
**AUSTRALIAN NATIONAL MEDIATOR
STANDARDS**

COMMENTARY ON PRACTICE STANDARDS

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Commentary on Practice Standards

Introduction

This document summarises many of the important oral and written submissions that were made in response to the Draft Practice Standards that were circulated in July 2007. The purpose of this document is to provide feedback on the different issues that were raised and also to provide input that may be considered further by the National Mediator Implementation Committee that is due to meet in April 2008. The document shows the revised Standard sections and inserts commentary under each section.

There were many comments made in relation to the Practice Standards. Most submissions and comments were supportive and many commented on editorial and other matters. There were a few submissions which suggested that the practice standards should be in the form of 'guidelines.' This is the subject of discussion in the Approval Standards Commentary. Overall however there was considerable support for both the content and the concept of Practice Standards.

For example, the National Dispute Resolution Network (NDRN) stated:

"NDRN agrees that it is essential to have nationally recognised minimum standards for mediators and ADR providers. NDRN further agrees that it is essential to move toward a regulated industry with minimum standards for practice. It therefore agrees in principle to the ambit proposal set out in the Draft Practice Standards."

Individual practitioners were also supportive; Mirek Fajerman submitted:

"I am very much in favour for the implementation of these long overdue standards. As an industry we should be at the forefront with the development of standards under which we want to practice, it would be most unfortunate to have 'others' develop standards..."

Those who attended forums were also supportive of content and the form of the Standards. Comments included: 'It looks great'; 'Finally we have something'; and 'it is great that this is finally moving forward.' Some within the legal sector were also supportive but had some specific concerns. For example, the Queensland Law Society stated:

“The Society is in broad support of the draft standards with certain reservations.”

The reservations that were expressed in a few submissions can be summarised under a range of headings:

1. It is important to recognise the diversity of mediation practice.
2. Some of the Standards appear to focus on family mediation rather than general practice.
3. Standards may conflict with existing ethical standards in some areas.
4. The wording of some sections needed to be reconsidered.

The Victorian Bar also noted that:

“The Bar is concerned to ensure that if a national mediation accreditation scheme is to be implemented that it be significantly amended to:

- be “relatively basic, simple, inexpensive and easy to implement” (p6 para (f) Boulle Report);
- be of an entry level standard, “with advanced or specialized forms of accreditation to be considered later” (p7 para II Boulle Report); and
- be “developed in light of existing Australian mediator Codes of Practice” (p7 para II (3) Boulle Report);
- fit within their own disciplinary infra-structure (p15, Annexure B, para 5 Boulle Report);
- be consistent with the generally accepted practice in the area in which they operate;
- be sufficiently generic and general to “cater for diversity in mediation practice” (p6 para (h) Boulle Report); and
- be transportable across a diversity of mediation systems (p4 Boulle Report).”

In the writer’s view, these matters are essential when considering how standards can be articulated. The comments made orally and in writing have been of great assistance in attempting to meet these objectives. The writer thanks all of those who provided input into this process.

There were some submissions that were markedly different from other oral and written submissions. For example, the Law Council of Australia stated that:

“The Law Council opposes the introduction of the proposed National Approval and Practice Standards for Mediators and National Mediation Accreditation System.”

This view appeared to be inconsistent with most other oral and written feedback (including feedback of most State Law Societies and Institutes) and that of all other professional organisations who have been involved in discussions in the past. Notably, the Law Council had also opposed the National Mediation Conference proposal upon which this framework has been developed.

One of the concerns of the Law Council is that:

“While the Law Council understands that the standards are to be voluntary, many lawyer mediators may need to comply with them if they become widely accepted.”

The extent to which the Standards may be used into the future is an important issue. In many respects, the Law Council’s concern that they may become ‘widely accepted’ is not without foundation. It seems likely that they will become accepted and will become used in relation to referral and other mechanisms. At one level, as has been noted in the Report on the Project, this is one of the objectives of this Project; to achieve more certainty in terms of National Accreditation and less fragmentation and confusion in terms of what is required with mediator accreditation. This will doubtless assist potential referrers.

1 Application

- 1) These Practice Standards apply to any mediator acting as a third party to support two or more individuals or entities to manage, settle or resolve disputes, or to form a future plan of action through a process of mediation and who voluntarily decides to become accredited under the National Mediator Accreditation Scheme. Practitioners who act in these roles are referred to in these Practice Standards as mediators. A mediator supports participants in a mediation process to identify, clarify and explore issues, to generate and consider options and to make decisions about future actions and outcomes. The Practice Standards are intended to govern the relationship of mediators with the participants in the mediation, their professional colleagues, courts and the general public so that all will benefit from high standards of practice in mediation.
- 2) The Practice Standards:
 - a) specify practice and competency requirements for mediators; and
 - b) inform participants and others about what they can expect of the mediation process and mediators.
- 3) Mediators voluntarily accredited under the Australian National Mediator Standards must comply with the Approval Standards as well as the Practice Standards. These Practice Standards should be read in conjunction with the Approval Standards.
- 4) There are a range of different mediation models in use across Australia. As noted in the Approval Standards, mediation can take place in all areas where decisions are made. For example, mediation is used in relation to commercial, community, workplace, environmental, construction, family, building, health and educational decision making. Mediation may be used where there is conflict or may be used to support future decision making. Mediators are drawn from diverse backgrounds and disciplines. Mediation may take place as a result of Court or Tribunal referral, pre-litigation schemes, through industry schemes, community based schemes as well as through private referral, agency, self or other referral. These Practice Standards set out minimum practice requirements and recognise that some mediators who practice in particular areas of with particular models may choose to develop or comply with additional standards or requirements. Mediators may practice as ‘solo’ mediators or may co-mediate with another mediator.
- 5) Where mediators practice under existing legislative frameworks and there is a conflict between the requirements of these Practice Standards and any legislation, the

