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Mediation theory and practice

A practitioner's reflections on developments in mediation

David Purnell

A culture of peace and peacemaking

In her book *Cultures of Peace*,[1] the American peace educator Elise Boulding has presented a comprehensive description of the many ways in which humans over the years have sought to build a culture of peace. Some of the points she makes are:

- Whilst written history focuses on war and conquest, most human activity revolves around raising families, organising work, solving problems and meeting human needs.
- A peace culture promotes peaceable diversity and thrives on visions of how things might be.
- At the micro-level there have been numerous effective communities living according to peaceable principles.
- At the macro-level, the peace movement has developed and survived many challenges and has led to increasing efforts to influence governments and societies.
- A fully developed peace culture requires the linking of women's knowledge and experience in microspaces to men's knowledge and experience in macrospaces.

Elise Boulding envisages an emerging world in which identity groups (she reckons there are over 10,000 ethnic, linguistic and religious of these already), rather than nations, will be affirmed and will live together constructively. She says that 'a source of hope lies in the capacity for social learning of individuals, families, grass roots groups, old and new faith communities, NGOs, and of institutions of governance, including states and intergovernmental bodies'.

Other scholars, such as Australian peace researcher John Burton, have emphasised the potential of human beings to create new opportunities to solve problems co-operatively rather than rely on 'might is right' approaches that depend upon control and dominance. Such thinking is a significant alternative to the assumption that humans will always fight when confronted with conflict.

In this context it is interesting to note that the recent report of the United Nation's High Level Panel to the UN Secretary-General concluded that the United Nations itself needs a greater capacity for preventive diplomacy and mediation, and recommends the creation of a new 'Peace-building Commission' to coordinate responses to major threats to peace (which include war, poverty, health and environmental crises).

I give this picture as a reminder that our conflict resolution activity is part of a wider scene of building a culture of peace. It is an essential feature of where the global community can move if we can build upon the visions of a peaceful world that have already been articulated and practised in many places and circumstances.

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Alternative Dispute Resolution in Australia

The term ADR began as a way of describing those processes that were outside the formal legal system. Community Justice Centres which began in 1979 were the first examples of ADR in Australia, but since then ADR processes have spread widely and are now much more 'mainstream'. Hilary Astor and Christine Chinkin[2] outline the way in which this has happened. They describe how ADR approaches to resolving disputes (mediation, conciliation, arbitration) have become 'institutionalised' in many parts of society, bringing challenges to the community origins of ADR and pressures to 'professionalise' it.

The creation of the National Alternative Dispute Resolution Advisory Council (NADRAC) in 1995 was a significant acknowledgment of the growing place of ADR in Australian life. NADRAC is (to quote from its publicity material) 'an independent advisory council charged with providing the Attorney-General with coordinated and consistent policy advice on the development of high quality, economic and efficient ways of resolving disputes without the need for a judicial decision'. Its functions include promoting ADR, research into conflict resolution methods, and advising on appropriate standards, qualifications and training for ADR practitioners.

NADRAC has had an impact on the

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Australian scene especially through its regular conferences, discussion papers, and through having the ear of the Federal Government. It has put out a series of proposals about such things as ADR definitions, mediator accreditation, and research themes. It has helped focus attention on the ongoing issues facing ADR in the context of its greater use by business, government, the courts, and tribunals. It has brought together practitioners from a wide range of backgrounds to share understandings and problems.

NADRAC's definitions of ADR have proved very helpful in the current climate where ADR is more widely used. The three categories NADRAC identifies are (1) facilitative processes (mediation, conciliation), (2) advisory processes (expert appraisal, dispute counselling), and (3) determinative processes (adjudication, arbitration). It seems to me that we should use these definitions as effective descriptions of how different agencies and processes work. Increasingly it is important to be clear about exactly what kind of intervention is expected by clients and offered by agencies, given concerns about legitimacy, accountability and privacy.

The question of appropriate qualifications cannot be ignored. There is a need for some consistency in standards to enable clients to have confidence in the service sought and provided. NADRAC has proposed a national accreditation system for mediators. In my opinion, it is important that: (1) there should be a national accrediting agency for mediators; (2) there should be a set of national basic competencies; (3) the Federal Government provide financial support; and (4) the States and Territories are in agreement.

