

## **Submission by Greg Rooney to the Royal Commission into Institutional Responses to Child Sexual Abuse with respect to Towards Healing, the Melbourne Response and meeting the needs of the victims of sexual abuse generally.**

I Greg Rooney wish to make a late submission with respect to the review of Towards Healing.

I am a retired lawyer and professional mediator and have been mediating Towards Healing facilitations since late 2002. I have completed in excess of 150 sexual abuse related facilitations for a number of programs including the Towards Healing protocols, the Healing Steps protocols for the Anglican Archdioceses of Adelaide, the Goodwood Orphanage Program in Adelaide, Christian Brothers orphanages in Western Australia, the United Protestant Associations orphanages in Sydney, mediations for Catholic Church Insurance and sexual abuse mediations for the private legal profession.

I have published two papers on this area of practice the first in 2007 co-written with Margaret Ross and the second in 2011 copies of which I have attached. Their formal citations are as follows:

- Conflict Management in the Family Field and Other Close Relationships – Mediation as a way Forward , *DJØF Publishing, 2011* , Chapter 7, P. 109 -124
- Mediating Between Victims of Sexual Abuse and Religious Institutions, *Australian Dispute Resolution Journal, Volume 18, Number 1, February 2007 -Margaret Ross – co-author*

I have been happy to allow my published reviews of Towards Healing and other processes for mediating between victims of sexual abuse and religious institutions to speak for themselves. They have been on the public record for a number of years and I stand by them.

However I have noted recent comments by representatives of the Catholic Church's Truth, Justice and Healing Council with respect to Towards Healing. I am concerned with aspects of those comments and feel compelled to respond from my own experiences so that the Commission can be exposed to a far broader view and appreciation of both the positive and challenging aspects of the Towards Healing and other like processes.

### **Devaluing Towards Healing**

I note public comments and press releases by the Catholic Church's Truth, Justice and Healing Council which appear to suggest that Towards Healing has been a failure and therefore in need of reform. The Council also appears to be suggesting that the Towards Healing process are in some way connected to the way the Catholic Church has failed to deal with alleged perpetrators.

Example: An interview by Francis Sullivan the CEO of the Catholic Church's Truth, Justice and Healing Council on the ABC Late Line program on 3 October 2013.

<http://www.abc.net.au/news/2013-10-03/francis-sullivan-ceo-churchs-truth-justice-healing/4997812>

Part of the program covered an incident involving the Sydney Archdiocese and the New South Wales Police in relation to a memorandum of understanding (MOI) with respect to alleged religious perpetrators. The other part of the interview related to the church's proposed reforms to the Towards Healing Program.

I note Mr Sullivan's statement in that interview that the MOI matter and the negative implications raised by that particular issue "*occurred during the Towards Healing period*". He seemed to be inferring, by this comment, that there is a deliberate link between Towards Healing and procedures relating to how alleged perpetrators are dealt with respect to the police. There is no direct link between these two issues. Towards Healing is essentially a process for meeting the needs of those who have been abused in a compassionate and pastoral way.

### **Two separate parts to how the Catholic Church has dealt with claims of sexual abuse.**

The first part relates to how the church dealt with the victims of sexual abuse at the time of the abuse and now.

The second is how the church dealt with alleged perpetrators of sexual abuse both at the time of the abuse and now.

The Towards Healing process was designed to be a pastoral approach aimed at dealing with the victims of sexual abuse from 1996 to date.

How the church has dealt with perpetrators in the past and how it deals with them today is outside the main focus of the Towards Healing processes. The perpetrator is not involved in any meeting with the claimant and the church authorities.

It would therefore seem to me that a strategy is being developed by the Truth, Justice and Healing Council to make the words "*The Towards Healing Period*" a general descriptor for the totality of how the Catholic Church has dealt, or failed to have dealt with, sex abuse cases including how it has dealt with alleged perpetrators within its ranks.

The attempt to link the two in such a public way does a disservice to the good work achieved by the Towards Healing program and by all those involved within it over the last 17 years. This is further exacerbated by the pre-emptive move by the Truth, Justice and Healing Council to '*reform*' Towards Healing before the Royal Commission has had a chance to independently critique its performance.

This public devaluation of Towards Healing has the effect of also publicly devaluing all the sincere apologies and other valuable healing work that I have witnessed over the last 11 years. This has and will continue to cause distress to the many people who have come through the Towards Healing program over the last 17 years.

**I would suggest that there are two distinct approaches within the Catholic Church on how to deal with historic sexual abuse matters.**

The first is that these are serious and important issues that have to be dealt with quickly and efficiently so that the church can go back to doing what it normally does. It is basically an administrative and a liability problem caused by past church failings and as such it needs an equitably based administrative solution. The Melbourne Response is a product of that approach. It is a solution based approach.

The second approach is that how the church deals with the victims of these abuses is at the centre of the churches reason for existence and is the most important moral and religious work the church can do. The integrity of the process is paramount in this approach. The process focuses on the victim's needs rather than that of the church. It is built on a facilitative process in which there is a meeting between church leaders and the complainant at a human and personal level. That church leaders accept personal responsibility on behalf of their dioceses or order; that they personally explain how this has happened and why; that they apologise and work with the complainant to help them move forward with their lives in a meaningful way. This meeting includes a face-to-face negotiation with a senior church leader about financial reparation. The Towards Healing response is a product of that approach. It is a process-based approach.

**The Royal Commission.**

**1. The Towards Healing Protocols have been running from approximately 17 years. It has been externally reviewed on two occasions.**

Towards Healing is essentially a Facilitative Mediation between a complainant and a senior church official in which the complainant can tell their story and have it acknowledged, to receive an apology and to receive assistance in helping them move forward with their lives. Each case is unique.

It is a process that has been independently reviewed twice by Professor Patrick Parkinson from the Sydney University Law School. The first review was after the first four years of the process and the second review was after the first 14 years of the process.

In the second review (2009/10) Professor Parkinson reviewed 70 submissions of which 29 were from complainants or their relatives. He made 17 recommendations which were accepted.

Professor Parkinson gave evidence before the Victorian Parliamentary Inquiry into the handling of child abuse by religious and other organisations held on 19 October 2012.

[http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Transcripts/Prof\\_Patrick\\_Parkinson\\_19-Oct-12.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Prof_Patrick_Parkinson_19-Oct-12.pdf)

He made following statements to the Inquiry:

*“Towards Healing and the Melbourne Response are predominantly Restorative Justice Programs or Processes dealing with historic abuse. It does not mean that you would not use Towards Healing for a contemporary case, but it is primary meant to be about historic abuse and yesterday’s problems.”* (Page 4, paragraph 3)

*“Which brings me, if I may, to the third issue, on restorative justice processes and some of the major questions that you have asked. It is important at this point to give the Catholic Church in this country a great deal of credit. There are very, very few churches- pretty much none- who have compensation processes of any kind. Maybe no others need to. In 1996 with the Melbourne Response and in 1996 with the Towards Healing the Catholic Church did make a very genuine step to try to do something about these adults, coming forward 25 to 30 years later, who had suffered terrible things as children, and to make amends.*

*There are people of enormous courage and enormous conviction involved with this. Bishop Geoffrey Robinson was the main inspiration for Towards Healing. He has said publicly, so I can say this, that he was a victim of child sexual abuse himself. He showed extraordinary commitment and dedication and he led others to do so as well. Sister Angela Ryan, with whom I have worked closely over many years on these issues, I see as someone who has shown amazing courage and dedication in dealing with these issues. Towards Healing was a genuine response of caring for victims.”*  
(Page 5 paragraphs 4 and 5)

*“It is important to record that, because Geoffrey and many, many others have been absolutely committed to cutting out the cancer in the church and Towards Healing was a genuine response to that. What it was doing was following Restorative Justice Models - in essence a victim compensation scheme like we have at the State level.”*  
(Page 5, paragraph 7)

**2. The argument that the Catholic Church needs to distance itself from the process of dealing with sex abuse by the appointment of independent commissioners. That the money issue should be separated from the apology.**

This is an age old debate that goes back to Biblical times and to 13<sup>th</sup> Century England.