respective legislative requirements will override those of the Practice Standards to the extent of any inconsistency.

Commentary

Some comments regarding this section related to terminology issues. In relation to terminology, the Standards were revised to meet (wherever possible), the views expressed. The terminology issues were important to practitioners in terms of ensuring that the Practice Standards responded to the diversity in practice. The Application section was also amended to explicitly refer to the diversity in mediation practice.

2 Description of a Mediation Process

The purpose of a mediation process is to maximise participants' decision making.
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- 1) A mediation process is a process in which the participants, with the support of a mediator, identify issues, develop options, consider alternatives and make decisions about future actions and outcomes. The mediator acts as a third party to assist the participants to reach their decision.
- 2) Mediation processes are not a substitute for individual or organisational legal and/or other expert advice, or individual counselling or therapy. Mediation processes may not be appropriate for all disputants or all types of disputes.
- 3) The goal of a mediation process is agreed upon by the participants with the assistance of the mediator. Examples of goals may include assisting the participants to make a wise decision, to clarify the terms of a workable agreement and/or future patterns of communication that meet the participants' needs and interests, as well as the needs and interests of others who are affected by the dispute.
- 4) The mediation process may:
 - a) assist the participants to define and clarify the issues under consideration;
 - b) assist participants to communicate and exchange relevant information;
 - c) invite the clarification of issues and disputes to increase the range of options;
 - d) provide opportunities for understanding;
 - e) facilitate an awareness of mutual and individual interests;
 - f) help the participants generate and evaluate various options; and
 - g) promote a focus on the interests and needs of those who may be subject to, or affected by, the situation and proposed options.
- 5) Mediators do not advise upon, evaluate or determine disputes. They assist in managing the process of dispute and conflict resolution whereby the participants agree upon the outcomes, when appropriate. Mediation is essentially a process that maximises the self determination of the participants. The principle of self determination requires that mediation processes be non-directive as to content.
- 6) Some mediation processes may involve participants seeking expert information from a mediator which will not infringe upon participant self-determination. Such information is deemed to be consistent with a mediation process if that information is couched in general and non-prescriptive terms, and presented at a stage of the process which enables participants to integrate it into their decision making. Such information might include the provision of general information and a reference to available

material that could assist the participants. For example, a referral to resources that could be used by parents in a family dispute to determine the impact of options upon children or other family members.

- 7) Some mediators may use a ‘blended process’ model whereby they provide advice. These processes are sometimes referred to as ‘advisory mediation’, ‘evaluative mediation’ or ‘conciliation’. Such processes may involve the provision of expert information and advice, provided it is given in a manner that enhances the principle of self-determination and provided that the participants request that such advice be provided. Mediators who provide expert advice are required to have appropriate expertise (see Approval Standards at Section 5 (4)) and to obtain the consent of participants prior to providing any advisory process.

Commentary

Some comments about this section were designed to address the varying definitions of mediation. This, as with the Approval Standards description, reflected many of the differences in Practice models and also the different ways in which mediation is used.

There were many comments that were made about the provision of expert information and ‘advice’ and the nature of mediation. These comments are also referred to in the Approval Standards Commentary.

Other comments related to a perceived focus on family mediation. The Law Council of Australia noted, for example, that:

“The Law Council notes that the description of the mediation process is similar in some respects to the description in its Ethical Guidelines for Mediators. However, some aspects of the description in the Practice Standard seem to relate to family mediation and child focussed or inclusive mediation in particular. The statements that mediation is not appropriate for all disputants or types of disputes, that the mediator assists to promote the interests of those affected by options and that mediators may give general information such as resources for parents, seem directed at family mediation.”

The Standards have been amended wherever possible to promote a broad focus on mediation.

3 Agreement to Enter into Mediation Process and Preparation

Before mediating, a mediator should ensure that an outline of the mediation process has been given to the participants.

- 1) The diversity in mediation practice means that there are considerable differences in terms of how participants enter into a mediation process. Where mediators are bound by existing professional or organisational requirements relating to entry into a mediation process and to the extent that such professional or organisational requirements contradict with the Practice Standards, the existing professional or organisational requirements should prevail.
- 2) Prior to the mediation taking place, the mediator will ensure that the participants have been provided with an explanation of the process and have had an opportunity to reach agreement about the way in which the process is to be conducted. This may

take place in an intake process that is held separately from a mediation session. The person conducting the intake process may be a different person to the mediator.