The use of the term 'competencies' remains important to community mediation agencies, given the tendency to demand tertiary qualifications for mediators and other ADR practitioners. It is part of the community philosophy that conflict resolution should and can be done by those directly involved, with some assistance where needed. They understand their own situations best, and anyone working with them (for example, a mediator) must connect in some way with them as they work out their way forward. This does not require a degree; it requires some level of empathy and a knowledge of processes of communication and trust that support the non-violent resolution of conflict through negotiation and good faith. Through modelling such processes, mediators can enable clients to learn some of the ways to handle future conflicts more effectively.

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Conflict resolution and mediation: evolving theory and practice

This section deals with some of the more recent areas of development in mediation practice generally. I traverse this ground in order to give some sense of the dynamic way in which our field of conflict resolution is developing around the world.

In the area of family mediation, there has been a significant move towards making children more the focus of mediation sessions. As a result, some agencies now commence mediations between separating couples with a focus on their children: how they behave, what their future holds, and what parenting needs they have. This can have the effect of getting the couple to put their initial energy into something they share (the children) rather than on their own separate needs. Insofar as the parties can find common ground in their response to the children's situation, they may be able to carry

something of that feeling into the rest of the mediation process.

Child inclusive practice goes a step further, by seeking the parents' agreement to having a counsellor meet their children in a separate session to gauge reactions to the separation, and then feed this back to the parents in a mediation session. This has usually been done with small children whose opinions (for example, about which parent to live with) would not usually be taken into account under the family law system. Although this is a relatively new idea, the feedback so far to the Australian agencies involved seems to indicate that this practice can give parents valuable information for their own decision-making about shared parenting responsibilities.

The most recent Government initiative has been the Family Relationship Centres, to be set up around Australia as a point of entry for couples separating and needing assistance with parenting plans and other conflict resolution. I welcome the potential role for such Centres in giving information, encouraging a non-adversarial approach, and referring couples to appropriate counselling and mediation services.

At the same time it is important to (1) have an integrated approach to issues of parenting and relationships; (2) build on the growing emphasis being placed on children in such conflicts and maintaining the goal of 'best interests of the child' as well as encouraging shared parenting responsibility; (3) offer appropriate training for parenting advisers to be employed by Family Relationship Centres; and (4) link new services with existing experienced agencies in the field.

Solution-oriented questioning

This has emerged as an important way of looking at conflicts. It is based on the view that people in conflict need to be able to see the possibility of a positive interaction with the other person before they will achieve an effective negotiation through mediation. At the pre-mediation stage, careful questioning can be used to help individual parties re-frame the way they see the other person, so they can imagine achieving a good outcome from the mediation. It is likely to be most effective if the mediator(s) have a good relationship with each party (and therefore gains their confidence) so that re-framing becomes more likely. This approach seems to have considerable potential.

Narrative mediation

According to an article by John Winslade and Gerald Monk,[3] this is based on the idea that stories and meanings are more important than facts and causes. It is an approach to mediation that seeks to (1) create a relationship that leads to the emergence of an alternative story, (2) build a story that is incompatible with the continuation of the conflict, and (3) open space for people to make the necessary shifts in perception and action. It seems to have some parallels with solution-oriented questioning, in that it encourages parties to re-frame or change their story in such a way as to make possible agreement with the other party. It requires the mediator to encourage mutual respect, a broader view of each other than tends to appear in conflicts, and a reflection by the parties on the 'bigger picture' of their relationship.

Cultural difference

The role of *cultural difference* has been increasingly acknowledged by those working in the area of mediation. In the Australian context it relates to both indigenous mediation and mediation with people from different ethnic origins. In an interesting address to the 2003 NADRAC conference on 'The cultural construction of conflict and peace', Paul Pedersen from Syracuse University in the US spoke of the cultural factors that differentiate the ways people see conflict. Some emphasise individualism, and therefore see conflict resolution as a private process in which individuals negotiate face to face. Others focus on collective identity and this makes conflict public, subject to group resolution, and accompanied by ritual. He advocated strategies that allow for the complexities of conflict rather than seeing conflict as a struggle between two alternatives. He felt that finding common ground first would help in most cross-cultural conflict situations.

A seminar … in 2004 in Canberra highlighted some elements of what is happening in relation to indigenous mediation. The mediation services in NSW, Victoria and Queensland all have indigenous mediators integrated into their main service and are also available to respond to particular needs.

Indigenous mediation

This has received more attention recently, with the development of specific panels of indigenous mediators within the Community Justice Centres, the MAWUL ROM mediation project in the Northern Territory, and the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) Facilitation and Mediation Project.