Should the victim be dealt with individually or as a member of a wider group?  
Should there be financial assistance for each complainant based on an individual assessment or a uniform set figure determined by an external tribunal?

Towards Healing, in its traditional model, is where the apology and the payment of financial assistance are dealt strictly on a case-by-case basis. This approach does not seek to compartmentalise the issue of an apology and financial assistance. They are treated together at the one meeting. It is a holistic approach covering all aspects and effects of the abuse.

I note a variation of the Towards Healing Protocols in the approach of the Archdiocese of Sydney under Cardinal Pell. A practice has developed in which financial reparation is negotiated first with a separate later meeting for the formal apology. This has brought the Sydney version of Towards Healing closer to the philosophical approach of the Melbourne Response.

From a biblical point of view (and I am not a biblical expert) I understand that the more Christ-like approach is to treat each person individually even if there are inequitable results.

This was certainly the approach of the Lord Chancellors in England from 1253 onwards. They were senior clergy who acted as the King's conscience. Each case was addressed on a case-by-case basis with no standard rules or enshrined principles that had to be followed. It was a personal decision made by the Chancellor made on the basis of what he thought was fair. In the 15<sup>th</sup> century the power of Chancery was recognised and equitable principles developed particularly by the then Chancellor Sir Thomas Moore and those that followed.

It was Sir Francis Bacon in 1615, in the Earl of Oxford's case, who under the authority of King James I held that in the event of any conflict between common law and equity, equity would prevail. The Judicature Acts that followed enshrined this principle within common law. Individual justice and fairness was combined with common law rules but with individual justice and fairness paramount.

These issues are still relevant today with respect to how the church deals with the victims of sexual abuse.

There are two quite separate issues that the church faces. The first relates to the victim of the abuse. The second relates to the way the systems within the church dealt with the abuse at the time and today.

In my view the church's response has to mirror the experience of the victim of the abuse. The act of abuse was done in isolation. The victim was targeted individually and in a manner that made it difficult for them to complain. Each act of abuse has its own circumstances and its own individual effects.

It is for this reason that the process of dealing with the victims needs to be directed at the individual rather than the group. This is not disputing the fact that there are wider systems issues for the church.

The church as an institution has a duty to be fair and equitable in its treatment of claimants although this is difficult because the church is made up of many individual and autonomous Dioceses and Orders. This is an issue for the church hierarchy. It does have to deal with the systems issue.

The more Christian-based approach would put the victim at the centre of the process. It fits with the church's role of promoting Christian principles within the wider community. There is also biblical and historical precedent for adopting an individual approach framed around each claimant. Separating the apology from the reparation breaks this bond. It devalues the apology especially in the minds of the complainant. The church leader needs to be present and engaged with the individual complainant in these difficult discussions.

There is some argument for separating the financial and the apology meetings in specific instances. I refer to the Goodwood Orphanage protocols in which this was done quite successfully. However there was a sense of uniformity in the way orphans were treated in this institution with respect to bedwetting, lack of education, physical violence and poor care practices. For example there was uniform ritual humiliation for bed wetters in which they were forced to stand in the midday sun with their wet urine drenched sheets over their heads. This is in contrast with individual acts of sexual abuse in which each case differs so markedly and the effects so great that any attempt to equate them risks a devaluation of their experience.

I would suggest that much of the drive behind the Catholic Church's Truth, Justice and Healing Council's approach of separating out the money issue from the apology

is driven by a preoccupation with the churches systems problems. It is church centric rather than victim centric.

The church will still need to deal with the more general issue of how it assesses reparation but not at the expense of dealing with each claimant as a unique individual with a unique set of issues. The church's broader systems issues should be dealt with separately. Towards Healing should not be sacrificed to further this end.

**3. Is there an appropriate dollar figure that should be paid to the victims of sexual abuse as reparation or compensation.**

How much should be paid to victims of sexual abuse by institutions in which the abuse took place. Should it be based on victims of crime legislation at approximately \$55,000 as with the Melbourne Response. Should it be \$100,000, \$200,000 or \$1 million. Should the amount be adjusted on a pro rata basis by reference to a sliding scale of abuse or loss (There is no correlation between the level of abuse and level of its effect on the person- see 2007 paper at page 17). Should the presence or absence of legal liability of the institution also be factored in. Or should there be no set figure as per the Towards Healing protocols and left to an individual negotiation between the parties.

I can only speak from my observations after meeting more than 150 victims of sexual abuse over the last 11 years in various programs and religions. The cohort that I have worked with are victims of sexual and physical abuse who have come to the process voluntarily. They are assessed by me with respect to issues of capacity particularly with respect to issues of power imbalance and violence. I also have had to be satisfied that they met the '*do no harm*' principle that I work under as a mediator (see also the 2011 paper at pages 111 & 112).

I would estimate that approximately 70% had legal representation although about half of that group chose not to bring their lawyers to the mediation. The remaining 30% chose not to have lawyers despite advice that they should obtain them. In those cases there was generally a provision in any settlement to cover the cost of obtaining independent legal advice.

I understand that many victims of sexual abuse cannot bear to go near the church or to engage in any of the church processes. I also note that many victims of sexual abuse do not wish to come forward at all. I cannot speak for either of these groups.

The following comments I draw from my first hand discussions with the cohort that I have worked with. Every case is so different and everyone reacts so differently it is hard to draw any set conclusions other than some general observations.

My first observation is a general reluctance to talk about money at all. There seems to be an embarrassment about raising the issue. I raise it directly in the pre-mediation meeting by asking them to get independent professional advice and think about what they would like to help them move forward.

There is a wide variety of attitudes with respect to what is the correct amount to be paid . There is a group who do not want any money at all and are hostile to any discussion of money. There are those who feel the payment of money is like being paid for sex. With those groups there is more talk about their particular needs and how the church can assist them financially with those needs.

At the other end of the spectrum are those who are pragmatic, who have dealt with their issues over many years, who accept that the church leader at the mediation is not personally responsible for what the perpetrator did to them. They just want some money to help them move forward with their lives. There are a range of emotions and desires between these two extremes. However this cohort seems to be motivated by the need to take some form of direct action that might hopefully break the victim cycle so that they can move forward with their lives.

With respect to the amount of money all I will say is that they seem to want whatever is the going rate. I have yet to discover what that amount is if it exists at all. In general they seem to want to feel that there was some fairness with respect to the amount.

However with this cohort I would say that the issue of money is subservient to what they see as a much bigger issue. What they seem to be wanting most is for someone to take their brain and squeeze all the *'shit'* out of it and put it back in their head so that when they wake up tomorrow morning they do not have to think about it. Money, although important to them, seems to be a secondary consideration to this more urgent need.

The real power and the effect of Towards Healing, if handled sensitively, is that it overlays a 2013 experience over the 1960 experience of being abused. The 64-year-old is able to bring the internalised 11-year-old to the facilitation. With the help of skilled counselling this can start the process of reintegrating that part of themselves that was shattered by the original sexual assault (see 2011 paper at page 112).

The difficulty I have and I believe the Commission will have is that each case is so individual and the reactions vary so greatly that any attempt to draw definitive conclusions about anything to do with victims reactions to their abuse and to the various approaches to dealing with them, including Towards Healing, does no justice to them.

Sweeping generalisations do no service to those that have been abused and to those who are trying to retrospectively do something about it. These issues can only really be viewed through the prism of each unique and individual case. It is an internalised grief they can only be glimpsed by those who have not experienced it.

**4. Cultural change occurs by experiencing an experience. For the Catholic Church to evolve and learn the lessons of the past it is important that church leaders fully experience the experience of the victims in a one-on-one meeting where all issues including financial reparation are dealt with on a holistic basis.**

Human beings and organisations only learn and evolve by experiencing an experience and learning from it. The advantage of the pure model of the Towards Healing process is that church leaders are required to sit with victims of abuse and work through all legal and non-legal issues so as to help them move forward with their lives. It is much harder than referring them to a tribunal or giving a belated apology after the money has been sorted out.

It is also harder for the complainant to sit through this process than simply engaging a lawyer to sue for money and striking a financial settlement.

