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Towards healing: what can mediation offer abused child migrant men?

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New challenges for ADR

Towards healing: what can mediation offer abused child migrant men?

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Current developments in ADR

Public apologies have been made. Senate inquiries have been held. Men who were brought to Australia by the governments of Australia and the United Kingdom in the 1950s and raised by the Catholic Church have formed support groups and lobby groups. The Church has initiated the Professional Standards Resource Group to put into practice *Towards Healing* which describes the principles and procedures for addressing the needs of people who were/are being physically, sexually and/or emotionally abused in the context of Church business.[1] The process may include mediation between the former abused resident and a representative of the Church, leading to agreement.

To what extent can these principles and procedures heal deeply embedded emotional, physical, cognitive and spiritual wounds? Mediation outcomes may be measured by rate and durability of the agreement, by the extent to which parties feel heard, and by the perceived degree of influence they are able to assert regarding what is discussed and agreed on during mediation.

How can agreements be reached after two generations of secrecy? Does the mediation process perpetuate secrecy? How can participation in and satisfaction with the process be gauged in the context of a lifetime of uncertain identity? What choices for pursuing their claims do these men really have?

In a previous issue of this Bulletin, Tom Altobelli asked whether mediation in disputes arising out of sexual abuse is 'opportunism or anathema', 'unorthodox or heretical'.[2] He argued that these issues involve questions of mediator ethics, embracing the knowledge and skills of mediators.

Altobelli, lamenting the lack of reliable information, comments that in the absence of known procedures, his 'discussion of this topic must, of necessity, be kept to one of broad principles'. My response to his call for an 'informed discussion about the actual use of mediation' in disputes involving a history of sexual abuse is proffered in my capacity as a mediation practitioner operating within the *Towards Healing* procedures. Perhaps by addressing the issues Altobelli raises, some transparency can be polished onto one facet of the prism of mediation in the Church context. Inevitably, however, as one process is explored another facet will become opaque.

Towards Healing is a document that focuses on the procedures for addressing matters of sexual, physical and emotional abuse in the Catholic Church. It describes principles and procedures for responding to complaints of abuse against personnel of the Catholic Church of Australia. The stage of the procedures at which facilitation is considered can be determined by noting that it is first described on p 19 of the 24 pages.

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The procedures include a facilitative process for addressing the needs of the victim. The facilitative process I have chosen to use is mediation. It is strongly influenced by my original training with the Bond University Dispute Resolution Centre and LEADR and by my experience as author, lecturer and trainer in mediation. Most significantly, my clinical work in prisons with sex offenders and victims and mediating in settings including family law, victim-offender, sexual harassment and aged care form the baseline for my practice.

Altobelli raised dilemmas of definition, orthodoxy, confidentiality, public interest and mediator disclosure, empowerment and choice. In NADRAC[3] terminology these are issues of:

- promoting services accurately;
- maintaining confidentiality and privacy;
- ensuring appropriate outcomes; and
- ensuring effective participation by parties.

This article comments on the issues raised by Altobelli in the context of my mediation practice. It will be proposed that mediation in the context of historic sexual abuse is appropriately scrutinised from primarily a process perspective and that the substantive issues should not hijack such scrutiny. The familiar maxim that 'the mediator manages the process, the parties manage the content', is, like all aphorisms, inaccurate. It does, however, convey a sense of emphasis, which assists in defining the roles of the participants in mediation.

I shall confine my comments on Altobelli's article to a specific group of male clients who were child migrants from the UK to Australia in the 1950s and who were raised by the Christian Brothers at Bindoon, Castledare, Clontarf and Tardun in WA. My experience of approximately 100 hours of mediation with this group of clients comprises a very small proportion of my more than 5000 hours of mediation practice. The comments that follow are, therefore, those of a work in progress, tentative and tested only in my own practice.

