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## Skills for conciliators

# A brief discourse on conciliation, fairness and illumination

*Deborah Tyler*

The issue of fairness is creating debate in the dispute resolution community, in particular on whether a third party neutral should seek to influence the parties' notion of a fair resolution. This discussion considers how issues of fairness might be addressed in the resolution of discrimination complaints made under the *Discrimination Act 1991* (ACT) and gives an example of how conciliators address fairness through illumination.

Under the *Discrimination Act 1991*, conciliation is triggered by a complaint under the statute and, as NADRAC describes, the conciliator 'may actively encourage the participants to reach an agreement which accords with the requirements of that statute'.<sup>1</sup>

A more subjective view of conciliation that gives a feeling for the atmosphere of a conciliation conference is found in Helen Garner's book *The First Stone*:

Conciliation ... rests on the idea ... that more than one interpretation of the facts can legitimately exist; on the possibility that there has been a genuine misunderstanding — or at least a gross mismatch of expectations. It has concern for the wounded feelings, the pride, of both parties. It takes into account that a story told over and over loses its tight fit with 'the truth' and becomes a story about a story. It allows people to escape from corners they may have painted themselves into, in their first wild burst of defensiveness. It admits the complexities of context which the rules of evidence in courts exclude. A certain patience is required, however, and a basic optimism about the ability of people to learn and change.<sup>2</sup>

### Differences between conciliation and mediation

Apart from the distinctions revealed in

NADRAC's definition — such as the advisory role of conciliators and the impact of a statutory framework — how is conciliation different to mediation? Other differences identified by authors include compulsion to attend conciliation, imposition of the conciliator on the parties, lack of neutrality or impartiality, strong intervention and the use of rules and regulations, with the result of increased formality.<sup>3</sup> From the perspective of conciliation under the *Discrimination Act*, it is argued that differences also exist in relation to the therapeutic-like and educational functions of conciliation<sup>4</sup> (which are rolled into the term 'illumination skills');<sup>5</sup> that is, conciliation of discrimination complaints can include a responsibility to 'name the problem [social injustice in McCormick's article, discrimination in the case of the ACT Human Rights Office] — and help devise a fair and durable resolution'.<sup>6</sup>

### What skills do conciliators need?

Bryson and McPherson<sup>7</sup> have offered an initial analysis, identifying conciliation competencies as analysis, objective empathy, inventiveness and problem solving, interpersonal skills, strategic direction, legislative framework, expert knowledge, multiple roles, personal flexibility, self-efficacy and managing expectations. Some of these, such as 'analysis', will be similar to mediation. Others might have a different emphasis in conciliation. For example, Bryson and McPherson state, in relation to 'inventiveness and problem solving', that it is the 'pursuit of collaborative solutions and generation of ideas and proposals *consistent with the case facts*'. Mediators certainly also pursue collaborative solutions and the generation of ideas and proposals, but the distinction ➤



'... when people bring their histrionic or authoritative personality characteristics to conciliation, the only hope for resolution of the complaint is to be able to move the person through a process that brings them, however momentarily, to the third position.'

➤ that Bryson and McPherson are making is that conciliation does this within the boundary of case facts.

With this overview in mind, consideration will be given to two essential and important differences between conciliation and mediation. These are 'expert knowledge' and 'illumination skills'.

### Expert knowledge

Bryson and McPherson define expert knowledge as 'knowledge of the relevant law, case law and other relevant developments, including an understanding of the legal options, processes and practices beyond conciliation'. This is certainly important to conciliation — a skilled conciliator in discrimination cases must have knowledge beyond that of discrimination case law. However, Bryson and McPherson's definition of expert knowledge may be too narrow, as an understanding of the psychology and culture of discrimination is also relevant to the management of the expectations and defensiveness revealed in a conciliation conference.

By way of contrast, Thirgood argues that a mediator should assume, by definition, a low interventionist role. His position is that 'mediation is a forum whereby the parties resolve their differences according to their own standards'.<sup>8</sup> In particular, he argues that it is the parties' internal notions of fairness that should govern outcomes, internal notion of fairness being:

individual and joint feelings about fairness, personality factors, relationship patterns between the parties, intuition, spiritual and religious factors, family norms, short and long term needs and best interest issues.<sup>9</sup>

However, Thirgood suggests that people resolve disputes using the same internal notions of fairness that are the bread and butter of discrimination complaints. It is these internal notions of fairness, when applied inappropriately to a person's public life, that can result in conflict and bring complainants to lodge complaints and the parties to the conciliation table. At that conciliation table the *Discrimination Act* provides an external standard by which to judge fairness.