It is the fact that it is hard for all parties is what makes the difference. It creates an experience that, if handled well, can help the complainant move forward while at the same time leaving the church representative with a deeper personal understanding of the effects of this form of abuse. An understanding that is taken back into the body of the church by each church authority.

I refer to a recent facilitation where a Bishop was asked to do his first Towards Healing facilitation. He had previously worked under the Melbourne Response. It was a difficult facilitation but he handled it very well and gave a genuine and heartfelt apology which was accepted. The negotiation over financial reparation was difficult but ultimately successful. It was excellent work by the Bishop. However he made the comment as he left that it was much easier under the Melbourne Response.

That is the real difference between Towards Healing and the Melbourne Response. Towards healing is much harder but equally it can create a deeper healing not only for the complainant but for the church as a whole. The Melbourne Response is much easier for the church.

**5. Examining institutional responses to child sexual abuse is also an examination of society in general in the two decades after the end of World War II and as it is today.**

Societies and groups who are experiencing fear tend to value and preserve the group at the expense of individuals within it. This was certainly the case in Australia at the end of World War II and the two decades that followed.

The post first World War I baby boomer's parents had suffered the emotional traumas of the First World War, their teenage years coincided with the great depression and they graduated into the Second World War. If they survived they returned to the fear of communism and the atom bomb. The Japanese had nearly invaded Australia and there was fear of the Communist domino effect. They were a traumatised generation.

The 20<sup>th</sup> century was a violent century driven by competition over resources and ideology. It was in this context that the public integrity of institutions such as the military, the police, the churches and other major institutions needed to be preserved and take precedence over individuals who might have suffered at their hands.

The First World War baby boomers were shocked to find that the Second World War baby boomers (their own children) embraced individualism. They grew their hair long, went to the beach, did sex drugs and rock 'n' roll and generally espoused libertarian causes. It was called the generation gap.

As a result of this generational change we now live in a society in which the individual takes precedence over established institutions. Conventions and legislation supporting the rights of the child are just one particular example of this change. The 21<sup>st</sup> century will, by necessity, have to be a century driven by relationships and collaboration (see <http://ssrn.com/abstract=1809267> at pages 1-4).

For the Christian churches in Australia and particularly the Catholic Church there was a fear of communism at the end of World War II which morphed into a fear of individualism as espoused by the second war baby boomers. After the fall of the Iron Curtain, nearly a quarter of a century ago, the new fear is secularism.

It does not matter whether fear is real, anticipated or, as it is in the majority of cases, illusionary. If fear dominates the thinking process of institutional leaders it can lead

to an overemphasis on the importance of preserving the institution over that of the damaged individual.

It is a challenge for those leaders to acknowledge and overcome the fear and blame addiction that so dominates many religious and political institutions, public life in general and the public discourse. Principles and ideals can still be championed and threats defended but from the strength of love and compassion (innate Christian principles) rather than from the weakness of fear and blame.

It is important to note that an understanding by the victim of the historical context of institutional abuse is of no benefit to them. In fact if a church leader attempts to give the abuse a context it generally leads to a swift and angry response by the complainant. They see this as just an excuse which makes them extremely angry. This is personal for them. Towards Healing works at that personal level.

## **6. The role of lawyers in Towards Healing**

From my observations of working in this area for the last 11 years and from conducting more than 150 sex abuse related facilitations (which includes mediations for the Anglican Church and the United Protestant Association), most lawyers who have acted for both the various religious groups and for complainants have acted professionally and in the best interests of their clients. These are very difficult facilitation's with very distressed claimants.

I have observed high quality legal representation with an emphasis on not only a positive financial result for their client but more importantly maximising the chance of an emotional release. From my observation the majority of lawyers have viewed their duty to act in the best interest of their client very widely. They have seen that part of their duty to their client includes encouraging them to participate in a process that deals with emotional issues and other non-legal aspects of the claim

I have also observed lawyers who have represented various religious bodies and Catholic Church Insurance to have also acted with great professionalism and sensitivity in these difficult cases.

For those clients who have not had legal representation they have always been advised to get it. There is always provision in any agreement for a payment for post facilitation legal advice.

There are many reasons why people have chosen not to bring lawyers to the facilitated meetings. The most common one is that they have already spoken to a lawyer who has told them that their case is not worth very much and that there is no

point for them acting in the matter. In other words there is little money in it for the lawyers. Other lawyers have advised complainants to just go along and try out Towards Healing and then come back to them.

Some people have a complete aversion to lawyers and refuse to go anywhere near them. I have always advised them both verbally and in writing that they should obtain legal advice either before the facilitation or at least afterwards.

I note the argument by the Australian Lawyers Alliance that Towards Healing has failed to respond to victims needs and is designed primarily for the protection of the church assets and reputation rather than for the benefit of the victims.

I have found this not to be the case. Every case involves a thorough pre-facilitation conference with both the complainant and the church representative. They are both assessed as to the suitability of a face-to-face meeting. Those facilitated meetings only go ahead if there is a genuine desire by both parties to meet and engage in a fully open and honest manner.

There have been a number of lawyers who have persuaded their clients not to engage with the church leader. In my view they have adopted an extremely narrow view of the definition of acting in the best interests of their clients. This view is restricted to only maximising the dollar return and ignoring how this is achieved and the emotional impact on their client. They have often undermined or dismissed the more positive non-legal aspects of the Towards Healing process.

These lawyers are often the ones who are most cynical in their attitude to the church and who are the most resistant to their clients receiving an apology. They seem to see the apology as a form of manipulation. This reluctance to participate in the apology deprives them of experiencing at first hand the empowerment and recognition afforded to their clients by a genuine apology.

Often the final issue to be negotiated is the lawyer's legal cost which in some cases far exceeds the amount that they are prepared to accept on behalf of their clients. In one case the final negotiating position between the church authority and the complainant was between \$100,000 and \$120,000. The lawyers for the complainant were then asked how much were their legal costs to date after having acted for only eight months. Their answer was \$180,000 (See also the 2011 paper at page 122).

I am not suggesting that Towards Healing and other like processes are suitable for every complainant but the blanket refusal to consider it by some lawyers and other professional advisers does no service to their clients. As stated the majority of

lawyers keep an open mind and are more willing to give serious consideration to the process as well as the outcome.

**7. There is an argument that the church should not investigate complaints of sexual abuse or negotiate any resolution with complainants.**

Towards healing is basically a standard facilitative mediation process based on Restorative Justice Principles.

It is a matter of public policy adopted by the legislature and the courts that parties should be encouraged to resolve their dispute outside of the court processes. It is why the courts have constantly upheld the confidentiality provisions of mediations and supported the concept that mediating and compromising are legitimate and essential parts of the judicial system. I note that 96% of all matters that are brought before the courts resolve prior to any formal hearing.

It is a curious argument put forward by Catholic Church's Truth, Justice and Healing Council and other groups opposed to Towards Healing that the church should wash its hands of sex abuse claims à la Pontius Pilate by handing them over to a court or tribunal for investigatory and decision-making decisions. In my view this approach would rob the church of experiencing at first hand the hard lessons it needs to learn.

It also places the complainant in the difficult position of having to undergo a formal adjudicative process with all the evidentiary and proof problems associated with such a procedure. It will stop many people coming forward.

Towards Healing offers many victims of sexual abuse a private and personal way of taking one small but important step forward with their lives. It is not suitable for everyone. It should not be taken off the shelf as an option for the many who have suffered at the hands of sexual predators operating within religious institutions.

## **Reflections**

I would like to say that in the 11 years I have been involved in mediating Towards Healing facilitations I have found that Sue Cain and other members of the Professional Standards team in South Australia, Queensland with Howard Murray, Victoria with Kerry Buchecker, Tasmania with Sister Majella Kelly and Sister Angela Ryan and the other leaders at the National Office have acted in a highly professional manner. The Professional Standards leaders and staff have carried out the difficult task with great sensitivity. As the facilitator I have benefited greatly by the way they have handled each claimant as they have come through the process and the concern they have for their welfare in preparing them for the

facilitation. I also have witnessed the way staff have helped them post the Towards Healing facilitation to move forward with their lives.

