/journalhome.htm/0748-4526). The authors comment that no credentialing tool is a guarantee of quality and outcomes, but a lack of any system leaves a great deal more room for error. P34.

<sup>33</sup> Herman & Ors. Ibid at p34.

<sup>34</sup> National Mediator Accreditation System. Draft proposal for Public Consideration. November 2005. Ibid at p2. See <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1336&context=adr>

<sup>35</sup> National Mediator Accreditation System. Draft proposal for Public Consideration. November 2005. Ibid at p2.

<sup>36</sup> See for discussion: *Who Says You're a Mediator?* Ibid. p4

<sup>37</sup> In Australia, "Industry Training Advisory Bodies" (ITABS) which develop competencies and training packages which are then endorsed by the Australian National Training Authority. *Who Says You're a Mediator?* Ibid. p7

#### IV. Certification

Certification commonly assumes the existence of clearly defined standards.<sup>38</sup> A regulatory authority (professional or government) certifies that the practitioner has skills, training and expertise to a certain standard and meets any personal integrity standards and is entitled to be so recognised. A person may still practise in the area without such a certificate in New Zealand. Accountants are in this category. The title Chartered Accountant is protected but anyone can practise as an accountant.<sup>39</sup>

#### V. Licensing regime imposed by professional organisations or backed by the state

Licensure is the most restrictive and least voluntary system. As with certification, the strength of licensing is that it requires a demonstration of competence. The Australian discussion paper also considered this option. This form of accreditation requires a high level of Government involvement and would be likely to encounter opposition from many quarters because it represented central Government control of mediators. It would also give rise to jurisdictional problems, because regulation is shared by the respective state and federal Governments. Licensing applies to lawyers in most jurisdictions. The practice of law cannot be undertaken without a licence (a practicing certificate) issued by the regulatory authority: the New Zealand Law Society.

#### VI. No Guarantees of Competency

Fong<sup>40</sup> makes the point that certification does not guarantee competency. Certification assures a minimum level of training and basic skills. Competency, he argues, is an ongoing aspiration, which all mediators should aspire to.

### **Australian National Mediation System**

When considering a unified approach to accreditation and assessment of mediators, are we searching for a global answer? While this might be the ideal for some mediators, it may be a step too far. Most countries have struggled to find a national solution, let alone connecting with a global solution. The Australian National Alternative Dispute Resolution Advisory Council was tasked in 2001 with finding a national solution to the issue of mediators credentialing in an environment of significant diversity and multiple mediation schemes.

Extensive consultation took place before achieving a national mediator accreditation system. The views expressed in the consultation reinforced difficulty of achieving a consistent national system derive from the divergent field that is described as mediation.

The NMS was developed by NADRAC and adopted at the 8<sup>th</sup> National Mediation Conference in Hobart, Tasmania in May 2006.<sup>41</sup> The system is a voluntary system. A

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<sup>38</sup> Herman, M.S., Eaker, D.G., Gale, J. and Foster, M. Ibid. p36.

<sup>39</sup> Anyone may set up practice as an accountant, but only a person certified by the Institute of Chartered Accountants may call themselves a Chartered Accountant: Institute of Chartered Accountants Act 1996. Similarly, for Health Practitioners, a certification regime is set out in the Health Practitioners Competence Assurance Act 2003. "Health Practitioners" are regulated by responsible authorities within their respective specified scopes of practices e.g. Dental Council, Midwifery Council etc. Certified practitioners may only practice within specialised scopes of practice.

<sup>40</sup> Fong, Larry. Competency and Certification. Interview on mediate.com. See <http://www.mediate.com/articles/fongdvd01.cfm>

copy of the NMS dated September 2007 is attached. As a condition of ongoing approval, mediators must comply with the practice standards and seek reapproval in accordance with the Approval Standards. The Approval Standards are dated November 2008.<sup>42</sup>

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.

A mediator, once registered, is entered on the Australian Mediation Register. There is one level of accreditation system (accredited to the National Mediation Standard) with advanced or specialised forms of accreditation to be considered later. The designation of 'accredited in terms of the NMS' was proposed as being "NMS registered mediator". The system is based on and operated by those mediation and ADR organisations that are identified for this purpose as Recognised Mediator Accreditation Bodies (RMABS). Recognised Mediator Accreditation Bodies (RMABS) are accredited under the National Mediator Standards. These include such membership organisations as LEADR (Leading Edge Alternative Dispute Resolution) and IAMA (Institute of Arbitrators and Mediators Australia), as well as professional organisations such as Law Societies. The RMABS must be recognised by the implementation body as being compliant with the requirements of the system and the function of the RMABS is to accredit mediators to the NMS.

