
CHAIR UPDATE – DECEMBER 2022

This Chair's update is circulated to our member organisations, current and former MSB Directors, and to NMAS trainers/coaches/assessors who have expressed an interest in receiving them.

We recommend that member organisations share this with their administrative and training teams.

As you are all aware, the Board has recently received the findings and recommendations of the NMAS Review.

The journey forward is a complex one, and the Board is working tirelessly to present to you a system which will build on the basis of the NMAS and improve the system for the profession of mediators.

Recently I was asked to present at a conference, and I have used the basis for that speech to share with you all the current state of play.

The review

The review is likely to result in the largest changes to the NMAS since the system was instituted in 2008. There has been one earlier review in 2015. That was conducted largely internally, by board members themselves. The review we commissioned in late 2020 was conducted by an outside business, Resolution Resources. The contract for the review was awarded following competitive tenders. There was a significant number of bids, and there were several tendering groups that appeared to have the appropriate skills and resources. The research that led to the recommendations was broad and thorough. The changes this time will be larger.

There have so far been two statements released by the MSB to members about the review. The first said, in effect, 'We've got the report and we are working out how to deal with it.' The second, released in October said, 'We are not going to have a code with a code administration committee as recommended, but we are going to use the review's work to amend the existing NMAS'.

There are three preliminary remarks I'd like to make before I get to the detail.

Heritage

What I want to stress is that large changes will not represent a criticism of the work that was done in establishing the MSB and the NMAS. Whenever I look at the MSB constitution and the standards, I have nothing but the greatest respect for those responsible—I was not among them. There must have been a lot of fine mediating done to achieve a balance of interests across widely differing groups. And as someone who spent a professional lifetime deep in legal documents, I appreciate the quality of the drafting of the MSB constitution and the NMAS. We all owe a debt of gratitude to those responsible.

The need, and the opportunity, for significant changes signal rather that the profession is developing, and largely developing in a way that the founders of the system would have anticipated and hoped for. To adopt the language used by the reviewers, we are moving from an emerging profession to a new profession. We need a more complete set of professional structures.

So that's where we are going: how do we get there? That leads me to my second preliminary observation.

Resources

One of the significant achievements of those who set up the MSB was to devise a structure that is remarkably lean. As I said, I was not involved in that work, but I remember that as a recently appointed mediation registrar of the Supreme Court of Western Australia in the early years of this century I attended meetings of mediators keen to set up some sort of national body. There were people talking about a national secretariat in Canberra with a permanent staff of perhaps five people, which they anticipated would be funded by recurring grants from the Commonwealth government.

What we have is that the MSB is a board of volunteers. We have a secretariat that is the less than full-time responsibility of the immensely capable Jenny Watson in Brisbane. We contract as needed for book-keeping services and promotional advice. That's it. It is of course a structure that is only workable because of the internet and all the communications technologies that surround it. In the last two years in particular, we have all done a lot of virtual meeting.

The point is that the MSB's lean resources have influenced the way we can handle the response to the review and implement changes. We will do what we can do: if we had greater resources, we would be able to act differently. This was one of the reasons we have not publicly released all the documents supporting the RR report: we don't want to be deluged with earnest submissions about topics we aren't going to deal with yet, or that we will not deal with at all.

The Board's duties

As a board, the directors would not have been discharging our duties simply to rubber-stamp an external review. That is the third preliminary point I want to make. We have an obligation to consider what response best discharges our duty to establish, maintain, and review the NMAS.

What is in the best interests of our members as a community? I will give you some examples of that shortly.

That might seem to be a long run-up before arriving at the bowling crease, but I hope it helps to explain why we are doing what we are doing.

Given our limited resources, the Board's first decision was to take a top-down view of the report and its recommendations, so that we could make some big decisions where it was clear what we should do.

Decision 1

The first of those decisions was a negative one. The review recommended that the Mediator Accreditation Standards be replaced by a voluntary code with a code administration committee following the model of voluntary industry codes under the Competition and Consumer Act. That was described in the RR report as Targeted Recommendation B.

