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National mediation standards

From accreditation to quality mediation practice — next steps?

Tania Sourdin

Introduction

Much of the mediator accreditation conversation that has occurred recently in Australia has been focused on threshold mediator accreditation issues. For example, the National Mediation Accreditation Standard (NMAS) discussion has largely related to entry into practice, with some reference to practice requirements, ethics and continuing education and practice requirements. The documentation and proposal of the Community, Health and Industry Skills Council in the family area and the Graduate Diploma that has been designed is again oriented towards the initial 'hurdle' of accreditation.

In the family sector there has been much discussion in the past about work that can be done beyond initial 'hurdle' requirements to enhance quality. Work undertaken from 2000–2004 in Australia was specifically oriented towards this task.¹ This work was possible because in many instances family dispute resolution work is structured around *organisations* that deliver family dispute resolution services rather than *individual practitioners* delivering services. As was noted, enhancing and improving quality in the largely private mediation sector was a more complex task than attempting to apply quality standards that could be articulated, encouraged and regulated by organisations.

In a recent research project conducted by the author exploring mediation use in the Supreme and County Courts of Victoria, released in April 2009, it is clear that while the mediation processes in this area may 'work' and generally be regarded as satisfactory there could be more done to enhance the quality of the mediation services that are delivered. The primary question is: how can this be done when the services are largely delivered by private mediators who are affiliated with Recognised Mediator Accreditation Bodies (RMABs) but not

necessarily subject to broader organisational requirements?

Often the discussion about improving quality has been related to quality assurance measures. Quality assurance measures are based on two principles: (1) that services can be accountable to those who access them; and (2) that quality improvement requires a commitment to regular evaluation and measurement of quality improvements.

The various sectors that operate in the mediation area have attempted to integrate these notions with varying degrees of success.

Interestingly, some of the very strengths of mediation make quality control and quality improvement of service delivery vital, though problematic. The fact that such processes are informed, confidential and flexible in application, and are interest-based rather than rights-based, make them difficult to monitor and provide opportunities for abuse by unscrupulous operators. As one analyst has noted,

The absence of any structure of procedural or substantive rules, in a process conducted without direct public scrutiny, presents the real danger of harm from inept or unethical practitioners ... [I]n mediation much more than in other dispute resolution processes, the quality of the process depends heavily on the quality of the practitioner.²

Standards consultant Charles Pou observes:

[The] characteristics that make mediation useful — its privacy, flexibility, and an atmosphere that encourages openness — can give rise to abuse ...³

While the NMAS may mean that practitioners who are untrained and inept cannot be accredited under the system, there are remaining issues about the quality of the mediation provided across the sector. In short: can we do more to enhance quality?

Is there a cost?

Improving quality practice is not without cost. A primary concern of all parties in the development of the NMAS was that prescribing minimum standards for accreditation and practice entails a cost, though the issue seems less problematic when the standard addresses the ethical/legal context rather than the knowledge/skill base. The same arguments relating to cost also apply to additional proposals regarding enhancing quality. Many practitioners are concerned that if there is a continuing focus on quality enhancement that this could become unduly bureaucratic, costly and disenfranchise mediators who practice on a part-time basis.

There is also a concern that increasing a focus on quality will result in an undesirable professionalisation of mediation practice. In commenting on the introduction of requirements under the *Family Law Act* and Regulations, Wade has pointed to dangers in the emergence of professions:

... a selected group of workers are granted a state monopoly, state funds and certain statutory privileges in exchange for assurances of quality of services provided. Access to the monopoly becomes increasingly difficult as the insiders progressively raise the training standards in order to exclude 'outsiders'.⁴

However, clearly just having standards will not ensure best practice, even if all practitioners adhere to them. There also are tensions inherent in the practice of ADR that are difficult to even recognise, much less address effectively. For example, issues such as the fundamental tension in a 'free choice' market about whether the choices are made about who delivers mediation services by lawyers who may have an interest in maintaining models and approaches that feel comfortable to them and their way of practicing and may not necessarily be



regarded as 'high quality' approaches by clients (or others).

