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New challenges for ADR

Mediation in sexual abuse cases: opportunism or anathema?

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Recent high profile events reported in the Australian media involving the Anglican and Roman Catholic churches have drawn attention, at least in legal and dispute resolution circles, to the issue of whether it is appropriate to use mediation and similar processes to deal with disputes arising out of allegations of sexual abuse. This is a difficult and emotional issue which, unless kept in context, has the potential not only to polarise views within the ADR community, but also to undermine the credibility of ADR in Australia.

This brief article will seek to delineate between what is known and unknown about the use of ADR processes in disputes of this nature, and within that shadow of uncertainty identify some of the major issues and arguments relevant to this discussion.

What is actually known about the use of mediation in these cases is very little indeed. Information publicly available is based on media reports and documents available on the internet. For example, a search of the archives of the Fairfax group of newspapers leads to quite a number of recent articles dealing with allegations of abuse against members of the priesthood and clergy, but only provides hints about the processes used to deal with these issues. There are several references to mediation and investigative committees but little else. The processes used were obviously not of importance to the writers of these articles.

Background and context

A useful document is *Towards Healing*, found at <www.catholic.org.au/statements/sexual_abuse>, which refers to detailed principles and procedures for dealing with complaints of abuse. This document refers to processes such as assessment and facilitation, but does not point to anything that resembles mediation. Another interesting document is the *Summary of Meeting* (15-17 March 2002) of the Standing Committee of the General Synod of the Anglican Church, with particular reference to the resolutions dealing with sexual harassment. None of the above is very reliable for the purposes of having an informed discussion about the actual use of mediation in such cases. At best, however, a hypothetical discussion may take place. This all suggests that the discussion of this topic must, of necessity, be kept to one of broad principles.

A few observations need to be made about context, albeit on the basis of impression, given what little we do know about these mediations. First, it is not known whether mediation in these cases is in fact mediation as it is classically understood or as may be set out in the NADRAC definitions. For example,

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mediation in the Family Court of Australia is a term used to describe therapeutic type processes such as counselling and evaluative type processes such as conciliation. When the media or lay people use the term mediation, the scope for misunderstanding and confusion is exacerbated.

Second, it is not clear whether the mediation is a process that brings together the victim and the perpetrator's employer, or the perpetrator and the victim. The dynamics of the former process are slightly different to the latter. Third, what information is available from the media reports suggests that the victim is claiming compensation for injuries suffered, and there seems to be less focus on whether the abuse in fact occurred. The fact of abuse may be, for all practical purposes, a given and therefore not an issue for the mediation itself, except in the very narrow legal sense that there is no admission of liability per se.

Unorthodox mediation

Notwithstanding these contextual issues, at first blush the use of mediation in this context could easily be categorised as unorthodox and even heretical. Sexual abuse is a particularly insidious manifestation of the abuse of power by the perpetrator over the victim and power imbalance has, since the inception of mediation, been consistently regarded as a factor indicating inappropriateness of mediation.

This orthodoxy is enshrined in statutory rules and in the policies and procedures of many mediation providers. Yet much orthodox thinking about the appropriateness of mediation in certain contexts has become subsumed by other factors and values. Heterodoxy now prevails in many quarters of the ADR world. The writer remembers his early ADR training and studies in the late 1980s and early 1990s, when the use of mediation in spousal violence or abuse cases was considered anathema because of the power imbalance issues. Yet within a mere 10 years there seems to have been quite a turnaround about this issue and there is a much greater willingness not to exclude cases from mediation just because of power imbalance issues.

There are many reasons for this change in practice.

- There is a much deeper understanding about power issues in mediation and a realisation of the prevalence of power issues in many different types of dispute.
- Training has become more sophisticated and focused in equipping mediators to identify and deal with these issues.
- Economic rationalism has seen many ADR providers become more inclusive in their screening processes.
- The value placed on seeking to empower parties to resolve their own disputes in the manner they choose has increased, perhaps at the expense of paternalism about whether the process is truly suitable for them.
- Any public interest in how parties resolve their disputes has been subsumed by a more liberalist valuation of non-intervention.
- Pragmatism seems to prevail over idealism and principle in many areas, including ADR.

These statements should be regarded as observations, not as statements of concurrence.