I note many of the complainants have been emotionally traumatised not only by the initial abuse but by the passage of time, sometimes decades, in which I have had to endure the pain and humiliation of their experience. I note that many hold great anger towards the church. This has placed the staff under great emotional pressure as they introduce the complainant's to and bring them in under the umbrella of the Towards Healing program. I have witnessed many instances of personal dedication far beyond the call of what would normally be required from the average employee. The leaders and staff have borne the brunt of the justifiable anger and frustration of the victims of abuse. They have been the human interface between the church and the victims of sexual abuse.

I am therefore saddened to see the public devaluation of the Towards Healing processes as part of a pre-emptive strategy to deal with the upcoming Royal Commission. It is as if the achievements of the Towards Healing protocols and those who have worked hard and have taken personal risks over the last 17 years are to be sacrificed for the greater good of the public face of the Catholic Church. It is consistent with a culture that the church and its reputation are more important than the individuals within it. A culture that has contributed to the very problems that the church is now facing.

Greg Rooney 06/11/2013

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# Mediating Between Victims of Sexual Abuse and Religious Institutions

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Greg Rooney and Margaret Ross\*

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*The victims of sexual abuse within religious institutions suffer the added trauma of experiencing a betrayal by those charged with the duty of nurturing their spiritual, moral and physical upbringing. In addition, there appears to be a pattern of perpetrators targeting the more spiritually and sensitively inclined children, especially in families with close ties to the Church. This compounds the loss suffered by the individual and those closest to them. A number of religious institutions have developed protocols for managing complaints of sexual abuse which include the non adversarial process of mediation. The authors draw on their experience of mediating meetings between church leaders and victims of sexual abuse to examine some of the challenges inherent in this approach.*

## INTRODUCTION

The victims of sexual abuse within religious institutions often suffer two forms of effect. The first is the effect of the original abuse inflicted by the abuser. The second is that the abuse was not detected promptly so that some form of help and support could be given at the time.

A number of religious institutions have developed protocols that respond to claims of sexual abuse. These protocols include, as a core component, a facilitated meeting between the victim/complainant and a senior church official, usually at a bishop or provincial level. This meeting is at the heart of the attempt to deal with the secondary effect of the abuse even though in many cases it is taking place 30 to 50 years after the original abuse. The success of the facilitated meeting can go a long way towards helping the complainant move forward with his or her life. However, these meetings have to be handled delicately and sensitively as they can pose a risk to the complainants of compounding their trauma.

In 1996, Catholic bishops and leaders of Catholic religious institutions in Australia created a set of protocols for the handling of complaints of sexual abuse. The "Towards Healing" process, as it is known, is an attempt by the Church to take a pro-active role in dealing with the victims of sexual abuse being prepared to make admissions and to communicate directly with them. It provides an option that is intended to complement the existing standard legal processes.

Over the last 10 years, the Towards Healing assessment and facilitation processes have slowly evolved on a trial and error basis. Many challenges have been thrown up for those involved, including the complainant, the Church authority, lawyers representing each party and, not least, the mediator. Other religious institutions have adopted similar processes including the Anglican Archdiocese of Adelaide' "Healing Steps" process. This article will reflect on some recurring issues and the challenges that these processes pose.

## THE VICTIM SEEN AS A "PROBLEM"

Working with the victims of sexual abuse can be a difficult and challenging experience. There is a natural desire to help repair the problems caused by the abuse and to make things better. However, these good intentions can lead to some unintended consequences.

Sometimes complainants feel that those around them treat them as if they are the problem. For most, the effects of the original abuse have been something that they have lived with for decades and will have to manage for the rest of their lives. They *have* a problem but they are *not* "the problem". From the complainants' standpoint, they have done nothing wrong. It is the perpetrator and/or the Church that have behaved wrongly. They can often become very offended when they feel that those around them just want everything to be brought to an amicable and acceptable conclusion. The sense is that this desire to fix things up is really meeting the emotional needs of the helpers rather than the complainant.

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Counsellors and lawyers can be driven by a natural desire to be helpful and assist in repairing the damage caused to complainants. However, this desire must be consciously tempered by what is realistic and of benefit to their clients. This desire can arise from a feeling of having to prove to the complainant and themselves that they are helpful. This need for reassurance that they are doing something of value may drive the advisor to intervene very actively in the life of the complainant without defining the limits of their role. There can be a danger that the advisor can inadvertently take on a parental role rather than a professional one.<sup>1</sup>

Most lawyers and counsellors understand the importance of maintaining a professional distance from their clients. It helps if they can distinguish between feeling empathy and feeling sympathy for them. Empathy allows them to support the complainant while maintaining distance. Sympathy can contain an element of pity and tends to hold the complainant at the level of the problem.

However, there are occasions where there is a sense from the lawyers and from some clergy that they wish these sexual abuse cases would simply come to an end. The stress felt by the clergy in having to deal with the dishonour that has been brought on the Church by colleagues they have known for years causes a great deal of pain and angst. It can lead to feelings of wanting the complainants to just go away, to finish.

Lawyers can feel the need to push for an arm's length non-emotional process for resolving the complaint. Thus, an opportunity to treat complainants as a defined group in the form of a class action can be very attractive. It can also be seen as a way to resolve the liability issues without a long and drawn out litigation process. It does assume that the payment of monetary compensation, by itself, will allow the victim to move forward with his or her life.

Some lawyers mistakenly believe that they fulfil their duty to act in the best interests of their client if they simply maximise the dollar return to their client. They often see the non-adversarial process, such as mediation, as an impediment to attaining that top dollar goal and will actively encourage their clients not to take part. Alternately, if they do take part, they will shield their client from fully engaging in the process. Nevertheless, as experience with the mediation process increases, so does the number of lawyers who understand that it has a real potential to bring significant benefits to their clients over and above the dollar amount received.

The Towards Healing and Healing Steps processes are also designed to be an addition or alternative to the long drawn out litigation path. Although they are less structured and formal, they are paradoxically a more challenging approach for all who take part. They can open the door to the possibility of personal healing through the empowering effects of the mediation process and the recognition of the complainant's story by the Church leader.

#### **THE LEGAL PROFESSION'S RELATIONSHIP WITH THE CLERGY**

The following quotes appeared on the same page of the *Weekend Australian* newspaper of June 19-20 2004.

Dr Jensen [*the Anglican Archbishop of Sydney*] said he found meeting and listening to victims "profoundly moving". "Over the years I have learnt so much from them – and continue to do so" he said. "I am aware our responses are often flawed". He hoped other victims of abuse would "feel encouraged to identify themselves and tell their story. I can assure them they will be heard with sympathy", Dr Jensen said. Mr Gerber [*the Director of Professional Standards in the Sydney Archdiocese*], who has been present at most of the meetings, said "It is incredibly healing for people because they feel that the church has heard them".<sup>2</sup>

...

Details of claims by the 32 victims were supplied to church lawyers on Thursday and Ms Litchfield [*the lawyer representing the victims*] said there had been no change from the church's form thus far of not engaging with the victims' legal action. She said the church's position remained wedded to a protocol, which paid scant attention to

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<sup>1</sup> Salzberger-Wittenberg, I, *Psycho-analytic Insight and Relationships (A Kleinian Approach)* Routledge and Kegan Paul, London, 1970 p 4.

<sup>2</sup> *The Weekend Australian Newspaper* (19-20 June 2004) p.5.

compensation or the role of official representatives such as lawyers. “We are a long way from mediation on these matters”, Ms Litchfield said. “There is an emphasis on pastoral care and my clients have gone beyond that.”<sup>3</sup>

These extracts evidence a differing approach on how to respond appropriately to complaints of sexual abuse against people associated with religious institutions. The traditional hard-nosed negotiating techniques that have been part of our adversarial culture for the last two centuries are being challenged by these more collaborative processes such as mediation. The Towards Healing and Healing Steps protocols are an attempt by the churches to incorporate these non-adversarial processes into how they handle complaints of sexual abuse.