The various ways in which quality standards can move beyond compliance and assist to create a culture of quality enhancement, by encouraging the commitment to and the participation of those who deliver services in this field to continuous improvement and best practice, is explored in more detail below.

Innovation in practice

The creation of quality standards and systems does address some particular issues in conflict facilitation.

There is considerable diversity in the professional orientation of practitioners and the styles and models of practice used, as well as the context in which they practice and this is recognised in the broad descriptions of mediation that have been adopted in the NMAS. This approach is consistent with most of the limited approaches that have been adopted in other jurisdictions. For example, Neilson and English, in the context of developing national accreditation standards for Family Mediation Canada (FMC), have commented:

It is in the interests of the future development of mediation to respect a diversity of approaches and practices, to include rather than exclude potential practitioners, and to encourage the continuing evolution of the discipline.⁵

In addition to diversity in practice, conflict resolution practices are not comprised of static processes, and arguably a quality framework needs to encourage the continuing innovation, evolution and development of the discipline.⁶ In the Australian context, both NADRAC and expert contributors in 'Raising the Standard',⁷ have endorsed the value of protecting and promoting ongoing innovation and development in the mediation field.⁸ A quality framework also needs to support the ongoing development and evolution of practice.

Exploring and testing new models and practices is one way of stimulating innovation and improvement in practice. Funding from government or other sources can support innovative projects that may be portable and assist those

involved in conflict. To enable this to occur, grant schemes that are ADR-focused need to be developed and the learning in relation to innovative projects need to be disseminated (and absorbed!).

In the family sector in recent years, there have been a number of initiatives that have trialed new ways of assisting couples in entrenched conflict to resolve their disputes, particularly disputes about children. In the non-family area the growth has been somewhat limited although it may be that the National Standards Body can assist to ensure that

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information is disseminated more readily into the future. However, more needs to be done — innovation and conversation about innovation are essential to ensure that 'better' approaches are fostered, learnt and developed.

Mentoring and expertise exchange

As noted previously, a quality enhancement program requires more than the prescription of the minimum amount of ongoing training, experience and professional development that is necessary to maintain accreditation. It involves finding strategies and processes that inspire participation in the continuous improvement of practice, at both an individual and agency level.

Mentoring processes and sharing information about good practice can assist to enhance a quality culture by supporting and promoting skills transfer within the sector, and can be considered part of ongoing professional development and supervision. Mediation is an evolving field, in which innovative and varied ways of dealing with conflict and improving models and practice are being explored.

Mentoring and the exchange of expertise provide ways for the skills and knowledge involved in new models of practice to be disseminated, as well as providing a mechanism for expanding existing competencies and this was recognised in the NMAS — although for many mediators mentoring either does not exist or is perceived as only applying to new mediators. Certainly insofar as many private mediators who operate outside the family system are concerned it is regarded as a foreign concept.

However, mentoring ought to not only be part of initial training, or part of inducting new mediators. It can be an ongoing process that encourages and rewards cross-fertilisation in ideas and practice by a variety of mechanisms, and could extend beyond agencies to the sector as a whole.

Mentoring may be particularly effective for regional and sole practitioners who may not have the benefit of working within an existing mentoring organisational structure and who may not benefit from the same level of ongoing professional education. Non-aligned practitioners could, for example, be required to be part of a mentoring program that involves linking with either funded or unfunded agencies or individuals.

This could be adopted in a flexible manner or could form part of ongoing self or external audit processes that could be supported by RMABs. In addition, regular co-mediation can be coupled with mentoring and ensure that feedback about skills and processes take place. Again, outside of the community and family sector, co-mediation and mentoring currently take place rarely if at all.