The empowerment issue

It could be argued in support of the use of mediation in sexual abuse cases that the process of mediation is empowering to the victims of abuse. This may or may not be the case. In any event, the questionable value of empowerment may have reached its use by date. A cornerstone of ADR theory and practice is that it enables the participants to take back control of their dispute, seek resolution of it using processes of their own choosing and, in theory and hopefully in practice, empower them to find their own solution.

This would be an unquestionable ideal were it not for the fact that it may be, perhaps more often than not, an ideal and value espoused and articulated by the ADR provider but not by the participants in the process. Practitioners might find it hard to recall, for example, the last time a client stated that they wanted to try mediation because it empowered them to resolve their own dispute. Clients constantly articulate concerns about time, cost, uncertainty, adverse impacts and so on, but rarely concerns about control.

By contrast, practitioners may reflect on the most recent occasion in which they articulated to a client or a party in mediation that one of its benefits was that the process empowered them to resolve their own dispute. Sometimes ADR practitioners are so busy stating what may seem to be self-evident truths of general application that they fail to discern the glazed looks in their clients' eyes.

Many clients come to mediation for resolution, not for empowerment. Empowerment has become a slogan the profession uses to sell its services and to differentiate those services from other dispute resolution alternatives. And yet the slogan perhaps should more accurately read: Come to mediation and we will empower you to resolve your own dispute … whether you want to or not.

Accordingly, in the mediation of sexual abuse cases, the justification that it empowers victims to take control of their dispute is seen to be mere chimera. One wonders how many victims of abuse, if any at all, were attracted to the process by the lure of empowerment when in reality they had only two other alternatives — litigation, or nothing at all. That is not to deny, however, that as a result of mediation some victims may have indeed been empowered by the process. Although this may well be the case, not enough is known. But one doubts whether the prospect of empowerment got them into the process in the first place.

The promise of privacy

A more viable attraction to mediation in sexual abuse cases is the promise of privacy and confidentiality. It may well be that many victims of abuse prefer to keep their experiences out of the public domain. This is no doubt an interest shared with those against whom claims for compensation are made. Yet it seems that the media has focused on the confidentiality of the process as the main target of their attack. The headlines scream about the hush money. One is left to wonder how many other victims of abuse underwent mediation and have not come forward because of the desire to maintain confidentiality, or perhaps because they were actually satisfied with the process and its outcome?

A common feature of the victims who have come forward is their dissatisfaction with the outcomes, but from this one cannot infer or extrapolate universal dissatisfaction by all victims. A deeper and more complex issue arises here. At what point in time does an essentially private dispute (compensation for a wrong suffered) contain sufficient public interest as to disentitle the victim to resolve their dispute privately? Who is to judge — surely not the media? At what point in time are the victim's rights to private resolution subsumed to the public interest in openly discussing issues n the public domain?

In broad terms, the law is reluctant to intrude in the private domain: regulation of the family and of commerce and industry, when viewed in its entirety, is minimalist and largely focused on the consequences and impacts of dissolution more than internal workings. Laissez faire is a maxim of regulation that applies as much to the family as it does to the marketplace. Consequently, the law is as reluctant to regulate how children are raised as it is to regulate the markets businesses enter and the strategies they use to set profit margins. The law is reluctant to intervene to supplant private choice, provided it is genuinely a choice freely exercised.

Accordingly, for those who enter private mediation for any issue and whose choice is voluntarily made, preferably with the protection of independent advice, the institution of law should uphold the private choice above the public interest. There are, however, interesting parallels with environmental mediation here. It was Lawrence Susskind who stated words to the effect that environmental mediation must take place in the sunshine. Implicit in this statement is the argument that some issues which present as being private are in reality public because the subject matter of the dispute is the environment itself. The public has an overreaching interest in the preservation of the environment as life itself depends on its preservation. If the parallels are considered sufficiently compelling, perhaps the answer lies in balancing the competing private and public interests by ensuring privacy and transparency. As for the media fury about the confidentiality of settlements reached at mediation, this does not reflect on the process but on the agreement reached, and in any event may meet the parties' interests.