- 3) The objectives of an intake process may include:
 - a) Determining whether mediation is appropriate and whether variations are required (for example, using an interpreter or a co-mediation model in culturally and linguistically diverse communities or varying arrangements where violence is an issue).
 - b) Assisting the participants to prepare for the process. Participants who are prepared and who have received relevant advice are in the best position to make an informed decision when attending a mediation.
 - c) Ensuring that every participant receives information about the roles of each party in the mediation; this discussion may involve questions relating to the role of lawyers, support people and others.
 - d) Checking whether any information needs to be exchanged, how this can be done and what information, documents or things need to be available during the mediation process.
 - e) Settling any preliminary procedural issues, for example:
 - i) what documents/notes will be kept by the mediator?
 - ii) will the process be confidential (if it is an internal process, what reporting will take place)?
 - iii) will the participants have authority to negotiate?
 - f) Clarifying the terms of any agreement to enter into the process.
 - g) Settling venue and timing issues.
- 4) The mediator should:
 - a) describe and explain the mediation process that is to be used;
 - b) where necessary, discuss the appropriateness of the process for the participants in light of their particular circumstances, the benefits and risks of the process, and the other alternatives open to the participants;
 - c) discuss the confidentiality of the mediation and any limitations on such confidentiality;
 - d) advise the participants about how they or the mediator can suspend or terminate the mediation;
 - e) reach agreement with the participants about any costs and how such costs are to be paid;
 - f) advise the participants about any indemnity provisions contained in any agreement to mediate, for example, where a mediator seeks to be indemnified in respect of his or her costs in response to any legal costs that may be incurred by the mediator;
 - g) advise the participants of the mediator's role in relation to the provision of advice or other services for example:
 - i) if the mediator is also a lawyer, he or she shall inform the participants that he or she cannot provide legal advice unless using a 'blended process' model and with their clear consent or represent any of the participants in any related legal action,

- ii) if the mediator is a psychologist, counsellor or therapist, he or she shall inform the participants that he or she cannot counsel or practise therapy with either or any of the participants.
- h) discuss with or inform the participants about the procedures and practices in the mediation, such as:
 - i) the circumstances under which separate sessions may be held,
 - ii) how participants may seek information and advice from a variety of sources during the process,
 - iii) how participants may withdraw from the process,
 - iv) that participants are not required to reach an agreement,
 - v) the opportunities for separate communication with the participants and/or with their legal representatives,
 - vi) the circumstances in which other persons can be involved in the process, for example, the participation of experts, support persons or interpreters who may be involved in the mediation.
- 5) Wherever considered beneficial by the participants, the agreement to enter into mediation will be in writing. Any agreement with respect to the confidentiality of a session, or any waiver of such confidentiality, may also be acknowledged in writing by all participants. If there is no written agreement, for example, where mediation is conducted by a Court or Tribunal member and is governed by legislation, then the mediator will record the participants' understanding as to entry into the process and confidentiality.
- 6) Mediators will provide the participants with a copy of these Practice Standards, or advise where and how they can be accessed, for example, by referring to a web site.

Commentary

This Section of the Standards was amended following detailed feedback from practitioners and organisations. There were particular concerns around the extent of any intake process. The Victorian Bar noted that:

"Requirement 3 – contains provisions regarding the intake process. It commences with a statement that '...the mediator will ensure the participants have been provided with an explanation of the process...through the intake process'. The reality is that in many situations, the mediator has little or no opportunity to conduct an intake process. Whilst this appears to be recognised by the statement in requirement 3(1) that "The person conducting the intake process may be a different person to the mediator", the mediator still appears to retain responsibility if the intake process does not comply with the Draft Practice Standards and many of the provisions contain onerous requirements directed specifically to the mediator."

This was also a subject that was discussed in a few practitioner forums. The reworded section reflects this input.

In a similar vein, Micheline Dewdney commented:

"Re bullet point 3: In principle I agree with Robert Angyal that although a mediator can and should offer an explanation of the roles of parties, they cannot ensure that the parties have understood. I also agree that the phrase "process of each party" does not make sense."

I believe that parties may at times be embarrassed to say that they have not understood.”

The revisions attend to these concerns.

Some differences in the views about this section related to whether or not an Agreement to Mediate was used. In terms of submissions, it was clear that some mediators thought that all mediators would use them while others considered that an agreement would not generally be used. These differences arise because of different jurisdictional and state based cultures and requirements rather than sectoral differences only. Interestingly the Law Institute of Victoria suggested that:

“Paragraph 3 of this Standard indicates that whenever considered beneficial by the participants, the agreement to enter into mediation will be in writing. Further, if there is no written agreement, the mediator will record the participants’ understanding as to entry into the process and confidentiality.

The Law Institute of Victoria considers that the requirement to enter into a written mediation agreement should be mandatory rather than “whenever considered beneficial” to protect both the interests of the parties and the mediator. The only exception to this may be if the mediator has statutory immunity. The LIV also notes that the meaning of “record” in this context is unclear and suggests this term needs further clarification.”