Quality forum

The establishment of a regular quality forum for non-aligned practitioners as well as practitioners within agencies may also be one way of enhancing practice and ensuring that standards are relevant across the range of disciplines active in the conflict area. A quality forum could involve either a physical forum or an internet-based forum (or both). A quality forum may enable ideas about practice, feedback mechanisms and developments in mediation practice to be exchanged. There are a number of issues involved in the establishment of any forum process. These include:

- cost;
- inclusiveness — in particular how regional and isolated practitioners could be involved; and
- time commitment — in particular how practitioners, whose work across the sector is sporadic, can best be involved.

It may be that a quality forum could be aligned with other conferences to reduce costs. To some extent the National Mediation Conference supports this approach. However, the issues relating to isolated and even disinterested practitioners may continue to present issues. Another alternative may be to require practitioner attendance at a quality forum every two to three years, together with the establishment of a website that supports the quality forum process — for example, this could involve identified question and answer sessions. This may involve RMABs but may also be fostered by others who are directly involved with mediation service provision — government, courts and industry agencies who also have an interest (or should have) in quality service provision.

Training strategy and planning

Ongoing education, keeping skills up-to-date, and being informed about current practice developments are widely regarded as maintaining and improving practitioner competence, and therefore being in the best interests of consumers. Requirements in these areas have been recognised in the NMAS approval standards, which have set a

fairly 'low' hurdle requirement in relation to initial training and ongoing educational requirements.

However, arguably in order for ongoing training and education services to be delivered effectively it may be appropriate to articulate core values and goals in the mediation area beyond the basic competencies that exist in the practice standards. For example, goals could include assisting disputants in some areas to move through a conflict resolution process with minimum emotional and economic stress.⁹

Another issue in ongoing training and education relates to how feedback is articulated into any training priority areas. There may need to be additional processes that enable client feedback and stakeholder input to inform professional development and training. In addition, it has been said that it is the combination of practical experience and application, with theoretical knowledge, that facilitates a continuous approach to professional development. This is the approach recommended by NADRAC, as best enhancing practitioner competence and quality.¹⁰

Information and ideas from other services and parts of the sector and research can also form the basis of improvement and innovation. Practice also benefits from being congruent with current strategic concerns and direction in the field. Developments may arise from government policy or from practice and research. Any ongoing training strategy could require practitioners to consider these areas as well as key value areas that could be identified by RMABs as well as the National Standards Body when undertaking continuing training and education.

Quality practice profiling and recognition

Another approach that could be directed at enhancing quality involves rewarding those who demonstrate high quality practice. Many organisations reward 'excellence' in identified areas. The establishment of quality awards could assist to foster and enhance improvements and excellence in practice. Quality award mechanisms may also encourage the development of effective feedback mechanisms as well as promoting innovative approaches to conflict.

Policy and practice frameworks

The consultation paper in *Raising the Standard*, suggested that in the family sector a new Quality Framework could be based on the Family Relationships Approval Requirements (compliance with these requirements is currently the basis for agency approval and funding under the *Family Law Act*).¹¹ This quality regime was intended to aim for more than compliance with basic standards. It also included a voluntary continuous improvement tier, encouraging agencies to continually enhance the quality of their service and practice within the standards framework.¹²

As noted previously, mechanisms that might work effectively across the mediation sector might also include a requirement for practitioners or RMABs to develop their own value statements — to support agencies, professional associations and even sole practitioners to develop policies that guide their practice and service delivery.¹³

Policy and practice in the mediation arena do not exist in isolation from each other. On the contrary, it can be argued they are very much interconnected and should support each other. As one commentator has suggested:

Good policy provides the parameters and guidelines that support the practice of mediation. Good mediation practice helps to inform policy.¹⁴

At present there are significant issues about what is guiding mediation practice in some sectors. Private mediators can experience 'powerlessness' in the face of representatives who, after all, may determine whether they obtain future mediation work. In addition, many are so isolated from the mediation community that the culture that may be adopted is more likely to be the culture of their 'community'. Attempting to change a culture that may support client disempowerment and inelegant practice requires the articulation of clear policy and guidelines by courts and others.