The Code of Practice describes the ethical and professional obligations of mediators accredited to the NMS. The Code of Practice describes the ethical and professional obligations of mediators accredited to the NMS. There is no uniform code of ethics applying to mediators but rather various organisations have adopted codes or ethical guidelines that cover similar issues. See for example the Law Council of Australia Ethical Guidelines for Mediators.<sup>43</sup>

The RMABS may provide education and training programmes, or use education and training services of other institutions, as part of their accreditation procedures.

The RMABS are able to provide certification to the effect that an individual has satisfied the requirements for accreditation according to the NMS. The education training and assessment course must comply with the specified requirements that

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<sup>41</sup> The facilitator was Laurence Boulle and members of the committee are Helen Marks, Scott Pettersson, Franca Petrona, Sandra Boyle, Warwick Soden, Mary Walker, Karen Day, Salli Browning, Gordon Tippett, Robert Crick, and Bill Field.

<sup>42</sup> [http://www.ama.asn.au/Final Approval Standards 200907.pdf](http://www.ama.asn.au/Final%20Approval%20Standards%20200907.pdf)

<sup>43</sup> [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uuid=239F39DD-1E4F-17FA-D241-5CF41A0BA6DC&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=239F39DD-1E4F-17FA-D241-5CF41A0BA6DC&siteName=lca)

include an education and training programme with a minimum of 40 hours in duration, including the assessment period.

The resourcing of the system is intended to be through fees paid by mediators who seek accreditation, as well as possible Government financing.<sup>44</sup> The system recognises prior learning accreditation of practical mediation experience and any experienced mediators accredited into the system will be subject to ongoing CPD and other requirements of the system.

The system was to be reviewed after two years and the review, among other things, focus on mediator uptake in the system, attitudes and experiences of consumers, costs and the effectiveness. A report on the project was undertaken by Professor Tania Sourdin in 2007/2008.<sup>45</sup>

The review highlighted that many considered the time has come for 'standards' rather 'guidelines' to be developed. NMS developed approval and practice standards to respond to this view.<sup>46</sup>

As a result of the review the National Mediator Accreditation Committee was set up to play a core role in:

- developing and reviewing the operations standards
- developing the National register
- monitoring, auditing and supporting complaints handling processes
- promoting mediation

In addition, it was hoped that the body might drive external rather than self-recognition and may enable a more cohesive certification system or advanced certification systems into the future.<sup>47</sup>

The National Accreditation Mediation System (NMS) was subject to a commentary on approval standards in September 2007. A copy of that report is attached.<sup>48</sup> The report on the Approval Standards was based on submissions from mediators and professional organisations. The clear view of virtually all submitters was that the scheme needed to remain flexible and more discretion be allowed to RMAB in accreditation. It is useful to review the Practice Standards of the NMS and the comments made by submitters at its review.

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<sup>44</sup> By way of example, the Australian Mediation Assessment charges \$A220.00 (inc. GST). [http://www.ama.asn.au/ANMS\\_Accreditation.pdf](http://www.ama.asn.au/ANMS_Accreditation.pdf) retrieved 14Jan2011.

<sup>45</sup> 'Australian National Mediator Accreditation System. Report on Project'. Professor Tania Sourdin September 2007, amended November 2008. 'Australian National Mediator Standards. Commentary on Practice Standards'. Professor Tania Sourdin, September 2007. See <http://www.nswbar.asn.au/docs/professional/adr/documents/AccreditationReportSept07.pdf>

<sup>46</sup> Sourdin, T: Australian National Mediator Accreditation System. Prepared September 2007, amended November 2008. Report on Project at p12. Retrieved 14Jan2011.

<sup>47</sup> Sourdin. Supra at 14

<sup>48</sup> See <http://www.nswbar.asn.au/docs/professional/adr/documents/Commentaryapprovalstandrds.pdf>

## **Specific issues dealt with by Australian National Mediation System**

Attached as Appendix 1 is a Table setting out the provisions of the Approval Standards and comments made during the consultation on the Standards.