In the writers view, this may be a matter that is worthwhile considering in the future. However, the writer also notes that such a requirement could raise issues for those who conduct community based mediations and where participants have literacy issues. At the same time, it is important to note that where court ordered mediation takes place, agreements may not always be used.

Some differences in the views expressed arose between practitioners who were familiar with mandatory mediation referral and those who were not.

The Queensland Law Society also submitted:

“We suggest that paragraph 2(h)(i) be amended so as to confirm that the mediator will not only discuss with the parties the circumstances under which separate sessions will be held, but also whether those sessions will remain confidential between the mediator and the party. Paragraph 2(h)(i) could read as follows:

“(i) the circumstances which separate sessions may be held and whether the separate sessions will be confidential between the party and the mediator.” (additional words underlined).”

One comment from the Law Society of New South Wales was that:

“Point 3 under this heading should also provide that An Agreement to Mediate must record the parties’ intention as to the binding nature of any settlement agreement reached.

The Practice Standards should be amended to provide that where existing ethical standards of legal professional organisations are inconsistent with the Practice Standard, the former should prevail. This should allow lawyers to be accepted under the new scheme without creating a conflict with the more stringent requirements of the NSW Law Society Revised Guidelines for Solicitors who act as Mediators..”

This concern was expressly addressed in the confidentiality section and the opening sections of the Standard.

The Law Council of Australia suggested that:

“The statements about whether a co-mediation model should be used in culturally and linguistically diverse communities and about varying arrangements where violence is an issue would not be relevant to other types of mediations such as commercial mediations.”

Many who contributed to forums made the comment that culturally and linguistically diverse participants can be found in all mediations and that power and violence issues may also be present in commercial mediations. One participant commented – “The fact that they can’t see it doesn’t mean it’s not an issue – that is the issue.”

4 Power Imbalance, Violence and Abuse

Mediators shall have completed training that assists them to recognise power imbalance and issues relating to control and intimidation and take appropriate steps to manage the mediation process accordingly.

- 1) Some disputes may not be appropriate for mediation processes because of power imbalance, safety, control and/or intimidation issues.
- 2) If at any time abuse is present, or implied or threatened, the mediator shall take appropriate measures to ensure the safety of participants. Options include:
 - a) activating appropriate pre-determined security protocols;
 - b) using video conferencing or other personal protective and screening arrangements;
 - c) requiring separate sessions with the participants;
 - d) enabling a friend, representative, advocate, or legal representative to attend the mediation sessions;
 - e) referring the participants to appropriate resources; and
 - f) suspending or terminating the mediation session, with appropriate steps to protect the safety of the participants.

Commentary

This section attracted many comments. Many of those in the legal sector who commented suggested that the section was directed at ‘family mediation’ rather than all forms of practice. For example, the Institute of Arbitrators and Mediators Australia (IAMA) stated:

“IAMA believes that the inclusion of the word “abuse” in this section is not terminology that is appropriate to all forms of mediation (eg commercial mediation) and hence should not be included in generalised national mediator accreditation standards.”

The section was revised to address these concerns however, the writer notes that such issues can arise wherever there is conflict.

In general, comments were supportive of this section provided that amendments were made to meet sectoral considerations and bearing in mind the limited nature of the 'threshold' training requirements.

5 Fair, Impartial and Ethical Practice

A mediator must conduct the dispute resolution process in an impartial manner and adhere to ethical standards of practice.

- 1) Impartiality means freedom from favouritism or bias either in word or action, or the omission of word or action, that might give the appearance of such favouritism or bias. A mediator will disclose actual and potential grounds of bias and conflicts of interest. The participants shall be free to retain the mediator by an informed waiver of the conflict of interest. However, if in the view of the mediator, a bias or conflict of interest impairs their impartiality, the mediator will withdraw regardless of the express agreement of the participants.
- 2) A mediator should identify and disclose any potential grounds of bias or conflict of interest that emerge at any time in the process. Clearly, such disclosures are best made before the start of a process and in time to allow the participants to select an alternative mediator. Mediators should take reasonable steps to minimise the chances of being in a position of potential bias or conflict of interest before the process commences.
- 3) A mediator should avoid conflicts of interest, or potential grounds for bias or the perception of a conflict of interest, in recommending the services of other professionals. Where possible, the mediator should provide several alternatives if recommending referrals to other practitioners and services.
- 4) A mediator will not use information about participants obtained in mediation for personal gain or advantage.
- 5) The perception by one or both of the participants that the mediator is partial does not in itself require the mediator to withdraw. In such circumstances, however, the mediator must remind all parties of a right to terminate the mediation process.
- 6) A mediator should not become involved in relationships with parties that might impair the practitioner's professional judgment or in any way increase the risk of exploiting clients. Except where culturally required, practitioners will not facilitate disputes involving close friends, relatives, colleagues/supervisors or students.
- 7) Mediators should adhere to, and be familiar with, the code of conduct or ethical standards prescribed by the organisation or association with which they have membership (see Approval Standards).

Commentary

This section attracted some comment and the Standard was generally amended to attend to the views expressed.