Promoting services accurately: definitions and descriptions

Altobelli asks 'whether mediation in this kind of case is in fact mediation as it is classically understood, or as may be defined in the NADRAC definitions'. As demonstrated below, the *Towards Healing* facilitation process fits the NADRAC definitions of facilitation and mediation well! In any case there is a significant fit. The process below also sits comfortably within the esteemed Folberg and Taylor definition.[4]

Mediation process

Altobelli questions whether this is orthodox mediation. There is more to *Towards Healing* mediation than NADRAC and the traditional Folberg and Taylor definition. There has been much discussion in the literature of the transformative potential of mediation, including whether mediation is transformative in nature, independent of specifically 'transformative' interventions. Mediation is a process of assisted human interaction in the interests of co-operative decision making. The title *Towards Healing* encapsulates the transformative intent and potential of the process. This is mediation at its most fundamental. It has transformative potential by the nature of its content and process.

It is the purpose and the process of *Towards Healing* mediation that promotes healing in relationships between, and within, the victim and the Church. Mediation of disputes arising out of sexual abuse brings the relationship dynamic into stark relief. Relationship formation is essential to the success of mediation where there has been sexual abuse. The relationship dynamic most at stake is trust.

Abuse damages and destroys a victim's ability to trust. Mediation provides a structured setting for safely exploring and testing the possibility of trusting. Media attention has emphasised the financial aspects of settlements. Most former residents are unable to discuss financial aspects until they have overcome their scepticism and mistrust of the institution in which they were abused. In what other setting could trust be established such that a settlement can be reached and accepted with dignity? Litigation?

While I am cautiously satisfied with the mediation process, further development is imperative to ensure that clients maximise their opportunity to participate fully and voluntarily.

Preliminaries

Where does mediation fit in the *Towards Healing* process? Initially the victim makes a complaint to the primary contact person through the 1800 number. The response is to allocate one of a number of contact people to the caller. A discussion is held very early in the process regarding criminal offences and reporting obligations. Next a specific process is designed, which can include investigation of the complaint by assessors, facilitation of agreements and review of the process. Mediation fits within the facilitation phase.

First separate sessions are held with each of the parties and if there is agreement that mediation is suitable, joint sessions are arranged.

Joint sessions commence with a mediator's opening statement, followed by the former resident's story of his time 'in care', which is recorded in note form by the mediator. The 'Church authority' or their delegate responds to the victim from a number of perspectives including the personal and the pastoral. *Towards Healing* requires that the process, including the response of the Church authority, 'strive [among other aims] for truth, humility, healing for the victims and assistance to other persons affected'.[5] Neither theological nor liturgical responses are part of the response of the Church authority.

Having repeated and clarified the opening statements of the former resident and the Church authority, an agenda is developed collectively. Each item is clarified and explored before options are developed, reality tested and refined, prior to negotiation and agreement. Separate sessions are held throughout the process.

Parties

Altobelli sought further definition in identifying parties to mediation. To date, the parties have been the victim and a representative of the Church who has the power to make binding decisions.

Support people

Parties are encouraged to be accompanied by support people who develop their roles to accommodate and complement those of the parties. The victim almost always has a support person provided either by himself or by the Director of Professional Standards. The Church authority is usually supported by another member of the Church body to which the accused person(s) is or was connected.

Constituents

Who is affected by the outcome of mediation? The constituents of the victim are numerous, including the victim's family of origin, his current close and extended family, 'boys' from his childhood and their families, other victims and their families and the Church community.

The constituents of the Church authority include the members of the Church body to which the accused person(s) is or was connected, the wider Church hierarchy and community, and other victims and their families.

Parties' interests

Why do victims participate in *Towards Healing*? What are their concerns? Former residents' interests frequently include the need for recognition of their story, being believed, completing their identity, obtaining personal information and information about their families, achieving peace, ending torment, putting the matter 'to rest', protecting their health, receiving a personal apology, arranging family reunification and accepting financial assistance.

Altobelli hypothesises that time, cost and the adverse effects of mediation are the parties' main concerns. Contrary to many mediation settings, financial cost is not a concern for parties in *Towards Healing* mediation as there is no charge. Parking and petrol money are provided when appropriate. Time is rarely a concern. Almost all the former residents have retired early due to health problems. From my perspective, adverse effects can be acute and relate to the courage needed to proceed with the mediation. Upon completion of the mediation, there appears to be a release from at least one set of adverse effects of abuse.