The Board took the view that the voluntary industry code structure is simply not appropriate for the regulation of this profession. It addresses at a completely different set of risks and public policy objectives. It may be relevant in addressing the problems in franchising or the dairy industry but was simply not relevant to us. It was also extraordinarily difficult to see how the proposal was consistent with the MSB's basic constitutional structure. Not going down the code path means that the necessary changes to the MSB's constitution will be fewer and simpler.

We thought it was important to tell the community of this decision as soon as possible. It also reinforces the reasons we did not release all the documentation: we didn't want impassioned submissions on who should be on the code administration committee if there wasn't going to be one.

What next?

The Board's review subcommittee has identified discrete areas to be worked on. As we get each topic into shape, it will go the full Board and/or out for comment from the profession. Here are just a couple of them.

Training and accreditation

At the moment, the NMAS prescribes what training and assessment are required for accreditation as a mediator. It also prescribes the standard of professional practice expected of mediators. Anyone with the slightest expertise in adult education who has looked at it has pointed out that doing the prescribed training and passing the prescribed assessment cannot assure the professional competence prescribed. There is a gap. How do we plug that gap, and what should the minimum standard of professional competence be? Counsels of perfection are all very well, but remember A Prairie Home Companion's mythical Wisconsin town of Lake

Woebegone, 'Where all the women are good looking, all the men are handsome, and all of the children are above average.'

Also, the research by RR identified two other expectations or wishes in the community. The first is that there should be a recognised hierarchy of expertise from beginners to a high level of expertise. How many levels? What are the markers?

The second was that there was a similar appetite for recognition of specialist areas of practice requiring particular knowledge and skills. What areas? Indigenous peacemaking? Family violence? Workplace relations? Conciliation?

Neither of those demands or pressures came as a surprise to the Board. The review findings just confirmed views that had been evolving on the Board for some time. I think that some reasonably developed proposals in this realm will come to the community for comment reasonably soon.

Complaints handling

There was finding by the review that if mediation is to be accepted as a fully developed profession there needed to be a mature and comprehensive complaints handling process. The consumer protection argument for an appropriate complaints handling system is obvious.

This is a very big can of worms. The first thing I would say is that there is absolutely no enthusiasm among the Board for the MSB to take over from RMABs and Training Organisations the whole area of complaints handling. Nor would we have the capacity to do so. If we were to acquire the capacity, it might come at a significant cost to member organisations.

The preliminary thinking is that the modified NMAS is likely to be much more prescriptive of what complaints handling procedures member organisations must have. It is all but inevitable that these will have to include procedures for appeal or review if a party is dissatisfied with the handling of the complaint at first instance. That second-stage process might in at least some circumstances be to a different body. Who or what?

Of course, if there is substance in a complaint the next topic to be addressed is discipline: sanctions for unprofessional conduct. You see, it doesn't get simpler, does it?

This area is likely to be finalised after the accreditation and training realms.

Classes of members

Those two are among the hard topics. One that is likely to prove less difficult is classes of members of the MSB. The MSB constitution provides for seven different classes of membership. One of those seven classes has one member; all the other members are either RMABs or Training Organisations; and so there are four unpopulated classes of membership. The review made some proposals about a reduced set of classes of members that I think are sensible and are likely to be uncontroversial. They will however need constitutional amendments. The thinking is to leave those until it is clear what (if any) other changes will

require constitutional amendment, so that members are not subjected to a procession of amendments.

Summary

These points above, are the tip of the iceberg, but hopefully will allay any fears that the review has not been taken seriously or that we are planning to rush into anything that has not been considered from all sides.

In reality, we probably have a few more drafts of the Standards, before briefing a professional drafter to review the documents and check that we are on the right track from that professional perspective. The Board plans to release drafts for consultation by the RMBAs and Training Organisations during which time we will embark on a series of outreach seminars, similar to what we used to do before Covid.

Should you or your organisation wish to discuss the matter further, or have any concerns, I am only too happy to meet with your boards or relevant committee or similar and explain.

Regards

A handwritten signature in black ink that reads "Christopher Boyle". The signature is written in a cursive, slightly slanted style.

Christopher Boyle | MSB Chair

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