Individual choices and accountability

Freedom of choice presupposes that individuals have alternatives from which to choose. However, choice is a finite, not an infinite concept. In reality, the victims of abuse have the choice between doing nothing, litigating or adopting an alternative process that meets the other party's interest in privacy and confidentiality. Any litigation is potentially difficult, time consuming, public and expensive, but civil litigation which is based upon allegations of sexual abuse is, as the Family Court of Australia has experienced over the years, in a terrible category of its own.

Few victims of abuse could have the resources to litigate against the employers of perpetrators and their insurers. To deny those victims access to an alternative process that offers a remedy is anarchic and unacceptable. Ironically, the public cost of the litigated alternative may well be as unacceptable as the private costs.

If the focus of this dialogue is momentarily shifted to accountability, the issue becomes whether the process of mediation should be held accountable for its use in a specific context where some people (the participants excluded) believe it is inappropriate? Specifically, the argument is that mediation does not take into account the interests of people other than the participants, for example other victims, or potential victims who might be protected if the conduct of certain perpetrators was made public. Surely not. The process is not judged by the outcome. The baby is thrown out with the bathwater all too often — let this not be the case here.

Just as the credibility of the adversarial system is tarnished but not destroyed by those horror cases of abuse of litigated processes, so too those critics of mediation in sexual

abuse cases will not succeed in making any real indent into the reputation of mediation in this context. And what about the mediators of sexual abuse claims? Should they be held accountable for aspects of the process used that are perceived to conceal the truth from the public eye, or should professional codes of conduct discourage practitioners from mediating such disputes?

Implicit in this is the suggestion that it is not enough that parties find a process and outcome acceptable — the mediator must also find it acceptable, perhaps by reference to a more objective (and public) standard. This is surely unworkable, from the perspective of both the parties and the mediator. The standards and values to which the mediator and participants in sexual abuse mediation subscribe are multifarious. There is no best interests principle governing the resolution of such disputes, such as parenting disputes under the *Family Law Act 1975* (Cth), to which most participants in such mediations will readily subscribe, even if they have different views about how the principle applies in individual cases.

Moreover, mediators and many other professionals involved in the resolution of disputes routinely engage in role-differentiated behaviour; that is, they adopt positions in relation to the dispute that are irreconcilable with their personal beliefs and values. Such behaviour is explained by reference to the role a professional plays in a process, for example, an advocate, adviser or mediator whose role may be quite distinct from the role they might play personally. Thus, making mediators accountable for outcomes, or guising them as protectors of the public interest (whatever that interest may be), is quite unworkable.

The disclosure question

Even if agreement is reached and the mediator as well as the parties are satisfied that it meets public and private interests, the question remains: what if a disclosure were made that the perpetrator was still in circulation and there was the at least theoretical possibility of re-offending? Should a mediator disclose in those circumstances? There is certainly no clear legal duty to disclose, and if a mediator felt constrained to disclose pursuant to a moral duty, one would expect the mediator to have explained to the parties the possibility of this as part of their retainer.

Indeed, this is the protocol adopted in the Department of Community Services, mediation of child abuse and neglect cases in NSW — all participants are very clear about the duty of disclosure. But one wonders whether the parties to the sexual abuse compensation claims in question would ever concede to a model of mediation that does endorse even limited disclosure in the circumstances referred to above. This would certainly enhance the credibility of the process, but it is unlikely to meet the interests of one of the parties. Perhaps a more acceptable area of agreement in these cases is that the focus should be on avoiding further abuse to the victim (where that is relevant), and that the process proceeds on the basis that no blame will be placed on the victim for the abuse.

There is much more that needs to be said about this topic, but little informed and specific discussion can take place until more is known about what is actually happening in the resolution of these disputes. It may well be that participants in these types of disputes have opportunistically seized upon the process of mediation because of the promise of privacy and confidentiality but with no regard to orthodoxy and principle. Some might say that this is more evidence of the coming of age of mediation in Australia, while others will cringe at how pragmatism has hijacked what was once a pure and principled process. ●

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This is a greatly abbreviated draft version of the writer's paper to be presented at the 6th National Mediation Conference to be held in Canberra between 18-20 September 2002. Further details about the conference may be obtained by contacting the Conference Co-ordinators on 0262 929 000 or confco@austarmetro.com.au, or by contacting the writer on 0246 203 627 or t.altobelli@uws.edu.au.