A seminar convened by the AIATSIS group in October 2004 in Canberra highlighted some elements of what is happening in relation to indigenous mediation. The mediation services in NSW, Victoria and Queensland all have indigenous mediators integrated into their main service and are also available to respond to particular needs. Indigenous conflict situations are likely to require the following responses:

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- mapping the conflict
- preparing a plan to manage the conflict
- contacting all parties separately to clarify issues and disputants
- ensuring appropriate information is available to all parties
- identifying what support people (lawyers, anthropologists) are needed
- bringing parties together within a flexible mediation process (probably without private sessions).

Workplace conferencing is a carefully facilitated process designed to bring together those most affected by harmful and destructive circumstances in the workplace … the conference brings together those affected and enables them to tell their stories about what has happened in the workplace.

Workplace conferencing

This is a specific example of multi-party dispute resolution. Workplace conferencing is a carefully facilitated process designed to bring together those most affected by harmful and destructive circumstances in the workplace. After initial interviews with all the parties separately, the conference brings together those affected and enables them to tell their stories about what has happened in the workplace. Ways to handle the problems are then worked out by the participants. The role of the facilitator is in setting the scene for the conference by meeting all parties separately in advance to clarify issues, giving all participants full information about the issues to be covered at the conference, and then allowing the participants to run it.

The website for Margaret Thorsborne and Associates (a Queensland-based group) contains details of this approach and outlines the main benefits as:

- all affected staff have the opportunity to understand the full picture of what has transpired
- there is transformation of the conflict into co-operation as the staff come together as a community to tackle the problem
- the issue becomes the responsibility of all rather than just management.

Thorsborne and Associates state that 'research has proved that participants in such processes have found them to be procedurally, emotionally and substantively fair and satisfying'. The site lists areas in which such conferences have been effective as including, in both the public and private sectors, sexual harassment, grievances, work performance, bullying, aggressive management, and high-level conflict among office staff.

Multi-party disputes

Multi-party disputes show very clearly the overlapping of concerns, the different layers of conflict, and the importance of proceeding carefully through the complexities. Community or town meetings are an example of this. A fascinating example was reported[4] by Roberta Mead from Perth involving 5000 participants in a citizens' summit entitled 'Listening to the City – Remember and Rebuild', held in Manhattan in July 2002 in the wake of the September 2001 attack on the World Trade Centre. Five hundred volunteer facilitators (including Roberta) were chosen for an orientation course in advance. The summit focused on the six concepts for rebuilding the WTC area of New York. Technology was used to highlight the demographics of the participants and to display questions for sub-groups to answer – including questions about fears and hopes. Themes were identified by a working group as they emerged from the meeting through periodic voting. The outcomes of the summit have influenced the ongoing policies of the city planners and legislators. The process was regarded as a success, as people had the chance to be heard. Roberta was also involved in a similar city-wide process in Perth with 1100 participants in 2003 called 'Dialogue with the City'. The Conflict Resolution Service in Canberra also has some experience facilitating such meetings.

Public dispute resolution

This is a growing field. The Harvard Negotiation Project in the US has a Public Disputes Program that seeks to enhance ways of resolving disputes at local, state and national levels in such areas as environment and town planning. Judith Morrison, who has recently completed a PhD at Murdoch University in Western Australia, has developed a course for public officials in the Department of Environment to become more prepared for effective negotiation with stakeholders. It will be worth evaluating the impact this has on the way a government agency can help resolve conflicts in public policy areas.

International disputes

The European Union is promoting the use of mediation for civil and commercial disputes within member states.[5] The Australian Centre for Peace and Conflict Studies at Queensland University is also involved in several relevant areas of work:

- supporting conflict resolution and prevention strategies in the Solomon Islands
- investigating community responses to violence, and state-building in East Timor, and
- examining ways in which customary chiefs in Vanuatu can play a constructive role in the development of the nation.

The International Conflict Resolution Centre at the University of Melbourne is also active in building conflict resolution strategies in the Asia-Pacific Region.

In this context it is worth mentioning the emergence of an Asia-Pacific Mediation Forum. The Forum exchanges information and skills across the region through conferences each two years. It is affiliated to the World Mediation Forum which links individuals, organisations and institutions supporting 'interpersonal, inter-group, trans-cultural and international mediation'. The World Forum will meet in Switzerland in September 2005.

Dialogue processes

Malcolm Burson, in an article in *Group Facilitation* 2002, has drawn attention to the use of dialogue processes. He tells how William Isaacs of Massachusetts Institute of Technology (MIT) has built on a model by physicist David Bohm that seeks to overcome closed mental models based on fragmented thinking:

> By inviting people to explore the assumptions underlying both individual conviction and group dynamics, the movement toward dialogue allows them to step back from the drive to hammer out decisions or agreed positions.