One advantage of a facilitated meeting is that it creates an opportunity to discuss and deal with the primary abuse by the perpetrator as well as the Church’s role in what happened. Questions of financial assistance, ex-gratis payments, compensation, reparation (or whatever term the parties choose to describe the payment of money) can be discussed. However, this discussion is designed to take place in a non-adversarial pastoral focused setting. It should be noted that the perpetrator is not present or involved in these meetings.

The mediator’s challenge is to handle the meeting sensitively, especially where the financial expectations of the complainant are not met by the Church. Lawyers who are sensitive to the process can help their clients achieve something positive out of this meeting even if final agreement is not reached on the money issue. The vast majority of legal representatives understand how the facilitation fits into the bigger picture and are able to use the process to help their clients deal with the non-legal personal issues while working towards resolving the legal liability issue.

It would help if lawyers understood how difficult it can be for a mediator to facilitate these types of disputes. It requires a great deal of skill to keep the complainant and the Church representative working positively with each other while the lawyers try to resolve the legal issues. Without cooperation and support from the legal representatives, there is a danger that the complainant will be further traumatised by the facilitation whether or not an agreement is reached on the money issue.

## **TOWARDS HEALING AND HEALING STEPS PROCESSES**

A mediator is generally in a similar position to a medical practitioner in that there is an implied duty to endeavour to “do no harm”. The mediator’s primary role in Towards Healing and Healing Steps is to ensure that the process does not, itself, compound the effects of the original abuse. It is therefore essential that the mediator meet separately with the parties and their legal representatives before undertaking a facilitation to canvas these issues fully.

Many victims present as very damaged people and so great care must be taken when arranging any interaction with representatives of the Church. Fortunately, there are a number of safeguards built into the Towards Healing and Healing Steps processes.

Firstly, complainants have to make a conscious decision to come forward and complain to the Professional Standards Office in his or her State. They are then offered immediate help and assistance including counselling. They are invited to consider a number of options including instigating police action against the perpetrator, suing the Church in the civil courts, or using the Towards Healing or Healing Steps processes. They are also encouraged to seek independent legal advice. Another safeguard is that these processes are purely voluntary, which can be terminated by the complainant at any time.

There has always been an option to complain to those in authority within the Church. Despite this, it is clear from the stories being told by complainants that, in the past even if they had summoned the courage to complain more often than not their complaint was minimised or ignored. Because the violation was so profound, most victims were not even able to tell their own families let alone another member of the Church.

Once the complainant agrees to engage in the process, the Director of Professional Standards will arrange for an independent assessor to investigate the allegations. The standard of proof required is the civil test; that, on the “the balance of probabilities”, the abuse occurred. While care is taken to conduct the investigation in a supportive way, the fact that the allegations are being formally questioned can be difficult and trying for the complainant. The Director of the Professional Standards Office maintains contact during the assessing stages and can monitor how the complainant is handling the pressure. If the complaint is substantiated, then the carriage of the matter is handed to an independent mediator to arrange a facilitated meeting between the complainant and the Church representative.

From the mediator’s perspective, it is of great assistance that there is a separation between the investigation and assessment of the complaint and the facilitation of the meeting with the Church representative. Once there is a positive finding by the assessors and the matter is referred for mediation, the question of whether the abuse occurred or not is no longer an issue. The church representative is bound to accept the complainant for the purposes of the mediation process, even though there might be actual doubts in the mind of that representative that the abuse occurred, or where there is strong legal advice that the Church has a good legal defence to a civil claim. This acceptance of the claim is for the purposes of the Towards Healing process only.

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<sup>3</sup> *The Weekend Australian Newspaper* (19-20 June 2004), p 5.

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## **THE MEDIATOR**

Each mediation is treated as a unique event. It is extremely important that the mediator is present for the individual parties and aware of their needs throughout the process. The mediator works to maintain a state of caring empathy. The ideal state is often said to be one of objective neutrality and impartiality.

This is admirable as an ideal but is it really ever achievable? When mediating responses to sexual abuse in the context of spiritual beliefs and religious organisations, the mediator is confronted with some of the deepest and most personal dilemmas that one can face in life. Any values the mediator has adopted, through conditioning or life experience, in relation to spirituality and sexuality, arguably the core parts of identity, are likely to be challenged in the facilitation process. It is a potentially explosive mixture and the mediator must become aware of his or her own prejudices, beliefs and emotional reactions.

It would be natural for mediators to have subconscious biases for and against the Church, especially those who have been brought up in a predominantly Christian community.

It is also hard to remain impervious to the pain and distress of the victims. Some have been subjected to degrading abuse resulting in permanent damage to their identity and self-esteem. The experience of facilitating these meetings can lead all participants to question their values and meaning in life.

For most mediators, this work will call upon deeper levels of the self and new skills and sensitivity not previously accessed by them. To witness a true acknowledgement of suffering and the remorse of the church representative, as well as the relief of victims when they are able to move forward, is a profoundly moving experience. There is a sense of hope for both the victim and the religious institution in such cases.

Mediations that do not resolve and parties who cannot acknowledge or let go can evoke feelings of despair and helplessness. The mediator may have a strong urge to make things better for all concerned, particularly the victim. They can feel a sense of failure if this does not occur. The mediator must have safeguards to support them through the process.

One of the strengths of Towards Healing is that this is recognized and great emphasis is placed on the mediator communicating with the Director of Professional Standards. Although the Director is not involved in the facilitation, he or she is available for support and to receive reports from the mediator. The Director's role in setting up the facilitation and preparing all involved is crucial also.

The mediator is well advised to have a supervisor or person with whom he or she can debrief in confidence. The issues can seem so varied, complex and deep at times that a non-judgmental sounding board can be a great resource. What is interesting and revealing is that the most difficult issues that come up for mediators in supervision relate to managing one's own ego. It is sobering to realise just how much of the self the mediator brings to the mediation process and how the ego can directly affect the process.

## **PREPARING THE PARTIES FOR THE FACILITATION MEETING**

The clear separation between the assessing and facilitation stages of the Towards Healing process allows the mediator to bring a fresh energy into the proceedings. The focus now moves towards the future. Hence the names "Towards Healing" and "Healing Steps".

The importance of preparation in these matters cannot be overestimated. The first step is a briefing from the Director of Professional Standards. Important information about how the complainant is coping with the process to that point can be discussed.

The mediator then makes initial contact with the complainant and the representative of the Church authority and, where possible, arranges a meeting with each separately. This first meeting gives the mediator an opportunity to discover the capacity of both the complainant and the representative of the Church to handle a face-to-face meeting. Sometimes it is clear that a complainant is not emotionally ready to undertake such a meeting. In these cases they are offered specialised counselling.

As well as assessing each party's capacity to handle the facilitated meeting, these pre-facilitation meetings have a number of objectives:

- to explain and agree on a step-by-step process that is appropriate in the circumstances of the particular case.
- to agree who should attend the meeting as support persons, legal advisors and counsellors.

- to explain the principles of the facilitated meeting in light of the Towards Healing and Healing Steps processes.
- to encourage the complainant to think about what they want for their future and how they will explain their needs to the church representative.
- to encourage the church representative to think about what the Church might offer the complainant in pastoral care and financial assistance and how they will express an apology.

At the pre-facilitation meeting, complainants are encouraged to reflect on two things. The first is to think about not only what they want to achieve from the mediation but *why* they want what it is they want. The second thing to reflect upon is that, if the mediation is a success and they achieve the things they want to achieve, and that after some time things become better than they are now, what would it look like.

The two questions are discussed with the respective parties at the pre-facilitation meetings. The purpose is to try to build some dissonance in their thinking by encouraging them to think about their interests rather than their positions, as well as to help them move their focus towards the future.

The second and more important purpose is to test if the complainant is able to perceive a future. On occasions when this second question is raised at the pre-facilitation meeting, the response from the complainant is that he or she cannot see a future. This response is a warning sign that the complainant might not be ready to move forward. Care then needs to be taken before moving to the facilitation stage.