There are different ways of dealing with these issues as far as mediators are concerned. In essence these approaches can be described as the difference between a compliance culture and a quality culture. While there are some mechanisms, training strategies and other



ideas that could support ongoing professional development, innovation and best practice this may not be sufficient. A policy context that not only promotes minimum standards, but also encourages, recognises and rewards continuous improvement and best practice is arguably more likely to create a quality culture and is more likely to support enhancements than creating a compliance culture, although this may be necessary in some sectors where service provision falls below basic threshold adequacy levels.

Complaints

Future issues that need to be determined, now that approval and practice standards have been developed, relate to participation and feedback in quality improvement and enhancement if the focus on quality is to be extended beyond standards. In the literature about accreditation issues in the conflict resolution and conflict management area, there has so far been little reference to ongoing quality improvement measures other than by reference to complaint benchmarks.

At present a raft of organisations and centres provide a significant amount of family conflict facilitation in Australia. Such services are required to document client feedback and evaluation procedures and must establish complaint procedures that comply with natural justice. Compliance also requires that this information also be used to improve services.¹⁵ There are also standards applicable to data collection, including confidentiality and privacy issues, and ongoing assessment and monitoring of performance.¹⁶

There are also a range of related themes often represented in the quality improvement area. For example, the work of Business Excellence Australia,¹⁷ which is focused upon developing organisational excellence through the delivery of high quality services, is one area of reference. Other important works in this field have included the Disability Support Framework that was developed in Queensland.¹⁸

Recently, some commentators who have considered conflict resolution

approaches have supported the need for continuing feedback and the desirability of sound complaint management processes (to deal with complaints about dispute resolution and management processes). For example, one commentator in the US has noted that

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key elements of a quality assurance system will involve user feedback and a complaint-handling procedure, and has noted that relatively little attention appears to have been paid to specifics.¹⁹

In the Australian context NADRAC has also considered that provision for client feedback and complaints is an essential part of a quality system, and recommended it form part of any code of practice in the ADR field.²⁰ This has also been the subject of much discussion in the context of NMAS where complaints-handling is required of RMABs (although the level of activity may vary according to the RMAB and statutory obligations). In addition, recent work by the National Mediator Accreditation Committee Complaints working group which has drawn upon work by a group of organisations will assist to support these requirements.

However having an effective complaints-handling system will not necessarily enhance quality — essentially it may assist to support the provision of satisfactory mediation services but may do little to enhance or improve processes beyond a 'basic' level.

At present, it is easy for mediators to conclude that because they have no or few complaints, the service that they provide is of a high quality (effective, fair and acceptable). Research over the past decade by the author suggests that such conclusions may not necessarily follow — disputants simply may not complain if a mediation service is unsatisfactory,

particularly in mandatory programs or where the outcome is either unacceptable or they felt disempowered by the process.

Using complaints data in isolation to make conclusions about quality is, at best, erroneous.

Surveying disputants about services

Surveying consumers about services in the conflict resolution and management area is one way of supporting and enhancing quality improvements, but surveying can present some complex issues. This is a result of:

- Service variation — some services may offer facilitative processes, others may offer structured conference-like mediation services and other services may be a focal point for community outreach.
- Practitioner variation — practitioners may vary from the lone barrister practitioner who provides mediation services on an irregular basis to groups of practitioners who may or may not receive government funding, but may be dependent upon a mix of funding arrangements.
- Client variation — clients accessing conflict processes come from all sectors of the community. As with any widely drawn sample in the Australian community, clients will have special vulnerabilities that may be related to disability, isolation (including geographical isolation) and literacy levels, as well as issues that may arise as a result of cultural and other factors.

These factors mean that no single survey approach can be recommended for assessing consumer perspectives about mediation services — rather a



multi-dimensional approach may be required. This is already recognised in some current standards that specify feedback needs to be obtained in a variety of ways and procedures to encourage the participation of culturally diverse clients.²¹

Another important issue relates to the cost of surveying and the need to ensure that practitioners are not unduly burdened by requirements to seek customer inputs.²²

However, despite these issues (which may also exist in other industries), it is clear that client input can play a vital role in improving quality and ensuring that services are responsive to client needs.