6 Confidentiality

A mediator should respect the confidentiality of the participants.

- 1) A mediator shall not voluntarily disclose to anyone who is not a party of the mediation any information obtained except:
 - a) non-identifying information for necessary administrative, research, supervisory or educational purposes; or
 - b) with the consent of the participants to the mediation process; or
 - c) when required to do so by law; or
 - d) where permitted by existing ethical guidelines or requirements and the information discloses an actual or potential threat to human life or safety.
- 2) The mediator will clarify the participants expectations of confidentiality before undertaking the mediation process. Any written agreement to enter into the process should include provisions concerning confidentiality.
- 3) Before undertaking the mediation process, the mediator will inform the participants of the limitations of confidentiality, such as statutory, judicially or ethically mandated reporting, such as any reporting required pursuant to professional ethical requirements.
- 4) If the mediator holds separate sessions with a participant, the obligations of confidentiality concerning those sessions should be discussed and agreed upon before the sessions.
- 5) If subpoenaed, or otherwise notified to testify or to produce documents, the mediator should attempt to inform the participants as soon as reasonably practicable. The mediator should not give evidence without an order of the Court or Tribunal if the mediator reasonably believes doing so would violate an obligation of confidentiality to the participants. The mediator may include indemnification provisions in relation to costs incurred (see Section 3(2)(f)).
- 6) With the participants' consent, the mediator may discuss the mediation process with the participants' lawyers and other expert advisors where such advisers have not attended all or part of the actual mediation session.
- 7) Where the participants reach an agreement in a mediation process, the substance of the proposed agreement may, with the permission of participants, be disclosed to their respective representatives, advisors or others and may be used in a de-identified form for debriefing, research processes and discussion purposes.
- 8) The mediator should maintain confidentiality in the storage and disposal of client records and must ensure that office and administrative staff maintain such confidentiality. Overall, mediators are not required to retain documents relating to a dispute although they may retain any written agreement to enter into the mediation process and any written agreement as to outcomes. Some mediators may also choose to retain notes relating to the content of the dispute particularly where duty-of-care or duty-to-warn issues are identified.

Commentary

This section was the subject of considerable comment, mainly in relation to situations where a mediator could report a matter that arose during mediation to the appropriate authorities where there was a threat to human life or safety.

Alan Limbury noted that:

“Paragraph 6 of the Draft Australian National Mediator Practice Standards provides that a mediator shall not voluntarily disclose to anyone who is not a party to the mediation any information obtained except:

c) when required to do so by law; or

d) when the information discloses an actual or potential threat to human life or safety

Insofar as sub-paragraph (d) permits voluntary disclosure by a mediator where disclosure is not required under law, it conflicts with paragraph 6.2 of the NSW Law Society Revised Guidelines for Solicitors who act as Mediators (updated 1/1/07), which provides that the obligations of a solicitor relating to confidentiality as between solicitor and client shall apply as between the mediator and the participants. It also conflicts with paragraph 5 of the Law Council of Australia’s Ethical Guidelines for Mediators (February 2006) which provides that, subject to the requirements of the law, a mediator must maintain the confidentiality required by the parties.”

The Law Society of New South Wales and the Victorian Bar raised similar concerns. The different views on this matter can in part be related to the different professional backgrounds of mediators. Different professions have different ethical guidelines about how and whether they may report a threat to human life and safety. These differences have been reflected in the Amended Standards, however the author notes that this may be an issue that could be more closely considered into the future (by both professional associations and the Mediator Accreditation Committee).

7 Competence

Mediators must be competent and have relevant skills and knowledge.

- 1) Mediators should seek regular professional debriefing. The purpose of debriefing is to address matters relating to skills development, conceptual and professional issues, ethical dilemmas, and to ensure the ongoing emotional health of mediators. Debriefing can take place following a solo mediation, a co-mediation, in groups or through independent sessions with another experienced mediator.
- 2) Mediators should also participate in continuing professional development training. Where possible, mediators should also participate in programs of peer consultation and should help train and mentor the work of less experienced mediators.
- 3) Mediators should be competent and have the capacity to apply knowledge, skills and an ethical understanding and commitment in the areas listed below. Mediators demonstrate competence by showing that they have the requisite knowledge and skills and can apply them. Mediators are required to ensure that ongoing professional development is focused on achieving and maintaining competencies including:
 - a) **KNOWLEDGE**
In areas including, but not limited to:
 - i) The nature of conflict, including the dynamics of power and violence.
 - ii) The appropriateness or inappropriateness of mediation.
 - iii) Pre-mediation preparation, screening and intake.