Therefore, if conciliation in complaints of

discrimination is to be successful there is a need for the conciliator to be skilled in:

- understanding the external standard of fairness as legislated for in statutes such as the *Discrimination Act 1991* or, as Bryson and McPherson state, 'knowledge of the relevant law';
- how that law might apply to the dispute in question, which means that conciliators are not neutral (with respect to the *Discrimination Act* this analysis is set out in the Discrimination Commissioner's decision to attempt conciliation);
- investigation and analysis skills, with an enhanced sensitivity to the subtleties of discrimination, particularly indirect discrimination; but also
- an understanding of the ideological assumptions that underpin conciliation and their juxtaposition with the social construct of conflict;<sup>10</sup> and
- an understanding of the psychology and culture of discrimination.

### **Understanding the psychology and culture of discrimination with a small insight into conflict<sup>11</sup>**

Davidson, in his article 'Clinical Management: Some Dynamics of Scapegoating',<sup>12</sup> asked the question 'Why is scapegoating<sup>13</sup> such a frighteningly popular spectator sport?' He concludes that it results from a combination of two factors: the hysterical and authoritarian personalities.

The hysterical personality brings to the equation a denial of responsibility in later life:

To be responsible for one's behaviour would be to risk the punishment unfairly received as a child, when the link between conduct and punishment was random and violent. Only by denial and projection of responsibility onto others, can one avoid punishment and maintain fragile, if anxious, self esteem.

The authoritarian personality is:

said to be aggressive, suspicious and punitive, and preoccupied with dominance-submission in their personal relationships. The love of formal authority, and the aggression directed towards carefully defined groups (eg races) are ways of nurturing a self-image of over-importance and repression of unacceptable impulses, by prosecuting ➤



➤ in others what one fears in oneself.

Davidson considers that the combination of the 'histrionic personality, with his or her extravagant extraversion, and an authoritarian organisation or society, with its judgmental puritanism, makes a setting for the most shattering scapegoating of individuals and groups'. This combination results in conflict, where the scapegoated group or individual fights back and names this dynamic for what it is: discrimination.

Understanding this framework<sup>14</sup> helps the conciliator understand the nature of the dynamic that may also be played out in process of the conciliation conference. It will certainly be reflected in the notion of fairness that the parties bring to the table. If the conciliator is to resolve a complaint by an external measure of fairness, the conciliator may have to help the parties bridge the gap between their notions of fairness and the external measure. Hence the need for conciliators to be skilled in the art of illumination. This in turn may require high intervention.

### Illumination and conciliation

It is speculated that illumination may occur at any stage within the conciliation. From the perspective of the *Discrimination Act*, the first point of illumination is where both the complainant and respondent are educated about fairness; the last point is when the Commissioner gives his or her reasons for attempting conciliation.

Generally, conciliators might spend most of their time focusing on illumination when the parties to the dispute are in the 'third position':

Neuro Linguistic Programming believes that there are three positions to any situation. The first position is how you are feeling/perceiving; in this case you are associated. In the second position, you experience how someone else views the same situation. This is also known as being in 'rapport or having empathy'. The third position is one in which you have removed yourself emotionally and have the vantage point of an outside party. This is commonly referred to as disassociated or objective.

When someone is in one position and then switches to another, one of the benefits is that new information and attitudes become

available. This, of course, increases one's latitude of options.<sup>15</sup>

It is hypothesized that when people bring their histrionic or authoritative personality characteristics to conciliation, the only hope for resolution of the complaint is to be able to move the person through a process that brings them, however momentarily, to the third position. It is in this position that the parties are more likely to think and behave in a way that is inconsistent<sup>16</sup> with the scapegoating view of the other party.

McCormick gives an example where he was trying to deal with the proposed option that a community radio presenter be sacked for having made racial slurs on air. McCormick tries to reframe this option by 'appealing to the minority group to move to even higher moral ground by asking them to consider the morality and the utility of demanding that the perpetrator be punished'. However, McCormick was appealing to the second position by seeking to draw on the minority group's empathy towards the potential plight of the radio announcer, while the leader of the aggrieved group was still in first position. The approach failed.

From experience, the art of shifting either party to third position requires asking the right question at the right time. It is of paramount importance to the successful illumination of the notions of fairness that the parties bring to the table. The following example demonstrates how illumination can work.

During a conciliation conference, a complainant put forward one option for resolution: 'I want the name of the person who briefed the Minister so I can sue that person for defamation'. While writing the option up so as not to belittle the strength of feeling that the complainant attached to the option (she was clearly in position one), the conciliator asked, 'What would you get from this?' The reply was 'The opportunity to clear my name'. This created an opportunity to ask, at the appropriate time, 'Are there other ways that your name might be cleared?' The question, 'What would you get from this?' helped shift the person from first position to third position. (To have asked her to go to second position and consider the impact of her request upon the

person who briefed the Minister would have led the process of conciliation into a debate about the worthiness of one person's position in comparison to another's, to the point that an option rapidly becomes a demand.)