The Australian Business Excellence Framework approached this issue by devising a checklist to assist businesses to identify priority areas.²³ In the checklist, businesses were asked a range of questions on a four-point scale (Never/ Sometimes/Often/ Always) that included: 'My organisation uses identified gaps between client expectation and perceived value to drive process improvement', and 'Progress against organisational indicators is regularly analysed'.

Arguably practitioners need to assess how they can determine what gaps exist and consider how to ensure that the processes they are using are meeting the needs of disputants.

In mediation research conducted over the past decade, it is clear that survey research (even if irregular) can pinpoint areas for improvement and is much more effective than relying on anecdotal data that may be inaccurate or even misleading. For example in the Victorian study (referred to earlier) many mediators considered that they used an industry standard model of mediation. However, participant and mediator survey information suggested that this was not the case for a significant proportion of mediators.

Primary departures related to the giving of advice, the timing of private meetings and the way in which clients were involved (and in some cases excluded entirely from the mediation room). These findings could only be

produced through the application of survey processes and while it is clear that many mediators did not make these departures, a significant number did.

Data information and management

An important related issue concerns how practitioners manage information that they obtain in mediations. Data management may involve managing:

- confidential client information (such as addresses, and other personal information) — this includes compliance with relevant legislation concerning privacy and access to records;
- information relating to provision of services;
- information created by clients and practitioners (for example email and other records);
- data about employees and management issues;
- information relating to surveys or feedback sessions.

Knowledge management is a particularly difficult issue for those who seek to ensure information gleaned from stakeholders is used to improve mediation services that may be provided.

Keeping data secure and confidential is a particular issue for sole mediation practitioners who may not have the benefit of locked storage and data security features in their practice. However, the retention of some practice records is an essential component in enhancing quality for practitioners.

Some options to enhance data management may include devising templates to assist practitioners to store and manage information, data and knowledge.

Sharing information through an information network may also assist to enhance practice. Some professional organisations outside the mediation arena provide networking arrangements for their members that enable the exchange of best practice scenarios and report on innovation in practice.

Clear policies on data management and research are essential. There appears to be a very different set of

approaches that operate within Australia. Some mediators for example will not disclose (even to researchers) information that they regard as confidential while others consider that information can be disclosed for research purposes. Again, the NMAS states that this is an exception, but clearer guidelines about these matters and leadership by RMABs would be useful.

Conclusions — taking the next steps

One way forward in the mediation area is to start having more in-depth discussions beyond our basic accreditation discussion. Processes used to enhance quality would necessarily be developed slowly across the sector. However, as with the initial accreditation dialogue, there is utility for mediators to develop strategies across the entire sector and to ensure that particular sectors (such as the family sector) do not develop in isolation from other parts. There is much we can learn from each other.

Existing quality framework approaches can assist to design an iterative approach to improving quality within the mediation sector. The central components of a quality framework include a number of options that can be grouped as follows:

1. Quality enhancement — involvement and commitment:
 - innovation grants;
 - mentoring and expertise exchange;
 - policy and practice frameworks;
 - quality practice profiling and recognition;
 - quality forums;
 - training strategies and planning.
2. Participation and feedback — collecting and interpreting information:
 - consumer participation and satisfaction surveys;
 - capturing and retaining knowledge;
 - complaints management liaison and feedback;
 - data information and management.
3. Quality assurance and standards monitoring — assessment tools:
 - internal self assessment of service quality;
 - external assessment of service quality;
 - review mechanisms. ●