The dialogue approach opens up alternative ways forward by encouraging listening, giving time for ideas to be explored, and using respectful questions to elicit understanding.

Restorative justice

The focus of RJ is on holding offenders accountable and empowering victims, early intervention to achieve an outcome that makes things as right as possible for all concerned (in other words 'restores' a sense of relationship and/or community). Victim-offender mediation and diversionary conferencing are good examples of this approach. The mediation emphasis on people being heard, and taking responsibility for their own decisions, is built into this. There is usually a 'contract' outcome in which the offender agrees to undertake certain activity to put right what has been upset. Peer mediation, in which young people in schools help others resolve conflicts, can be seen as another RJ approach that has become quite widely used.

Online dispute resolution

ODR is another recent development. According to an article by Melissa Conley Tyler,[6] more than 1.5 million disputes have been resolved online. A conference convened by the International Conflict Resolution Centre at the University of Melbourne last July brought together more than 300 people from 25 countries to discuss online dispute resolution. Conley Tyler has discovered there are 115 websites involved in this work, which includes mediation, complaints handling, arbitration and adjudication. She lists the following methods as part of ODR – email, voice conferencing, instant messaging, bulletin boards, and video. Those of us involved in face-to-face mediation may find it hard to appreciate the usefulness of ODR, but we ourselves have learned that shuttle and phone mediations can work in certain circumstances.

Violence and mediation

The issue of violence and mediation remains alive. I want to refer to two recent reports on the way in which violence relates to mediation. First, there was a paper presented by Rachael Field (Queensland University of Technology) given in July 2004 at the national mediation conference in Darwin. It was entitled 'A Model of Family Mediation that Supports the Participation of Victims of Domestic Violence'. Essentially the argument was that, given the high probability of many victims taking part in mediation, there could be a model to help protect their safety and interests. It would involve lawyers being in the process from the beginning – as advisers and coaches at pre-mediation stage, as advocates and advisers in the mediation itself, and as supporters in helping achieve legal enforcement of agreements afterwards. We need to be open to discussing such proposals

The dialogue approach opens up alternative ways forward by encouraging listening, giving time for ideas to be explored, and using respectful questions to elicit understanding.

seriously, although I think it would require some careful preparation and briefing of lawyers and mediators to ensure that such a role did not compromise the mediation process.

The second report relates to an interesting experiment by the Family Mediation Centre (Victoria) and Relationships Australia to involve counselling and mediation in a joint process for separating couples seeking a parenting plan. The report was prepared by four authors (Boyhan, Foster, Grimes and Jaffe) and published in the *Alternative Dispute Resolution Journal* in 2001. It said that:

> a crucial finding was that, although violence was initially seen as a contra-indicator for referral to the project, it emerged that all families involved had experienced some degree of family violence: nevertheless they were able to be accommodated in the project.

It seems that, provided the violence was in the past, the process could work effectively. This kind of approach seems to have potential in situations where couples are blocked from effective negotiation by strong emotions arising from the history of their relationship. The process included such things as individual sessions with a mediator, individual sessions with a counsellor, mediations with two mediators, shuttle mediation, and child interviews with feedback to parents.

There has been a strong movement towards a 'dispute management' approach to conflict, whereby the suitability of different processes is assessed by an 'intake process' before mediation is offered.

Where does mediation stand now?

Overall I would say that mediation has stood the test of time as an effective tool for dealing with conflict. The research that has been done confirms that people are much more satisfied with outcomes when they have the major say in them. ADR and mediation seem to be able to deliver well in this regard. The mediation process remains a powerful tool for getting effective communication between people, by creating a structured framework and then allowing flexibility in its application to meet the needs of the parties.

There has been a strong movement towards a 'dispute management' approach to conflict, whereby the suitability of different processes is assessed by an 'intake process' before mediation is offered. This has the positive effect of enabling people in conflict to be heard more fully and given appropriate information about which process might suit their situation best.

Evaluating the impact of mediation is not easy, given the many factors that influence people's attitudes and behaviour before and after conflict resolution occurs. There may be better ways to get feedback from clients – for example, by handing out evaluation forms at the end of a mediation session, or by following up with a phone call. The feedback received indicates that in general parties can affirm what they see as an effective service offered by intake staff and mediators, even when the actual outcome is less than they hoped.