At the later stage in conciliation, when looking more closely at options, the question was asked 'Are there other ways that your name might be cleared?' The respondent was then asked whether they could see other opportunities for meeting this need and were invited into their 'third position'. They put forward options such as:

- the complainant writing her story and having it included in her personnel file for perpetuity so that if anyone did look at her file, both sides of the story would be available;
- certain parts of the personnel file being sealed and only to be opened in certain circumstances; or
- an agreed statement of events to be included in her file and signed by the parties.

What is intriguing about these options is that they are not the options of a respondent working from the perspective of an authoritarian organisation. For a moment, the shift has occurred and the complainant and respondent can, from the third position, deal with each other on an equal basis, showing mutual respect and opportunities for mutual gain.

This provides only one example of how illumination can shift the parties to move ➤

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➤ beyond the sometimes inappropriate notions of fairness that they bring to conciliation. Sometimes it doesn't work and sometimes either the complainant or respondent remains well entrenched in their notion of fairness.

Sometimes illumination is used to help the parties test, from the third position, whether the options they have generated will uphold the spirit of the *Discrimination Act*. It has also proven to be a useful skill in moving past potential impasses.

### In conclusion

The *Discrimination Act* is one of many laws that make a statement of the community's expectation of fairness. However, to only use the parties' notion of fairness in conciliation would deny the statutory framework within which conciliation is attempted and could further entrench scapegoating. Thus conciliators must be able to influence the parties' notions of fairness by illumination. Ethical, respectful and professional methods for achieving fairness need to be explored and debated if conciliation is to retain its unique role and status in the dispute resolution community. ●

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### Endnotes

1. NADRAC, *Alternative Dispute Resolution Definitions* Commonwealth of Australia Canberra 1997.
2. Garner H, *The First Stone: Some Questions About Sex and Power* Picador Sydney 1995. The author thanks Sue Duncombe for first bringing this description to the author's attention.
3. *The Laws of Australia* LBC Sydney 1998, vol 13 ch 3 [91] [126].
4. Wade J H, 'Mediation — The Terminological Debate' ADRI August 1994 at 204.
5. Please note that it is not argued that the model of conciliation used at the ACT

Human Rights Office is a pure transformation model as, by way of example, it seeks a written settlement and the conciliator brings expertise to the conference. Therefore, to avoid confusion between transformative mediation and the skills described here, the term 'illumination skills' was coined. Illumination is defined as 'help to explain a subject' and 'enlighten ... intellectually': Hughes J M, Michell P A and Ramson W S (eds) *Australian Concise Oxford Dictionary* Oxford University Press Melbourne 1993. Thanks to Ms Roxane Shaw, Senior Conciliator, for her help in coining the term.

6. McCormick M, 'Confronting Social Injustice as a Mediator' 14(4) *Mediation Quarterly* 1997 at 293.

7. Bryson B and McPherson M, 'Pathways to learning: conciliator core competencies' 1(3) *The ADR Bulletin* 1998 at 1.

8. Thirgood R, 'Mediator Intervention to Ensure Fair and Just Outcomes' ADRI May 1999 at 143.

9. As above at 144.

10. De Maria W, 'Social Work and Mediation: Hemlock in the Flavour of the Month' 45(1) *Australian Social Work* 1992 at 17.

11. The framework of this particular issue comes from the author's experience as a psychologist and group worker for a program for adolescents with severe disabilities. Part of the program focused on assisting them come to terms with society's views of people with disabilities and the skills and insight to redress those too often inappropriate views. (Thanks to Andrew Kyprianou, Past Director, HETA.) It provides one framework amongst the many that provide a theory of discrimination. Other theories are not disputed; nor is it suggested that all disputes or claims of discrimination fit into this framework.

12. Davidson P, 'Clinical Management: Some Dynamics of Scapegoating' 7(1) *Journal of Managerial Psychology* 1992 at iii.

13. In Davidson's paper scapegoating is defined as 'displacing anger and aggression onto members of less powerful

continued on page 44 ➤

**continued from page 42**

groups who are not responsible for an aggressor's frustration'.

14. Davidson offers one framework for understanding discrimination. It is argued that a conciliator should at least bring some theoretical framework to conciliation in order to understand the psychosocial dynamics at play during conciliation as well as an understanding of their own notions of fairness, rather than approach fairness in a void. Otherwise conciliation at its worst may reinforce inappropriate notions of fairness.

15. Grinder M, *Advanced Mediation Using Neuro Linguistic Programming* workshop presented by M Grinder, Sydney 1991.

16. Such inconsistent behaviour may result in 'cognitive dissonance': 'An emotional state set up when two simultaneously held attitudes or cognitions are inconsistent or when there is conflict between belief and overt behaviour. The resolution of the conflict is assumed to serve as a basis for attitude change in that belief patterns are generally modified so as to be consistent with behaviour': Reber A, *The Penguin Dictionary of Psychology* (2nd ed) Penguin Ringwood 1995.