The meeting with the church representative is also very important. Many persons appointed to this position are at a bishop level or a provincial of a religious order. They are usually senior men and women who have functioned in administration positions for some time. While most are very caring and compassionate, there can be a tendency for some to come into the facilitation meeting with an intellectual view of the problem. At the same time, the complainants, who have bottled up their emotions for decades, will arrive in a highly charged emotional state.

One approach is to manage the process in a way that will allow the complainant to move from the emotional plane to a more intellectual frame of mind and for the church representative to move out of the intellectual plane and into a more emotional frame of mind. It is hoped that they will connect with each other somewhere in the middle. This is done by using the mediation process to create a safe space for both parties to interact.

It is at this point that there is a true meeting between the two human beings sitting opposite each other in the room. When this happens the words that flow from the bishop or religious leader's mouth will come from the heart. The actual words do not matter. The empathy and pain felt with this connection is real and indeed may be the release that some victims are seeking.

Some church leaders have a natural gift for handling this work. For most, it comes with much personal and professional pain. To help them prepare for the meeting and the apology it is suggested that they do not prepare or rehearse any form of words. They are encouraged simply to sit and listen to the complainant and trust that the words that come out of their mouths will be the right ones. This is designed to help the church representative to be in a state that psychoanalyst Wilfred Bion refers to as being "without memory and desire"<sup>4</sup> and Freud calls maintaining an "evenly-suspended attention"<sup>5</sup>. What generally happens is that they are so taken aback by the pain felt by the victim that they themselves struggle to find words. This struggle is picked up by the complainant and forms a connection between them. The words "sorry" or "apology" may not be used but the complainants who are open to it can sense sorrow.

After everyone has said what he or she wants to say, a break is usually taken. The next session focuses on the future and examines what assistance the church representative can give the complainants to help them move forward with their lives.

#### **PASTORAL AND FINANCIAL ASSISTANCE**

Paragraph 41.1 of the Catholic Church's Towards Healing protocols sets out the terms of the assistance to be given to complainants once they have been accepted into the Towards Healing process.

41.1 In the event that the Church authority is satisfied of the truth of the complaint, whether through admission of the offender, a finding of a court, a canon law process or a Church assessment, the Church authority shall respond to the needs of the victim in such ways as are demanded by justice and compassion. Responses may include the provision of an apology on behalf of the Church, the provision of counselling services or the payment

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<sup>4</sup> Bion WR, "Notes on Memory and Desire" (1967) in Langs R (ed), *Classics in Psycho-Analytic Technique* (Jason Aronson, 1981).

<sup>5</sup> Freud, S. "Recommendations to Physicians Practising Psycho-Analysis". (1912) in Langs R (ed). *Classics in Psycho-Analytic Technique* (Jason Aronson, 1981).

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of counselling costs. Financial assistance or reparation may also be paid to victims of a criminal offence or civil wrong, even though the Church is not legally liable.<sup>6</sup>

A big issue for the complainant and the Church authority and their legal advisors is how to measure the financial assistance or reparation referred to in para 41.1.

Towards Healing's primary focus and goal is to provide for the pastoral care of victims of abuse. It is designed as a way for the Church to re-engage with victims of abuse based on the principles of justice and compassion. Justice and compassion relate not only to the way the complainant is received by the Professional Standards Office, assessed by investigators and assisted during the facilitation phase, but also to the way they are given financial assistance.

It is clear that the payment of money to the complainant is a part of this process. However, financial assistance or reparation under Towards Healing is directed more to what might promote healing for the victim rather than to payment of objectively measurable damages.

The original Towards Healing document in 1996 neither included nor excluded financial payment as an outcome. Professor Patrick Parkinson, of the University of Sydney, found in his review of the process in 2000 that a payment to the victim was one of the possible outcomes of facilitation but that discussion focussed more on payment as a promotion of healing. He concluded that compensation was "not a Towards Healing matter".

The principles of Towards Healing state that pastoral care should be the primary focus and goal of the facilitation process. Thus, the process used and the outcomes discussed must be guided with this foremost in mind. Pastoral care is defined as existing when a person has "responsibility for the well-being of another". This includes the provision of spiritual advice and support, education, counselling, medical care and *assistance in times of need*. Thus payment, if any, is made more as a moral response, based on considerations of justice and compassion, to the victim's pain and direct needs.

### **MEDIATING IN THE SHADOW OF THE LAW AND FINANCIAL CONSIDERATIONS**

Although Towards Healing is primarily a pastoral response to victims of abuse, the process is carried out in the shadow of the law and the pressures of each party's financial situation. These two factors can exert a powerful influence and sometimes need to be aired during the process. However, notwithstanding these pressures, the mediator's primary task is to bring the complainant and representatives of church bodies together for a meeting guided by the principles of reconciliation and compassion as a pastoral response to the needs of the complainant, their family and sometimes the community in which the abuse occurred.

There are some within the Church who would prefer to give the apology and then hand the carriage of the case over to lawyers to determine the financial assistance package.

In the authors' view, the Towards Healing facilitation should be treated as a whole package with the apology being directly linked to the pastoral and financial assistance. A face-to-face discussion of money can be very awkward and uncomfortable, especially coming immediately after the acknowledgement and apology. However, separating these two stages can fracture the process and undo much if not all of the power and value of the apology.

Even though the money negotiations can be distasteful for both complainant and church representative, it is something that has to be expressed and dealt with to bring an ending. Paradoxically, the very fact that this is difficult and uncomfortable seems to be the key to helping the complainants move forward.

There will, of course, be cases where it is appropriate for the financial assistance negotiations to be held separately but this should be treated as an exception rather than the rule. If everyone is able to work through the difficult transition between apology and the payment of financial assistance, it opens the door for the mediation to transform the past into something better. It is important that the church representative is present and takes an active part in the whole mediation process. For many complainants this personal

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<sup>6</sup>National Committee for Professional Standards, *Towards Healing – Principles and Procedures in Response to Complaints of Abuse against Personnel of the Catholic Church in Australia* (2000)- para 41.1

attention by a bishop or religious leader makes the apology and the assistance to move forward a deeply significant event.

### **MEASURING FINANCIAL ASSISTANCE**

Each diocese and religious order or institution in the Catholic Church in Australia is a separate legal identity with varying degrees of capital reserves. Thus, each Church authority will have its own approach towards how it measures the amount of financial assistance it will provide to victims. Some will have insurance protection while others will have to find the money out of their own reserves.

For some lawyers and advocates this can be a problem as it challenges the concept of fairness and the public nature of justice. The process of treating each case as a unique and individual experience can lead to some victims receiving more money than others. This tension between what is fair and the unequal measure of compassion shown by those who are decision makers has some Biblical precedent in the parables of the labourers in the vineyard (Matthew 20: 1-16) and the Prodigal Son (Luke 15: 11-32).

However, the payment of financial assistance is a tangible acknowledgement by the Church that it accepts a level of moral responsibility for what happened to someone in its care. This assistance is often paid by the Church authorities, irrespective of its legal liability.

In cases of serious abuse or serious emotional damage to the complainant, the amount paid should not be a nominal figure. It should reflect a generosity of spirit from the Church that clearly confirms to the complainant that he or she was not to blame for what happened. It should be an amount that genuinely helps the complainant move forward with their lives. It should be a figure that is a tangible representation of the apology.

Each case of abuse needs to be treated as an individual exercise because the level of abuse does not always equate to the level of damage done to the victim. Many victims of what could be described objectively as at the minor end of the scale of abuse suffer profound emotional damage while others with horrendous stories of sexual abuse have developed remarkable survival skills.

Interestingly, most complainants seem reluctant to ask for money. They feel embarrassed and guilty about asking for money while at the same time feeling angry at being put in a position of having to ask for financial help. Therefore, each case needs to be worked through with great sensitivity and dealt with on its own merits. That is the ultimate strength of the Towards Healing and Healing Steps processes.

### **RELIGIOUS INSTITUTIONS AND THE LEGAL SYSTEM**

The close association between the mainstream Christian churches and the legal profession has been put under strain by the large number of claims of sexual abuse. The Church has traditionally left it to lawyers to protect its interests in matters involving potential legal liability. The common legal approach of not making admissions or communicating with the other side has left the Church exposed to the allegation that it is more interested in protecting its own interests than those of the victims.