Church authorities' interests include hearing and responding to the life story of the former resident with 'truth, humility, healing for the victim and assistance for other persons affected'.

Preferred outcomes

What do the victims want? Prior to mediation, the former residents' preferred outcomes vary significantly. A considerable number would like an apology; others would not. Many would like to renew their links with the Church; some would not. Many would like counselling; others would not. Most would like a five or six figure sum for family reunification, debts, their children's wellbeing, day to day living, education and health expenses. Many emphasise that the financial component of the settlement is a source of great embarrassment and should not be thought of as compensation, but rather to meet future needs. Some prefer to regard any financial settlement as compensation for the damage done.

The preferred outcomes of the Church include healing for the victim and the victim's family, a financial settlement that is fair, relative to other settlements and to financial resources available, and a contribution from the Australian and UK governments whose policies resulted in the child migration scheme. While *Towards Healing* acknowledges the responsibility of the Catholic Church for the abuse experienced by many boys,[6] governmental decision making set the context for the role the Church was to play.[7] Church authorities often regard any financial settlement as an aspect of healing to be distinct from compensation.

In any negotiated settlement neither party achieves all its pre-negotiation preferred outcomes. In the *Towards Healing* mediations creative 'expansion of the pie' and the 'willingness to stand in each other's shoes' has lead to agreement in each case to date.

Other facts

For former residents, the experience of mediation is simultaneously miniscule and enormous. Compared with previous hardships, the mediation process is minor; nevertheless it can still be daunting and for each former resident there is a set of unique circumstances.

The abuse that the former residents suffered as children all but removed and continued to erode their fragile sense of identity for 50 years. They believed they had been rejected by their families of origin in the UK and ignored by their families in Australia. In some situations they were explicitly rejected by newly discovered relatives

later in life. This sequence, combined with abuse and neglect, condemned many to a lifetime of identity confusion.

Each Church authority has their own story that is not addressed during the mediation.

Parties' emotional responses

The complaint process in general, and the mediation stage in particular, is extremely stressful for former residents, many of whom are severely affected by long term stress and deprivation. Anxiety, fear, shame, guilt, anger, embarrassment and sadness are among the myriad of emotions described during and between sessions.

The Church authorities' emotional responses are less evident during the mediation. Each addresses the dissonance that is implicit in representing perpetrator(s) from among their religious community. Descriptions of emotional responses have included deep shame, distress and concern.

Maintaining confidentiality and privacy

Like most, *Towards Healing* mediation exists on a private-public continuum. Care is taken to ensure the details of each individual mediation remain confidential. For the Church it is important that the general process is public so that the community may judge the resolve of Church leaders to address the issues of abuse within the Church.[8]

For all involved, except the former resident, the mediation is bound by confidentiality 'within the limits of the law'. At the conclusion of mediation former residents are reminded that they are 'welcome to write a book' of their experiences up to and including the mediation. In particular the procedures state:

> No complainant shall be required to give an undertaking which imposes upon them an obligation of silence concerning the circumstances which led them to make a complaint, as a condition of an agreement with the Church authority.[9]

After a lifetime constructed around a paper thin identity, peace not publicity is their immediate goal, following the rigours of the mediation experience. With time, this may change. There is usually an agreement, as with most commercial contracts, that the quantum of settlement will remain confidential.

However, all is not transparent. There is a contradiction implicit in privacy and confidentiality considerations: How can privacy and confidentiality be maintained for clients of *Towards Healing* mediation without taking on the meaning of 'secrecy' so significant in the abuse that was experienced? What of the interests of constituents: third parties, future parties? By what mediation and agreement standards can former residents prepare their cases?

Ensuring appropriate outcomes

Accountability

Altobelli raises important questions with regard to accountability, which flow from issues of privacy. Specifically, Altobelli argues 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 perpetrators was made public.