Professor Tania Sourdin of La Trobe University has been devising tools for evaluating ADR better. In a paper she gave to the 2004 National Mediation Conference in Darwin she analysed several examples of mediation, including the NSW Settlement Scheme (an initiative of the NSW Law Society to refer matters to mediation and assist the courts). The research showed that the scheme settled 69 per cent of cases in 2002. Of the clients, 95.8 per cent were satisfied with the process (compared with 60 per cent for arbitration and 70 per cent for direct negotiation); 87 per cent were satisfied with the outcome (compared with 50 per cent for each other process); 91.7 per cent saw the mediation as fair (compared with 60 per cent for arbitration and 71 per cent for negotiation). Clients generally

supported the use of a facilitative rather than advisory or determinative process.

A recent book entitled *Bringing Peace into the Room*[7] includes an article by Kenneth Cloke ('What are the Qualities of a Mediator?') which identifies the following values that mediation seems to encourage:

- conflict as positive, an adventure or journey, an opportunity for growth and change
- diversity and difference, and rejection of stereotypes
- openness, honesty and equality
- agreement and commonality, and rejection of coercion
- co-operation and collaboration
- the satisfaction of everyone's interests
- integration of intellect, emotion, body and spirit
- the victory that is without defeat
- forgiveness, completion, transformation
- perseverance.

Mediators bring a conscious presence to a mediation that makes a big difference to the parties. This does not mean that mediators become directive, but rather that they can exert a powerful influence on the environment of the negotiation between the parties and thereby enhance the prospects of a positive result for them.

I want to say something about 'neutrality' in relation to mediation. I have recently noticed that in some literature there is an appearance of the word 'balanced' as a replacement for 'neutral' and I rather like it. It is perhaps a more accurate way of saying that as mediators we seek to take a balanced perspective on the dispute and to contribute our skills to its resolution, and that we seek to balance the communication process between the parties. In this context it is appropriate to mention the increasing awareness of the importance of mediators' body language. Trainers of mediators now more commonly emphasise that too much nodding and acknowledgment of a party's story can give a false impression of being 'on their side' and thereby alienate the other party.

There are of course increasing pressures on mediators to be aware of legislative and ethical considerations, to be informed about recent developments in family law and so on, to be wary of allowing threats or violence to affect the safety of the parties adversely. In addition, mediators may be asked to undertake mediation with clients who have been 'mandated' to attend. Mediation agencies are devising ways to train mediators in all these aspects of the process.

Robert Bush and Joseph Folger, in their book *The Promise of Mediation*, review the practice of mediation in great detail, and conclude that there are four 'stories' about its value.

> One account (The Satisfaction Story) describes mediation as creative problem solving, which produces settlements that satisfy needs and reduce suffering on all sides of conflicts. Another (The Social Justice Story) sees mediation as helping to organise and build coalitions among individuals, so as to generate greater bargaining power for the have-nots. A third (The Transformative Story) pictures mediation as working to support empowerment and recognition and thus changing the quality of conflict interaction so as to increase human strength and understanding even within the crucible of human conflict. The fourth (The Oppression Story) sees mediation as enhancing state control and applying pressure and manipulation in ways that cause greater unfairness to the already disadvantaged.[8]

Bush and Folger favour the transformative approach as having the greatest potential to make mediation a vehicle for enabling people to make significant progress in their interactions as well as achieving better outcomes. I think we must be aware of the tendency for the mediation process to be co-opted in the quest for more efficiency and outcome-oriented methods. There is a danger that the real value of mediation as an alternative avenue for clients will be lost if they encounter a formula-based approach and a pressure to achieve an outcome regardless. Mediators will then also be under pressure to suggest options or manipulate the process to create the desired results, rather than working carefully with parties through the issues to be covered.

Johan Galtung, often seen as the father of peace research, has said that 'the first casualty of conflict is complexity'. I want to reaffirm that mediation can enable people in conflict to rebuild the complexity of their interactions, to move away from stereotyping and blaming, and to listen to each other in a creative way that leads to constructive outcomes.

I think we must be aware of the tendency for the mediation process to be co-opted in the quest for more efficiency and outcome-oriented methods. There is a danger that the real value of mediation as an alternative avenue for clients will be lost ...

In concluding, let me reiterate that mediation is a dynamic tool. It is a vital resource for people in many different situations. It should not be co-opted for quick fixes. It can enable people to work through difficult issues, restore relationships, trust and communication. Let us affirm its basic non-adversarial qualities, and treasure its potential for contributing to the culture of peace we all seek. ●

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contributions

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