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Endnotes

1. See for example T Sourdin, T Fisher and L Moloney *Towards Quality Standards for Family Dispute Practitioners Research Report 2004*, Professional Standards for Family Dispute Management Practitioners project, La Trobe University, Victoria (2004).
2. R Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, National Institute for Dispute Resolution, Washington DC (1992) 3.
3. C Pou, *Mediator Quality Assurance: A Report to the Maryland Mediator Quality Assurance Oversight Committee* (2002) 4.
4. J Wade, 'Family mediation — a premature monopoly in Australia?' (1997) *Australian Journal of Family Law*, 11, cited in H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd ed, 2002) 233.
5. L Neilson and P English, 'The role of interest-based facilitation in designing accreditation standards: the Canadian experience' (2001) 18 *Mediation Quarterly* 3, 221–248, 224.
6. Above note 5.
7. Above note 1.
8. NADRAC, *A Framework for ADR Standards, Report to the Commonwealth Attorney General, Raising the Standard: A Quality Framework for Primary Dispute Resolution under the Family Law Act 1975*, Consultation Paper (2001).
9. Commonwealth Attorney-General's Department *Raising the Standard: A Quality Framework for Primary Dispute Resolution under the Family Law Act 1975*, Consultation Paper (2001), 32–33.
10. Above note 8, 60, 84–86, Recommendation 18.
11. Above note 9, Appendix A, 19, 13–14.
12. Above note 9, Appendix A, 32–33. See also Department of Family and Community Services, *FRSP*

Approval Requirements Compliance Guide (FAMQIS) (2003).

13. Above note 1, Appendix A, 32–33.
14. D Syme, 'From policy to practice; the role of legislation, regulation and policy in supporting mediation practice', Paper delivered to World Mediation Forum, Buenos Aires (2003) 1.
15. Department of Family and Community Services, 'Introduction to the quality strategy for family relationship services', Approval requirement 10 <www.facs.gov.au>. See also FAMQIS (2003) *FRSP Approval Requirements Compliance Guide*, Standard 11.
16. Department of Family and Community Services, 'Introduction to the quality strategy for family relationship services', Approval

requirement 10 <www.facs.gov.au> Approval Requirements 3, 11, 14.

17. See for example, Standards Australia (2003) *Australian Business Excellence Framework 2003*, Sydney.
18. See Queensland Government (2000) *Quality Framework in the Disability Sector in Queensland*, Brisbane.
19. Above note 3.
20. Above note 9, Recommendation 3, 63, 73.
21. FRSP (2003) *Approval Requirements Compliance Guide*, See Standards 10 and 11.
22. Pou has noted that bureaucratic hurdles can impede the development of flexible practices and reduce the practitioner base — above note 3, 19.
23. See, the Standards Australia, *Australian Business Excellence Framework* (2003) 36.

ADR DEVELOPMENTS

ADR in the civil justice system

NADRAC submitted the issues paper, 'Alternative dispute resolution in the civil justice system' to the Federal Attorney-General, Robert McClelland on 26 March 2009. The paper is aimed at setting up strategies to remove barriers and provide incentives for the use of ADR, both before and after the commencement of civil proceedings.

Mr McClelland said, 'The legal system must be able to provide a framework that allows people to resolve their legal disputes in a simple, fair and cost-effective manner.'

The paper examines options such as:

- increasing public awareness of ADR;
- changes to civil procedure, costs and fees to provide greater incentives to use ADR;
- mandating ADR prior to litigation;
- improving assessment and referral services; and
- using ADR techniques to improve court and tribunal hearings.

Stakeholders and interested parties were encouraged to comment on the issue raised in the paper. Submissions were due by 15 May 2009 and NADRAC will report to the Attorney-General by 30 September 2009.

The issues paper and submission details are available at <www.nadrac.gov.au>. ●

Mediating property issues in Dubai

Dubai is set to open a Mediation Centre in May to settle property-related issues. The Property Court currently has a backlog of 500 cases and has set up the Centre to quickly deal with disputes. Once complaints are registered with the Mediation Centre, the Centre will try and resolve the dispute within a month.

This Centre follows the success of similar centres that had been set up to resolve labour and family disputes. These centres resolved 70% of cases without the need to proceed to court. ●