- iv) Communication patterns in conflict and negotiation situations.
- v) Negotiation dynamics in mediation.
- vi) Cross-cultural issues in mediation and dispute resolution.
- vii) The principles, stages and functions of a mediation process.
- viii) The roles and functions of mediators.
- ix) The roles and functions of support persons, lawyers and other professionals in mediation.
- x) The law of mediation on confidentiality, enforceability of mediated agreements and liability of mediators.

b) SKILLS, including, but not limited to:

- i) Preparation and dispute diagnosis in mediation.
- ii) Intake and screening of both the parties and the dispute to assess suitability for mediation.
- iii) Conduct and management of the mediation process.
- iv) Appropriate communication skills, including listening, questioning, reflecting and summarising, required for the conduct of mediation.
- v) Negotiation techniques and the mediator's role in facilitating negotiation and problem-solving.
- vi) Mediator interventions appropriate for standard difficulties in mediation
- vii) Potential responses to high emotion, power imbalances and violence.
- viii) Use of separate meetings and shuttle mediation.
- ix) Asking questions about or in appropriate circumstances, drafting of mediated agreements.

c) ETHICAL UNDERSTANDINGS in relation to:

- i) The avoidance of conflicts of interest.
- ii) Marketing and advertising of mediation.
- iii) Confidentiality, privacy and reporting obligations.
- iv) Neutrality and impartiality.
- v) Fiduciary obligations.
- vi) Supporting fairness and equity in mediation.
- vii) Withdrawal from and termination of the mediation process.

Commentary

The supervision requirements that were the subject of much comment were either amended or deleted as a result of the consultation process.

Some comments related to the actual competencies. However, almost all who contributed suggested that the competencies that had been the subject of agreement at the National Mediation Conference in May 2006 should be retained (with very minor amendments).

However, Val Sinclair noted that:

“In the Draft Practice Standards item 2:

The Practice Standards are described as:

- Specify practice and competency requirements for mediators
- Inform participants and others about what they can expect of the mediation process and mediators

While the Standards inform and describe the mediation process and expectations of mediators they do not provide measurable competencies.

As you know measurable competencies are necessary for Training purposes and for Assessment purposes. These standards do not provide a framework for assessment of the practice competence of mediators and therefore not an acceptable way of accrediting mediators to practice (i.e. Identifying the essential skills required to perform the work)

There is a Training requirement that all competencies should be based on existing competencies for example:

The first Mediation Competency Standards in Australia were the:

- ACT Mediation Competency Standards.
- They formed the basis for the competencies used in The Certificate IV in Community Mediation.
- From these were developed the Current Family Dispute Resolution Competencies.

While a number of the Family Units of Competence are obviously not relevant for other types of mediation the basic mediation process competencies include elements and performance criteria that could be utilised and therefore provide some consistency in competencies required to conduct a Dispute Resolution process.

It would seem to be a not too difficult process to develop Units of competence, elements and performance criteria from these draft standards and from existing competencies and apply the existing family competencies for family matters.

It seems to me that it is not possible to implement these draft standards as a nationally agreed statement of the skills and knowledge required for effective performance in practice if they do not provide a framework for collecting evidence and assessing practice skills. My concern is that they do not meet the current needs of practitioners, trainers or assessors for consistent measurable practice competencies in all areas of practice. From a consumer perspective there is still no consistent way of knowing that the practitioner has been assessed as having the necessary skills to be able to effectively conduct a mediation process.

It may be that as this is a living document that the committee will be able to explore these issues and work towards developing measurable competencies. I look forward to being a part of that committee.

I congratulate you on the work you have done to date and know that to have draft practice requirements developed is a huge step forward.”

In the writer’s view this is an issue that should be further explored by the Committee that will function in 2008.

BOULLE AND CONFERENCE COMMITTEE

In order to be Accredited under the System mediators should be persons of fit and proper character who have been educated, trained and assessed in terms of:

1. Substantive knowledge relating to:
 - a. The nature of conflict, including the dynamics of power and violence;
 - b. The appropriateness or inappropriateness of mediation;
 - c. Pre-mediation preparation, screening and intake;
 - d. Communication patterns in conflict situations;
 - e. Negotiation dynamics in mediation;
 - f. Cross-cultural issues in mediation and dispute resolution;
 - g. The principles, stages and functions of the mediation process;
 - h. The roles and functions of mediators;
 - i. The roles and functions of support persons, lawyers and other professionals in mediation;
 - j. Key issues in a specific Code of Practice referred to in the course;
 - k. The basic law of mediation on confidentiality, enforceability of mediated agreements and liability of mediators.
2. Skills and techniques in:
 - a. Preparation for mediation;
 - b. Intake and screening of the parties and dispute to assess suitability for mediation;
 - c. Conduct and management of the mediation process;
 - d. Appropriate communication skills, including listening, questioning and reframing, required for the conduct of mediation;
 - e. Negotiation techniques and the mediator's role in facilitating negotiation and problem-solving;
 - f. Mediator interventions appropriate for standard difficulties in mediation;
 - g. Potential responses to high emotion, power imbalances and violence;
 - h. Use of separate meetings and shuttle mediation;
 - i. Drafting of mediated agreements;
 - j. Protocols for terminating mediation;
 - k. Anticipating and responding to post-mediation difficulties;
 - l. The use of information and computer technology in mediation practice.
3. Ethical understanding in relation to:
 - a. The avoidance of conflict of interests;
 - b. Marketing and advertising of mediation;
 - c. Confidentiality, privacy and reporting obligations;
 - d. Neutrality and impartiality;
 - e. Fiduciary obligations;
 - f. Ensuring fairness and equity in mediation;
 - g. Withdrawal from and termination of the mediation process.

