



19 September 2011

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JM; rp

Hon Justice Iain Ross
Chair
Mediator Standards Board

by email: info@msb.org.au

Dear Justice Ross

MSB Fee Structure Options Discussion Paper

Thank you for providing the opportunity to consider and respond to the MSB Fee Structure Options Discussion Paper. The Society's ADR Committee has considered the Discussion Paper. We provide the following comments in relation to each of the recommendations contained within it.

R1 That RMABs enter and update data about their accredited mediators on the national Register of Registered Nationally Accredited Mediators according to defined protocols.

The Law Society has established and maintained its own list of accredited mediators.

There may be some benefit in a national register, if for example parties to a dispute wished to consider using a mediator from interstate with expertise in a specific field. This would however require the data fields used by the MSB to be relatively detailed to be of any real use.

The MSB needs to balance what may be the minimal benefits of establishing a national register with the administrative demands and costs and its confidence in gaining the support and cooperation of the RMABs to achieve a consistent.

The Law Society is concerned about the lack of consideration of the RMABs' role in the MSB Options Paper and would welcome an extended period of consultation with the RMABs.

R2 That on behalf of the MSB, RMABs collect an annual registration fee from each of their individually Registered Nationally Accredited Mediators and that such fee include an Administrative Fee to be retained by RMABs with the balance remitted to the MSB.

Individual lawyer mediators already pay fees for their practising certificates and membership of the Law Society. A portion of the costs of their practising certificate contributes to the levies paid by the Society to the MSB.

There is a real risk that individual mediators will not be prepared to pay another registration fee and will elect not to be members of the MSB and as a consequence, the MSB will lose its broader representative status.

In addition, the administrative burden of requiring the RMABs to collect the registration fee would not be insignificant. Whilst an administrative fee is proposed to compensate the RMABs, this fee in itself needs to be processed and only adds to the cost to members.

There is a related risk of RMABs not renewing their membership as the membership base will no longer be broadly representative of the RMABs and the RMABs consider that the MSB is competing with the RMABs members' interests which are the RMABs priority.

R3 That fees for membership of the MSB by its organisational members continue to be collected.

There is a need for a fair and consistent process that will work across all RMABs administering the accreditation and re-accreditation processes. If it is proposed to be an annual fee, is it proposed that it continue to be levied according to the number of accredited mediators? The issue here is that the RMABs will most likely have to recover the MSB membership fees from mediators via the accreditation fee/re-accreditation fee process. Observations include that this may over time become a disincentive for RMABs to continue their operations in support of the MSB given the ongoing administrative burden; other RMABs may benefit from accreditation fees paid by mediators accredited through a different RMAB and there is a risk of losing mediators from RMAB lists if the fees become prohibitive.

There are related issues such as mediators having to "pay" to be on certain lists, or if a mediator only pays one application fee/re-accreditation fee and then is "mutually recognised" for the purpose of appearing on other RMAB lists, the "other" RMABs will be administering mediators without receiving a fee.

Again, the Law Society would welcome an extended period of consultation with the RMABs as it is concerned about the lack of consideration in the MSB Options Paper of:

- the consequences of the creation by the MSB of a membership base which includes individual mediators; and
- the impact this could have on RMABs.

R4 That the work program for the MSB be endorsed and the arrangements for establishing the administrative functions of the MSB be either contracted to an individual or company for a fixed fee, or contracted to a shared service provider, located in the environs of another organisation with the services to be provided specified including relevant KPIs and oversighted by the Board.

The Law Society cannot endorse the proposed work program without further consultation and development of a level of understanding regarding the issues raised by the MSB Options Paper.

Specific issues of concern are the proposed change role of the MSB and changes to the proposed relationship between the MSB and the RMABs, in particular with regard to the proposed change to the MSB's membership base and the introduction of a 'consistent' disciplinary framework.

Legal practitioners who work as mediators are governed by the Legal Practitioners Act and the Australian Solicitors' Conduct Rules. The disciplinary framework is mandated by legislation and could not be subsumed into a consistent national disciplinary framework managed by the MSB.