### **Discussion Points**

The debate in Australia over the Australian National Mediation Standards illustrates the difficulty of obtaining a common view, even nationally. However, the current version of the 'Approval Standards', which have been subject to review, provide a useful starting point for the elements for which some unity of support might be obtained. The National Mediator Accreditation System is broadly compatible with the proposed international standards established by the International Mediations Institute. This gives a clear path to international recognition.<sup>49</sup>

The elements of an assessment and accreditation process would include, at the minimum:

- a) A register of accredited mediators. The threshold and continuing requirements must be met. These usually include a "good character" requirement.
- b) Guidelines for or a code of conduct or standards code of conduct dealing with ethical requirements. The prevailing view is that mandatory requirements rather than guidelines are preferable.
- c) Some process for enforcing the code of conduct and competency standards.
- d) Requirements for both initial training and ongoing education and training and assessment.

### **1. A Registry**

At the heart of any system of credentialing is the availability to the public of access to the names of 'approved' mediators. At the very least this must comprise a list of mediators and their contact details. The system must ensure the register is up to date and reliable.

Useful discussion could be had on how this could be achieved internationally.

### **2. Threshold Training and Education Requirements**

The issue of education and what is and is not sufficient has probably generated the most passionate debate.

As noted in the above table, there are various views about whether the training requirement of the Australian Approval Standards is too high. That requires

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<sup>49</sup> Address to NADRAC 9<sup>th</sup> National Mediation Conference, Perth, Australia. 12 September 2008.

completion of a written skills assessment and 38 hours of training with at least 1.5 simulations undertaken by different trainers or an independent. There are various requirements as to the ratio for coaches and the standard of the training team. The prospective mediator must participate in 9 simulated mediation sessions and be the mediator in at least 3 of those sessions. A written skills assessment is provided. It must indicate competency or not, as well as strengths, weaknesses and recommendations for further training.

By way of contrast, the Law Society of New South Wales in its 'Mediation And Evaluation Information Kit'<sup>50</sup> requires a course length of not less than 4 days or 28 hours. It notes various courses which meets that requirement. The requirements of basic credentialing are:

1. Have been qualified to practice as a Legal Practitioner for at least five years;
2. Have successfully completed a skills based training programme in mediation, extending over a minimum of four days, with an evaluation component.
3. Have conducted mediations as a mediator for a minimum of three years;
4. Have undertaken a minimum of 24 mediations as a mediator within the three year period immediately preceding the application;
5. Have undertaken minimum workshop participation of 12 hours and/or trainer/coach involvement over the preceding 12 months.

The NMS allows for 'experienced, qualified' practitioners who may achieve accreditation without the threshold experience and educational requirements being met.

The nature of the training is also important. In addition to academic learning, the non-academic experience of skill building is particularly important in teaching conflict management.

Julie Rashid<sup>51</sup> comments that learning should be a transformative activity that integrates academic learning and student development. She goes on to describe that students learn most effectively in a seamless learning environment where the lines blur between academic and non-academic experiences. She comments that assessment is essential to student learning and it is a strategy for improving student learning and educational quality. She says:

"The ultimate goal of assessment is to measure learning and improve instruction. Assessment impacts policy, programmatic systems, human resources, and student retention. Assessment is not an interruption of our business, it is our

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<sup>50</sup> See <http://www.lawsociety.com.au/idc/groups/public/documents/internetcontent/026438.pdf> retrieved 17Jan2011

<sup>51</sup> Conflict Resolution Education: An Examination of Student Learning Outcomes. ([www.mediate.com/articles/rashidJ3.cfm](http://www.mediate.com/articles/rashidJ3.cfm)) retrieved 15Nov2010. Dr Judy Rashid is the Dean of Students at North Carolina A & T State University and teaches conflict resolution.

business to see what our students are learning and how effectively they learn it.”<sup>52</sup>

The current view is that the model of the ‘reflective practitioner’ is particularly apposite for dispute resolution professionals. The tools selected to measure learning outcomes, therefore, might include focus groups, self-reflection papers, journal writing, document analysis, service logs etc.

### **3. Continuing Accreditation Requirements**

The NMS propose a two year cycle which has an experiential element of 25 hours of mediation over two years or alternative work as a Dispute Manager. The second prong of the accreditational requirement is 20 hours professional development over a two year cycle which includes development courses and the option of coaching and mentoring as well as external supervisory auditing with set hours allowed for these activities.

The NSW Law Society has additional prescriptive requirements for a lawyer mediation specialist as follows:

Commentators have indicated that the continuing accreditation requirements of NMS are too onerous, particularly for part-time mediators. Alternatives suggested include, over the two-year period: 5 mediations or 10 conciliations and 10 hours continuing education.