The mediation stage of *Towards Healing* is accountable to the mediation parties. The *Towards Healing* process is publicly accountable. With regard to this aspect, the role of the mediator is to mediate and report concerns outside the mediation role to the director.

In noting that there is no 'best interests principle' Altobelli opines:

> 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.[10]

A distinction needs to be made between acceptability of process and of content. The separate sessions and the joint sessions involve a collaborative approach to assessing the suitability of the mediation process. The mediator and parties initially determine acceptability criteria during the first separate session and continuously monitor them throughout the mediation.

'Mediator acceptability criteria' of outcome exist in the form of victim participation and self-determination. It is the responsibility of the mediator to facilitate continuous capacity building, including the reality testing of options and tentative agreements. The mediator's role is to monitor each mediation from

the perspective of ethics, knowledge and skills, and does not extend to monitoring parties' outcomes.

These concerns are live. Who monitors the mediator's ethics, knowledge and skills? One of the ways in which *Towards Healing* mediation maximises mediator impartiality is by the inclusion of support people for parties.

Disclosure

Altobelli states:

> 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.[11]

This touches on further privacy issues and in doing so raises more questions than it answers. For this client group disclosure is usually not an issue. The time elapsing between the offence and the complaint process results in perpetrators being unlikely to be abusing other victims — or does it? What of the suggestion that a victim of abuse is at a higher risk than the 'norm' of becoming a perpetrator? Is a child migrant victim of abuse by Church members who is identified as a perpetrator of abuse entitled to participate in the *Towards Healing* procedures?

What of the corollary: if the publicity argument were to outweigh that of privacy, resulting in victims being identified, the cycle of abuse could begin again, as former residents are targeted by vigilantes.

Ensuring effective participation by parties

Empowerment

Altobelli asks whether 'the questionable value of empowerment may have reached its use by date'. 'Empowerment' is a term at risk of taking on the brazen emptiness of jargon. Perhaps it is in need of being retrieved as a viable mediation construct. I understand empowerment to be a process of achieving change along a continuum of personal efficacy.

In the shared language of victims and researchers, the most frequent response to being abused is self-blame, self-hatred, fear and gravitation toward abusive situations. In day to day interactions these are severe handicaps, undermining a sense of 'self'. Following mediation in which victims hear that they are believed and that they did not deserve to be abused, these men seem able to begin to realign their real self image in keeping with their ideal self image, belatedly 'finding' themselves. This is the empowerment function of mediation.

Frequently the victims need to hear from the Church authority, often more than once, that they did not deserve the treatment they received. For most men, it is only very recently that they have started to challenge their assumptions of self-blame for having invited the abuse. They are at the commencement of empowerment. For up to 50 years each has interacted with the world from the premise of being evil, an indelible legacy of sexual abuse.

There is no real resolution for these men. Their problems of foregone opportunity and identity cannot be resolved, they can at best be ameliorated. *Control ... choice ... self ... shall I buy a mattress ... pay the water bill ... today ... or next week or not at all ... instead of 'borrowing' from my children*? This is the empowerment that mediation can bring former residents. This empowerment is the result of finally being believed and receiving financial assistance.

Altobelli questions whether the empowerment belongs to the mediator's identity rather than the former residents. My experience is that the men's desperation empowers the first move toward mediation; mediation can empower the first move beyond desperation. My focus is on how parties can leave *Towards Healing* mediation with, at the very least, the same sense of empowerment that enabled them to commence it.

Choice

The issue at stake here relates to the fundamental question of choice from a range of alternatives. Fisher, Ury and Patton advocate that parties to mediation and negotiation should develop, refine and hold a 'best alternative to a negotiated agreement' (BATNA), the best of their ATNAs, in their back pocket.[12] How can a former resident, abused in the care of the Church have a BATNA when, due to the statute of limitations, they do not have a workable ATNA? If these men have no ATNA, where is their power in the 'negotiation'? This is intrinsic to resolving issues of privacy and confidentiality, empowerment and accountability.