8 Inter-professional Relations

Mediators should respect the relationships with professional advisers, other mediators and experts which complement their practice of mediation.

- 1) Mediators should promote cooperation with other professionals and encourage clients to use other professional resources when appropriate.
- 2) When disputes involve more than one facilitative or other decision-making process, mediators will keep themselves informed and keep other professional colleagues informed about the processes taking place. Mediators will consider and respond to any consultative responsibilities that extend beyond more narrowly defined obligations to facilitate a process directly between the disputants.

Commentary

This section was not well understood by those who do not practice in a team environment and who may not, for example, refer participants to a joint expert to assist in making financial decisions. Generally however the feedback that was received about this section was positive.

9 Procedural Fairness

A mediator will conduct the mediation process in a procedurally fair manner.

- 1) A mediator will support the participants to reach any agreement freely, voluntarily, without undue influence, and on the basis of informed consent.
- 2) The mediator will provide each participant with an opportunity to speak and to be heard in the mediation, and to articulate his or her own needs, interests and concerns.
- 3) If a mediator, after consultation with a participant, believes that a participant is unable or unwilling to participate in the process, the mediator may suspend or terminate the mediation process.
- 4) The mediator should encourage and support balanced negotiations and should understand how manipulative or intimidating negotiating tactics can be employed by participants.
- 5) To enable negotiations to proceed in a fair and orderly manner or for an agreement to be reached, if a participant needs either additional information or assistance, the mediator must ensure that participants have sufficient time and opportunity to access sources of advice or information.
- 6) Participants should be encouraged, where appropriate, to obtain independent professional advice or information.
- 7) It is a fundamental principle of the mediation process that competent and informed participants can reach an agreement which may differ from litigated outcomes. The mediator, however, has a duty to support the participants in assessing the feasibility and practicality of any proposed agreement in both the long and short term, in accordance with the participant's own subjective criteria of fairness, taking cultural differences and where appropriate, the interests of any vulnerable stakeholders into account.
- 8) The primary responsibility for the resolution of a dispute rests with the participants. The mediator will not pressure participants into an agreement or make a substantive decision on behalf of any participant.

Commentary

This section was amended following some detailed feedback.

Some who commented raised issues around practical implementation. The Law Institute of Victoria noted that:

“Under paragraph 5, to enable negotiations to proceed in a fair and orderly manner, mediators must ensure that participants have sufficient time and opportunity to access sources of advice or information. While the LIV fully supports this concept, it also notes that a situation may arise where a skilled mediator, using his or her independent judgment, may decide that the parties need to be encouraged to move towards making a decision. Such an action could be in potentially in breach of this paragraph. “

The Victorian Bar noted also that:

“Requirement 9(5) – imposes an obligation that “if a participant needs either additional information or assistance, the mediator must ensure that participants have sufficient time and opportunity to access sources of advice and information”. This provision is so open-ended, onerous and subjective in implementation, that confidence in compliance in many mediations will be impossible.”

Most who made oral submissions considered however that these provisions were appropriate and that mediators should have positive obligations in this regard.

10 Information Provided by the Mediator

The mediator has no advisory or determinative role in regard to the content of the matter being mediated or its outcome. The mediator can advise upon and determine the mediation process that is used.

- 1) Consistent with the standards relating to impartiality and preserving participant self-determination, a mediator may, with the clearly informed consent of the participants, provide the participants with information that the mediator is qualified by training or experience to provide. Such information should be couched in general terms.
- 2) A mediator should only provide information within the limits of his or her qualifications and competence while conducting a mediation.
- 3) Mediators shall not explore or provide interpretations of behaviour or statements with the aim of providing assistance of a counselling nature nor should they provide legal advice (see ss5 below).
- 4) Where appropriate, for example, in some family, environmental and workplace disputes, the mediator has a responsibility to facilitate a discussion about the participants’ awareness of the interests of others affected by the dispute, and by the proposed agreement, and to assist the participants to consider the separate and individual needs of other such persons.
- 5) If a mediator, upon request, uses a ‘blended process’ model, such as evaluative mediation or conciliation, this process must be the subject of clear consent normally through the use of a mediation or similar agreement.
- 6) Mediators will provide information about their specialist and relevant training, education and expertise to participants upon request.

Commentary

Much of the commentary on this section related to the role of 'blended' processes and how the mediator provides information. This topic has been addressed in the Final Report and in the Approval Standards Commentary.

Some comments were incompatible with others. For example, Micheline Dewdney stated:

"The second sentence could be reworded as follows:

"The mediator provides information on the mediation process and remains in control of that process".

This comment accords with particular process models. However those that practice in a transformative model or style may consider that 'control of process' is vested with the participants.

11 Termination of the Mediation Process

The mediator will suspend or terminate a mediation process if continuation of the process might harm or prejudice one or more of the participants.