### **4. Supervision/Mentoring**

Another contentious area is the requirement for some ongoing support for mediators, as part of their professional requirement. This can range from mentoring to some sort of clinical supervision.

The requirement of supervision is well established in any profession. For instance, in New Zealand, medical practitioners are required, under the Health Practitioners Assurance Act 2003 (NZ), to maintain their competence. In the case of psychologists the supervising psychologists’ board has determined that supervision, complemented by a continuing competence programme, is a key mechanism to which to achieve this. The Board, however, recognises that the nature of the supervision will vary between individuals and across different work context. It does not believe that one model or style of supervision will apply to all psychologists in all areas of practice, at all times in their careers.

The definition adopted by the New Zealand Psychologists job for supervision is as follows:

“Supervision is defined as a scheduled time to meet with a respected professional colleague for the purpose of conducting a self-reflective review of practice, to discuss professional issues and to receive feedback on all elements of practice, with the objectives of ensuring quality of service, improving practice and managing stress. A distinction is drawn between the term “clinical supervision” as used within the

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<sup>52</sup> Supra at p2

psychology profession and the way some other stakeholder groups use the term “supervision”; for example employers may use the term to refer to line management monitoring. Under the Act “supervision” is defined as “the monitoring of, and reporting on, the performance of a health practitioner by a professional peer” whereas “oversight” is defined as “professional support provided...by a professional peer for the purposes of professional development”. The latter definition more closely reflects supervision as it is routinely practised within our profession, and as it is used in these guidelines.”

“Mentoring’ is less prescribed. At its simplest it is the sharing of knowledge and insights by a more experienced practitioner with one who is less experienced and the provision by the mentor of information counsel and support.

## **Conclusion**

The time has come for mediators to move toward a unified assessment and mediation system. This system must be flexible and voluntary to both gain acceptance among mediators and also to ensure that “mediation” continues to grow in both application and process. Consumer protection demands that at least where the state mandates (whether by defacto means or others) the participants should be entitled to expect that the mediator has some skills, training and oversight. The system for accreditation and assessment must be flexible at a national level and provide a path to international consistency

No credentialing system will provide universal competence, that should be our own individual goal as mediator aided by the opportunities organisations, such as AMA which provides for ongoing discussions and exchanges between the global community of mediators.



## Appendix 1

### Summary of Approval Standards

Australian National Mediator Standards, November 2008, and commentary on approval standards<sup>53</sup>

Approval Standard	Issues in Report – Commenting on Approval Standards – Sept 2007
1. Application  "...to act as a mediator and assist two or more participants to manage, settle and resolve disputes or to form a future plane of action through a process of mediation"	<ul style="list-style-type: none"> <li>• Most submissions indicated it was important that it was a voluntary system.</li> </ul>
Reapproval: 2 yearly	<ul style="list-style-type: none"> <li>• Concern that reapproval every 2 years is too onerous</li> </ul>
Covers all areas of Mediation	
2. Description of Mediation Process	
"Blended" mediation adjudication process requires  <ul style="list-style-type: none"> <li>- expertise</li> <li>- clear consent</li> </ul> of the parties	<ul style="list-style-type: none"> <li>• Concern over the inclusion of "advising" type of process which creates two streams of mediators</li> <li>• Amended standard makes it clear if undertaking "advisory" process, specialist expertise and additional obligations required</li> </ul>
3. Approval Requirements for Mediators	
a) Evidence of good character	<ul style="list-style-type: none"> <li>• Concern about how to provide proof of this</li> </ul>

<sup>53</sup> Supra

	<ul style="list-style-type: none"> <li>• Relevant professional standing may be sufficient e.g. lawyers</li> </ul>
b) Undertaking to comply with ongoing practice standards and compliance with legislature.	
c) Evidence of relevant insurance, statutory indemnity or employee status	<ul style="list-style-type: none"> <li>• Insurance etc should be left as a commercial matter for mediator</li> </ul>
d) Membership of organisation with ethical requirements, complaints and disciplinary processes	
e) Evidence of competence by reference to education, training and experience	
<h3>3.5. Recognised Mediator Accreditation</h3> <p>Body must have:</p>	
a) more than 10 mediators accredited	
b) a range of services e.g. professional development	
c) a complaints system	
d) a sound governance / liability and admin	
e) a sound record keeping in respect of approval of practitioners and courses	
f) a capacity to assess	
<h3>4. Training and Education</h3>	
- By reference to applicable practice standards, qualifications, training and experience.	