Following mediation in other settings, parties may explain the relativities of the agreement they made. Following *Towards Healing* mediation, victims can find no context for their agreement, which is an absolute. There is no point of real or hypothetical comparison because there are no ATNAs for men who were abused in the care of the Church as child migrants.

For the child migrants of the 1950s, litigation is not a choice. The abuse occurred up to 50 years ago, and many of the perpetrators are now deceased. Litigation may never have been a choice.

So where is the choice? How voluntary is the mediation outlined in the *Towards Healing* procedures? How can *Towards Healing* ensure that parties for whom mediation is not suitable have other options for settlement?

Conclusion

From the perspective of 'broad principles' Altobelli raised issues of orthodoxy, empowerment, confidentiality, public interest and disclosure in respect of mediation involving issues of sexual abuse in the Church setting. This article has considered the extent to which mediation within the *Towards Healing* principles and procedures:

- is promoted accurately;
- maintains confidentiality and privacy;
- ensures appropriate outcomes; and
- ensures effective participation by parties.

With regard to promoting services accurately and in particular, providing definitions and descriptions, I wonder

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how clients can maximise their opportunity to participate fully and voluntarily given their distress and lack of experience and information as to what to expect from the process?

Further, the tension between maintaining privacy and confidentiality while promoting transparency, in order to avoid colluding in the 'secrecy' so significant in the original abuse, is ever present.

The need to ensure appropriate outcomes includes issues of accountability and disclosure. Who monitors the mediator's ethics, knowledge and skills? How can *Towards Healing* mediation maximise mediator impartiality and ensure that the interests of constituents are appropriately protected? The requirement to ensure effective participation by parties has raised various questions. How can parties to *Towards Healing* mediation maintain the sense of empowerment that enabled them to commence the process?

Having practised for some time within the *Towards Healing* model, I have observed empowered parties negotiate settlements and freely sign deeds of release including confidentiality clauses. This, coupled with the fact that to date, no second generation perpetrators have been identified, leads me to an appreciation of the need for further discussion and analysis of the process.

Parties in WA have not yet been asked to participate in a formal, summative evaluation. Formative evaluation is an explicit, continuous component of the process of orthodox mediation. There have, however, been no complaints about the process or the outcomes. Why is this?

My hypothesis is that the humanity with which the director, contact people, assessors, reviewers, parties, support people and the mediator perform their functions has resulted in satisfied clients. It is the synthesis of the philosophy and the practice of the people involved with *Towards Healing* that has ensured fair and just outcomes. The process will benefit from continued critical analysis of the knowledge, skills and ethics of mediation in this setting and by constantly re-examining the assumption that interest based negotiation provides a fair outcome for abused child migrant men. ●

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Endnotes

1. Australian Catholic Bishops Conference and Australian Conference of Leaders of Religious Institutes *Towards Healing: Principles and Procedures in Responding to Complaints of Abuse against Personnel of the Catholic Church of Australia* National Committee for Professional Standards Melbourne 2001. Also available at <www.catholic.org.au/statements/sexual_abuse_th2001_1.htm>.
2. (2002) 5(3) ADR 33 at 33.
3. NADRAC *A Framework for the ADR Standards* Canberra 2001 pp 110–14.
4. Folberg J and Taylor A define mediation as 'the process by which participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs' in *Mediation: A Comprehensive Guide to Resolving Conflict without Litigation* Jossey-Bass Publishers San Francisco 1984 p 7.
5. *Towards Healing* p 3.
6. *Towards Healing* p 1.
7. For more information about the role of governments see *Lost Innocents: Righting the Record — Inquiry into Child Migration* at <www.aph.gov.au/senate/ committee/clac_ctte/child_migrat/Contents.htm>.
8. *Towards Healing* p 1.
9. *Towards Healing* p 20.
10. (2002) 5(3) ADR 33 at 36.
11. Above note 10.
12. Fisher R, Ury W and Patton B *Getting to Yes: Negotiating Agreement without Giving In* Houghton Mifflin Boston 1981 p 28.