- R5 That the MSB periodically engage with RMABs to ensure that their accreditation and reaccreditation processes are rigorous and consistent with the requirements of the NMAS and the RMABs to provide formal assurance that their members are compliant.**

The Law Society would be more comfortable with an approach which is focused on establishing, implementing, reviewing and updating the NMAS Approval Standards and supporting RMABs in the management of accreditation and re-accreditation rather than endeavouring to create nationally 'consistent' Practice standards and disciplinary frameworks.

A 'light touch' approach is preferable to an audit type approach.

- R6 That the MSB should continue to hold and control the master set of the Approval Standards and Practice Standards which comprise the Australian National Mediator Accreditation Standards and should consolidate and review the Standards periodically, with appropriate consultation.**

The Law Society does not see that the MSB has a wider role in holding and controlling a master set of Practice Standards. The range of diverse practice requirements which are mandated by legislation would work against such an approach. The Law Society recommends that the MSB dispense with the objective of establishing and controlling a master set of Practice Standards.

The Law Society sees the primary role of the MSB as:

- (a) developing, maintaining and amending as required the NMAS as administered and managed by the RMABs;
- (b) reviewing and updating the NMAS Approval Standards;
- (c) periodically engaging with the RMABs to ensure that their accreditation and reaccreditation processes are rigorous and consistent with the requirements of the NMAS.

A timetable for phases of review could be put in place.

The Law Society considers that further clarification is required as to the role of the Practice Standards. The Practice Standards are prescriptive, but the consequence of non-compliance are not clear. There the possible insurance and risk consequences by having detailed Practice Standards mandating how mediators conduct mediations. It is also not clear what (if any) impact the Practice Standards intend to have on the legislated professional obligations of lawyers. For example, are the current standards intended to become the standard used to determine any disciplinary action? What (if any) weight would the standards be given in local disciplinary proceedings?

- R7 That the MSB undertake Australia-wide consumer surveys at a time to be determined to gauge public satisfaction with mediation and then track changes over time.**

Rigour would need to be applied to this process if undertaken. Often there can be over-representation of parties who have had negative experiences. We note there is no data on current complaints against mediators.

- R8 That the MSB in consultation with Members develop a framework document for a consistent approach to discipline of members including the relationship with other bodies' disciplinary processes and discusses the mutual recognition of process.**

The Law Society will continue to manage practice standards and compliance/disciplinary matters as required by legislation. The Law Society struggles to see how an effective disciplinary framework can be nationally established by the MSB and successfully applied to the Law Society's member mediators.

The Law Society appreciates that there are segments of the mediator community that are unregulated. In the absence of a disciplinary framework for these mediators, mediators who are subject to the practice standards of their own profession will be held to a higher standard, whilst others are not held accountable at all.

The Law Society has serious concerns that the suggested sharing of information regarding disciplinary matters with the MSB will constitute a breach of confidentiality.

- R9 That a fee for a registration of a mediator as a MSB Registered Nationally Accredited Mediator be set initially at \$80 pa for 2012/13 and the MSB membership fees for different membership categories be as set out in Table 3 (and the Executive Summary)**

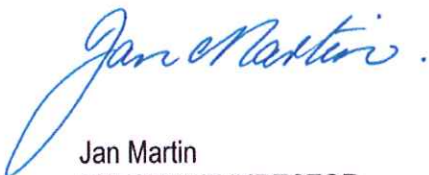
See comments in relation to R2 above.

- R10 That based on an estimate of the number of Registered Nationally Accredited Mediators likely to apply to be included on the MSB National Register, the MSB balance and adjusts its fee income and work program expenditure accordingly.**

See comments above regarding further consultation required with the RMABs before fundamental existing structures (that are working) are sought to be changed largely as a reaction to establishing a sustainable funding model.

I trust that these comments are of assistance. Should you have any questions in relation to them, please do not hesitate to contact me.

Yours sincerely



Jan Martin
EXECUTIVE DIRECTOR