This divergence first became public when the then Governor General of Australia, Peter Hollingworth, gave as a reason for not meeting with victims of abuse, during his tenure as the Anglican Archbishop of Brisbane, the advice of the Church's lawyers. It again emerged in the events surrounding the resignation of the Anglican Archbishop of Adelaide, Ian George. It was said that the inability of the Church to respond adequately to the victims was partly caused by relying too heavily on lawyers. Similar sentiments were expressed by the Provincial of the Jesuits in Australia in relation to allegations of abuse in a Sydney Jesuit school.

However, both Anglican and Catholic churches have had a long history of association with the law and the legal profession. Indeed, eight centuries ago, the clergy played a direct role in the administration of justice.

In 13th century England, if subjects felt they could not obtain justice before a common law court, they could petition the King. The Lord Chancellor, who was a bishop learned in the civil and canon law, would personally handle these petitions. The bishop would hear and determine matters independently and make a decree in his own name. What we know now as the law of equity has its origins in the clergy's role in administering relief on the grounds of justice and conscience to people with difficult cases.

It was said that the Chancellor was the keeper of the King's conscience. Legal rights or the lack of a legal right could be addressed by the Chancellor on a case-by-case basis. There were no standard rules or enshrined principles that had to be followed. It was a personal decision by the Chancellor made on the basis of what he thought was fair.

The Chancellor would give or withhold relief, not according to any precedent, but according to the effect produced upon his own individual sense of right and wrong by the merits of the particular case before him; no wonder that Selden could say that "Equity is a roguish thing. For the law we have measure ... equity is according to the conscience of him that is Chancellor, and as that is longer or narrower, so is equity." Tis all one as if they should make the standard of the measure a Chancellors foot.<sup>7</sup>

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<sup>7</sup> Hanbury's *Modern Equity* (9<sup>th</sup> ed, Stevens & Sons Ltd) p 5.

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From the Chancellorship of Sir Thomas Moore (1529-1532), it became usual to appoint legally trained chancellors. Once lawyers took on this role, the focus gradually moved away from the individual conscience of the Bishop Chancellor to one based on common rules and precedents. Fairness and justice moved into the context of procedural fairness to all based on having common standards and common justice. This made it easier for lawyers to measure justice and equity for their clients. Equity and the common law were merged and the legal culture developed into the adversarial system where judges viewed from above lawyers advocating their client's strategic position. The judge was required to dispense justice dispassionately in accordance with the law.

The Towards Healing and Healing Steps processes mark a conscious shift by the Church to take a more hands on, pro-active role in dealing with the victims of sexual abuse. It is almost a step back in time to the days of the ecclesiastic chancellor. Under Towards Healing and Healing Steps, the bishop or head of a religious order meets with the complainant on a one-on-one basis to administer relief to the victim based on a sense of justice and conscience irrespective of whether the complainant has a provable legal right of action against the Church. A professional mediator is present to manage the interaction. It is certainly not a dispassionate process.

There is no uniformity in the amount of financial assistance paid to complainants to help them move forward with their lives. It is the same as in 13th century England, ie it is measured by the length of the bishop's foot. Some bishops have very big feet and others have quite small ones.

No system is perfect for helping the victims of sexual abuse move forward with their lives. However, the Towards Healing and Healing Steps approaches do offer opportunities for the victim and the Church to reconcile at a personal level. While this cannot undo the damage of the original and secondary effects of the abuse, it can lead to something that is beyond compensation. It can open the door for the victim to move forward with his or her life by experiencing the transformative effects of *empowerment and recognition*.<sup>8</sup>

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<sup>8</sup> Baruch Bush RA and Folger JP, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (Jossey-Bass Publications, 1994).

# Conflict Management in the Family Field and other Close Relationships

## Mediation as a Way Forward

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### Chapter 7.

## Mediation as a Process for **Healing**

By Mediator Greg Rooney

*Mediating the effects of sexual and physical abuse within religious institutions and the lessons that can be applied to mediating disrupted relationships.*

Can mediation be recognised in its own right as a valid and effective process to help people who have suffered a deep emotional trauma move forward with their lives? Can it be used as an agent for healing in situations involving people who have suffered deep emotional hurt through the actions of others?

It is rare for any dispute to come before a mediator without a significant emotional element in play. High levels of emotion are not just restricted to family law disputes; they can also be observed in most areas of conflict, including commercial and organisational disputes. Parties who have lost money or feel betrayed in commercial disputes can be overwhelmed by the emotions of loss, despair and rage. While it is often said that mediation is carried out in the shadow of the law (Mnookin & Kornhauser, 1979), it can also be argued that it is carried out in the shadows of the parties' emotions.

It is quite natural for people, at the focal point of their conflict, to feel strong emotions, emotions which usually dissipate once the core issue has been resolved. However, many people live with deep emotional trauma caused by events that are not related to the issue in dispute. Mediators might feel that a sudden outburst of emotion is caused by the issue under discussion, when in fact it might be symptomatic of a much deeper emotional malaise.

The issue for mediators and the mediation field is how to distinguish between emotions generated by the heat of the moment alone and emotions born out of a deep psychological trauma. At what point in the continuum of emotional disturbance and trauma does mediation, as a method of resolving practical issues, cease to be appropriate? Should mediation be denied simply because one or both parties is suffering from a pre-existing deep emotional trauma that has been reignited by a dispute?

Family and relationship breakdowns are a common cause of conflict in the community. Their prevalence exposes a significant section of the population to the traumas of separation. Many people in long-term relationships can, over time, become emotionally enmeshed. Not only is the ending of a relationship a traumatic event in itself, it can trigger a resurgence in any latent emotional wounds and traumas. These latent traumas can be the result of many factors, including the effects of the disrupted relationships of the parents of those experiencing such traumas.

It is ironic that, at the time when separating parties are required to decide extremely important practical issues such as where the children will live or how to divide the property, they are emotionally at their most vulnerable. Mediation can play a valuable role as an alternative to adversarial litigation, in helping people resolve these important practical issues.

This paper will examine the issues of dealing with heightened emotions in the mediation session, identifying deep psychological traumas, and assisting those who experience them to resolve disputes by way of mediation. It will do so in the context of claims of child sexual abuse by clergy in religious institutions. It will focus on the process of delivering an apology and offering assistance to the victims which will help them move forward with their lives. It will seek to consider transferable skills and approaches that can be applied to mediating family law disputes where one or both parties has a significant long-term emotional trauma.

In many respects, religious communities are like families. There is a hierarchy and a collective group mentality bonded by deep spiritual beliefs. The sexual abuse of young children within that community can have a devastating emotional impact, not just on the victim but on the group as a whole. Many victims of child sexual abuse complain that, not only are they emotionally damaged, they have also lost their connection to their religious community.

This abuse can have long-term effects on the young victim's ability to form and maintain relationships, and often eventually results in quite traumatising relationship breakdowns. Many such breakdowns are caused by the hidden effects of childhood sexual abuse. Much of this can be hidden, because many people do not disclose even to their partners that they have suffered this form of abuse, leaving its presence to go unnoticed — even with very effective pre-mediation conferences.

This paper's particular focus will be on mediating the apology and the provision of retrospective reparation by the church for abuse by the clergy. The examination will be from the perspective of the practising mediator, and will not focus on restorative justice procedures between the victims of sexual abuse and the perpetrator.

This topic will be looked at from three different but interconnecting perspectives. Firstly, it will explore some techniques and approaches that can be used by the mediator to prepare parties for the mediation, especially identifying and focusing on the role which heightened emotions play in the process. Secondly, it will consider the mediator's relationship with his or her own emotions, memories and desires, as well as the urge to understand and help, and examine how these influence the dynamics of the mediation session. Thirdly, it will explore

the process architecture of a number of differing dispute resolution systems that have been put in place by religious organisations and complainant groups to pursue or manage claims of sexual abuse.

*Techniques and approaches to manage the mediation session in a highly charged emotional context*

Mediating between parties who have suffered deep emotional trauma can present many difficulties and risks for the mediator. The onus is squarely on the mediator to assess the parties' suitability for mediation fully, prior to undertaking the session. The primary duty of the mediator is to do no harm. Mediating between victims of sexual abuse and religious institutions falls into this category.