<p>- Ongoing professional education requirements. If “blended” process must be competent to provide information / advice</p>	
<p>5 (1) Threshold training and education requirements completed course:</p>	
<p>a) training team of 2 led by 3+ year mediator</p>	<ul style="list-style-type: none"> <li>• concern that trainers may not be trained educators</li> </ul>
<p>b) ratio 1:3 for coached simulations</p>	
<p>c) minimum of 38 hours excluding assessment</p>	
<p>d) 9 simulated mediation sessions and at least 3 in which the candidate is mediator.</p>	
<p>e) written debriefing coaching feedback in respect of 2 simulated mediations</p>	
<p>5 (2) Completed a written skills assessment and 38 hours training with at least one 1.5 simulations undertaken by different trainer or independent (may be DVD or video). Written report to detail</p> <ul style="list-style-type: none"> <li>• outcome of skills assessment (competent or not)</li> <li>• strengths, weaknesses and recommendations for further training</li> </ul>	<ul style="list-style-type: none"> <li>• Various views about whether training requirement is too short or too long.</li> <li>• Written skills assessment may be too onerous for some mediators.</li> </ul>
<p>5 (3) Provision for “experienced qualified” practitioners where:</p> <ul style="list-style-type: none"> <li>• difficulty in attending course (rural / remote / cultural / linguistic scarcity required)</li> </ul>	<ul style="list-style-type: none"> <li>• submission that lawyer mediators often require other training which should count toward training</li> <li>• suggestion that 28 hours of skills based training and assessment sufficient for lawyer mediators</li> </ul>

<ul style="list-style-type: none"> <li>worked as mediator 24 months prior to 1/1/08 plus equipped with core competencies.</li> </ul>	<p>sufficient for lawyer mediators</p>
<p>5 (4) Additional requirement for “blended” mediators providing advice</p>	<ul style="list-style-type: none"> <li>Significant and serious differences among mediators in “threshold training and education”.</li> </ul>
<p>6 (1) Continuing Accreditation Requirements</p>	
<p>- 2 year cycle:</p> <p>a) <u>Sufficient practice experience</u></p> <p>(1) 25 hours mediation over 2 years, or alternatively</p> <p>(2) work as dispute manager etc where insufficient work opportunities, and</p> <p>b) <u>20 hours of professional development over 2 year cycle</u></p> <p>I. preferred development courses (up to 20 hours)</p> <p>II. external supervision or auditing of their clinical practise (up to 15 hours)</p> <p>III. Presentations at mediation or ADR seminars including 2 hours prep for each hour delivered (up to 16 hours)</p> <p>IV. Representation in the mediations (8 hours)</p> <p>V. Coaching, instructing trainees (up to 10 hours)</p> <p>VI. Mentoring less experienced mediators (up to 10 hours)</p> <p>VII. Role playing, assessing, observing (up to 8 hours)</p>	<ul style="list-style-type: none"> <li><u>Submission</u> that too onerous particularly for part-time mediators. Alternatives suggested: <ul style="list-style-type: none"> <li>5 mediations</li> <li>10 conciliations (12 hours in total)</li> <li>10 hours continuing education</li> <li>every 2 years.</li> </ul> </li> <li>RMAB has discretion</li> <li>Concern about what “supervision” entails</li> </ul>

6 (2) Removal or suspension (National Justice requirements) for non-compliance.	

The current version of the Approval Standards (November 2008) is available electronically.<sup>54</sup>

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<sup>54</sup> See <http://www.leadr.com.au/documents/Approval%20standards.pdf>

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## **Abbreviations**

ADR	Alternative Dispute Resolution
ADRJ	Australian Dispute Resolution Journal
AMINZ	Arbitrators and Mediators Institute of New Zealand
BOND LR	Bond Law Review
IAMA	Institute of Arbitrators and Mediators, Australia
JAMS	Judicial Arbitration and Mediation Services (USA)
LEADR	Leading Edge Alternative Dispute Resolvers (previously Lawyers Engaged in Alternative Dispute Resolution)
NADRAC	National Alternative Dispute Resolution Advisory Council
NMS	National Mediation Standard (Aust.)
NMS	National Mediations System
NSW	New South Wales
NZLC	New Zealand Law Commission
NZLS	New Zealand Law Society
NZPA	New Zealand Press Association
NZULR	New Zealand University Law Review
ODR	Online Dispute Resolution
RMAB	Recognised Mediator Accreditation Bodies (Australian National Mediation System)
RSMA	Recognition and Supervision of Mediator Accreditation (Aust.)