- 1) Mediators should be alert to situations where parties or their advisors seek to misuse the mediation process to achieve other ends such as:
 - a) delaying proceedings in the hope of reinforcing the continuation of an existing arrangement or prolong litigation or obtain other advantage; or
 - b) 'buying' time in order to dissipate or conceal assets; or
 - c) where, in the opinion of the mediator, one or both participants is in some other way acting in bad faith.
- 2) A mediator may suspend or terminate the mediation process if in the opinion of the mediator it is being used for a purpose other than a mutual attempt to arrive at resolution or its usefulness has in some other way been exhausted. Mediators should, where possible, provide reasonable notice to the participants.
- 3) The mediator may withdraw from the mediation process when any agreement is being reached by the participants that the mediator believes is unconscionable. If terminating or withdrawing from a mediation process, the mediator should assist the parties in assessing further process options for dealing with their dispute.

Commentary

The termination section was the subject of some comments. The Victorian Bar noted:

Requirement 11 – provides that "the mediator will suspend or terminate a mediation process if continuation of the process might harm or prejudice one or more of the participants". This provision is ill-conceived. For example, in all mediations the process might prejudice a participant's legal rights. If they commit to a binding agreement as the outcome of a mediation process, it is hard to imagine that they would not have prejudiced their legal rights (even though they would have gained some other legal rights)

The Victorian Bar also noted that:

Requirement 11 (1)(b) – requires mediators to be alert to situations where parties or their advisors are “buying’ time in order to conceal or dissipate assets”. This is another example of a provision inappropriately focused on one particular type of mediation (family law/ family dispute).

The Queensland Law Society suggested that some additional criteria could be added:

Paragraph 1 sets out various situations where mediators should be aware that the parties or their advisors are seeking to misuse the mediation process. We suggest that a further sub-paragraph 1(d) should be added which reads as follows:

“(d) fishing for information and cross-examination of a party beyond what is reasonable in the circumstances.”

In contrast, the Law Council of Australia noted:

The Law Council notes that the standards in relation to termination are similar to the provisions in its Ethical Guidelines for Mediators and suggests that lawyer mediators who comply with the guidelines could be acknowledged as complying with the Practice Standard.

Small amendments were made to address some of the comments that were made. Most of those who provided comment seemed relatively satisfied with the content of the Standard.

12 Charges for Services

The mediator must make explicit to parties all charges related to the practitioner’s services and how they are calculated.
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- 1) The mediator will explain any fees to be charged for the mediation process and any related costs. The mediator must also obtain agreement from the participants as to how any fees will be shared and the method of payment.
- 2) Any written agreement with the participants about the mediation process should include a description of any fee arrangements with the mediator.
- 3) A mediator will not base fees on the outcome of the mediation, but it is not unethical for a mediator to act pro bono or to leave to the discretion of the parties the payment of any fees.
- 4) If any retainer has been collected before mediation services have been rendered, any unearned fees should be returned promptly upon termination of the mediation process.

Commentary

This section appeared to be relatively uncontroversial and was closely related to developed standards.

13 Making Public Statements and Promotion of Services

The mediator should ensure that public statements made by the mediator promoting business are accurate.

- 1) The purpose of public statements concerning mediation processes should be to:
 - a) educate the public about the process in order to help the public make informed judgments and choices; and
 - b) present the mediation process objectively, as one which seeks to empower participants directly and constitutes only one of several methods for arriving at an outcome.
- 2) Public communications should not mislead the public, misrepresent facts or contain any:
 - a) statements likely to mislead or deceive by making only a partial disclosure of relevant facts; or
 - b) statements intended or likely to create false or unjustified expectations of favourable results.
- 3) When advertising professional services, mediators should restrict themselves to matters which educate and inform the public. These could include the following information to describe the mediator and the services offered, such as: name, address, telephone and facsimile numbers, email address, office hours, relevant academic degree(s), specialist subject expertise, relevant training and experience in the mediation process, mediation qualifications such as certifications and accreditations, appropriate professional affiliations and membership status, advantages of a mediation process, and any additional relevant or important consumer information. In particular:
 - a) mediators should refrain from promises and guarantees of results. However, a mediator may report on de-identified information about any evaluation of their services that might assist parties to better understand the mediation process; and
 - b) mediators must accurately represent their qualifications and their relevance and significance.
- 4) Mediators should, where possible, encourage and/or participate in research that can support further professional and public education.
- 5) Mediators can promote their accreditation or additional accreditation and membership under this system.

Commentary

Two submissions – from the IAMA and the Law Council of Australia – suggested that the wording be checked with Trade Practices Act requirements. The IAMA suggested “that the wording of this section be checked with the various requirements of the Trade Practices Act.” Similarly, the Law Council of Australia noted that:

“The Law Council notes that its Ethical Guidelines for Mediators deals simply with publicity and advertising by providing that mediators must not engage in misleading or deceptive publicity or advertising or make false or misleading statements about their services. The Law Council suggests that the wording of these provisions is preferable as it avoids possible difficulties with anti-competitive behaviour, which may arise from the proposed restrictions on advertising in the Practice Standard.”

In general, however, practitioners and others regarded the articulated standards as appropriate and useful in terms of educating all practitioners who work in the sector.