These mediations have added difficulties, partly because the abuse took place when the complainant was a child and extremely vulnerable. There appears to be a common pattern to the way perpetrators groomed their victims. They generally targeted young boys and girls just prior to puberty or in early puberty; they focused on young children whose parents had a close connection with the church, thereby allowing them access to the children in the parental home. Their preference was to target the more spiritually inclined children, who were generally more trusting of religious figures. They kept well away from the more robust and streetwise children; the more spiritually inclined child is likely to be easily threatened and embarrassed into not making a complaint.

More often than not, the young victims were able to suppress these traumatic events for a number of years by simply getting on with their lives. Often the emotions would lie dormant until middle age, when long-term memories of traumatic events would begin to resurface. In the last few years, victims have also faced constant publicity of sexual abuse cases in the media. All of this has contributed to the re-emergence of the symptoms associated with the deep emotional trauma, and the shattering of their sexual identity by the original abuse. The issue for the mediator is how to manage these emotions sufficiently to allow a constructive meeting between the complainant and the religious leader to take place safely.

In some respects, mediating with people who have suffered sexual abuse is somewhat easier, in the sense that it can be readily assumed that the complainant has suffered a deep emotional trauma by the event. Therefore, the mediator is 'on notice', and can take the appropriate precautions, where in family law cases the presence of a deep emotional trauma can be masked.

The importance of a pre-mediation meeting with both the complainant and the church representatives cannot be underestimated. The aim is for the mediator to make a reasoned determination as to whether the complainant is emotionally capable of receiving some benefit from the mediated meeting, and to avoid re-traumatising the complainant.

The following are some techniques that can be used to assess the capacity of the victim to take part in the mediation. They attempt to identify how far the complainant is along the continuum of readiness to move forward with life. This is the key issue. However, it has two distinct parts to it. Firstly, have victims reached the point where they are ready to revisit the abuse through meeting the current head of the religious organisation? And secondly, are

they ready to move beyond the actual meeting with the current head of the religious organisation in question — and, if so, what might that ‘movement beyond’ look like? In being asked to focus beyond the mediation, victims’ capacity to disengage from the past is being tested.

There are two questions that can be helpful at this point. The first is to ask complainants to assume that the forthcoming mediation meeting turns out to be a success. They are then asked whether they are able to visualise sometime in the future when things might be better than they are at present, and, if so, what that would look like. The purpose of this question is to ascertain whether complainants have the capacity to look to the future. Some complainants say that they cannot see a future, and that they can only consider the prospect of suicide. In such situations, complainants are certainly not ready for a face-to-face meeting. Others, while struggling with the question, are able to turn their minds towards a future point. This is a good indication that they are sufficiently robust to at least consider the possibility that they can move forward with their lives.

There is some similarity between the purposeful framing of this question and the objects of solution focused therapy (de Shazer 1985). However, in cases such as those discussed here, framing is used more as an assessment tool to determine how the victim might cope with exploring the future. Over the years, I have trialled a number of forms of this question; however, in a heuristic sense, I have found that form of words to elicit the best response. (The question was adapted from a course in Dispute System Design with CDR Associates in Boulder, Colorado, 1994.) When designing a dispute resolution system for an organisation, it was suggested that the question be posed — *“if the system were to work well, what would it look like?”*

Another technique for assessing the emotional capacity of the complainant is to suggest, in the pre-mediation meeting, the following: “although you are a mature person and can think like a mature person, it is the  $x$ -year-old boy or girl (where  $x$  is the age at which the sexual abuse occurred) that will be meeting the religious representative”. I have found that victims’ responses to this question can indicate how far they have emotionally progressed. The purpose is not to get an answer from them, but to plant the thought in their minds, opening them up to a different way of thinking about themselves in relation to the forthcoming meeting. In fact, any answer they give at the time is not important. The most powerful questions a mediator can ask are ones that do not need to be answered.

I have found it helpful, at an appropriate time in the mediation session, to ask complainants how the  $x$ -year-old boy or girl is feeling at that moment. It often allows them to reflect openly on their progress. It also helps the religious leader to understand that, while the person sitting opposite them appears calm and rational, there is a fragile and emotional person within.

### *The apology*

There has been much written on how to make an effective apology (Schneider, 2000; Deutschmann, 2003). The most effective apology is one that is not prepared in advance. It is one that evolves out of a process of listening, and allows an emotional connection to form in the here and now of the session. If this can be achieved, then the words that follow often do

not automatically need to contain the actual word 'sorry'. The power comes from the emotional connection and energy that flows from the interaction between the giver and the receiver. It is the sharing of this emotional experience that gives the apology its healing force.

To help achieve this, it is important to prepare both the complainant and the religious leader for the mediation encounter. Many senior religious figures are of an advanced age, and have spent many of their later years in administrative positions. They can tend to take a somewhat academic or intellectual view, from reading the history of the abuse and the medical reports. A way of breaking down this intellectualism is to ask religious leaders not to prepare any formal apology in advance of the mediation. They are asked to sit quietly while complainants give their thoughts and feelings about how they feel at that particular moment.

Complainants too are requested not to prepare for the mediation. They are advised that the opening question to them at the beginning of the mediation session will be "what thoughts come to you about all of this, as you sit here today?" This is a deliberately open question. Most complainants at first struggle when trying to collect their thoughts and express their feelings. This allows church leaders time to find a connection with claimants before being asked to speak. At this point, the mediator tries to hold the space and to encourage the complainant to continue. When the mediator feels that the complainant has expressed him- or herself sufficiently, the mediator will turn to the religious leader and ask them to reflect on what has been said. It is often interesting to watch senior religious figures also struggle with their words, a struggle which forms the basis of a personal connection between the two. This emotional response from church leaders, if they allow themselves to properly engage with complainants, can often demonstrate a more profound sense of sorrow and regret than any formalised set of words.

#### *Mediators' relationship with their own emotions, memories, desires and understanding*

Parties in mediation who are suffering a deep emotional trauma require very sensitive handling by a mediator. It is not sufficient to have good pre-mediation structures in place and a good pre-mediation conference. The other essential ingredient is the mediator him- or herself. To undertake this form of work, mediators have to be really clear about their own emotional status, so that it does not exacerbate the parties' own emotional state. The mediator's presence in the room has as much impact as that of the parties.

A mediator is not an empty vessel. Mediators bring all their own life experiences and their own particular traumas into the room. We should not assume that we sit in the session passively observing the proceedings while occasionally drawing from our toolbox of skills to make interventions here or there. A mediator's emotions, desires and beliefs and worldview all have an impact on how s/he behaves in the session. It is important that we recognise this, and accept they mediators have these impulses, which influence their behaviour. This awareness allows mediators deliberately to let go of any of these attachments, so as to be totally present in the here and now of the session. It is important that mediators are able to create a safe space for the parties, without letting their own emotions and beliefs impinge.

So, how does a mediator suspend or detach from his or her emotional responses and desires, so as to remain totally attuned to both parties' reactions and emotional status?

Wilfred Bion (1967) looked at this issue from the perspective of an analyst. He suggested that, to be fully present in the here and now of the session, the analyst had to detach from his/her memories, desires and the need to understand what was happening at a particular point in time. The problem, he said, was not having memories, desires and an interest in understanding what was happening; we all have these urges, and he suggests that it is not about forgetting them. What is required is a deliberate act of letting go of an attachment to such urges within the session. The problem with having memories, desires and a need to understand is that they occupy a space in the mind of the therapist that should be left empty for something new to enter.

Bion drew on Freud's elegant and insightful passage on the techniques of analytic practice, where he suggested the state of mind that physicians who wish to practice analysis should develop:

*"It consists simply in not directing one's notice to anything in particular and in maintaining the same 'evenly-suspended attention' (as I have called it) in the face of all that one hears. In this way we spare ourselves a strain on our attention which could not in any case be kept up for several hours daily, and we avoid a danger which is inseparable from the exercise of deliberate attention. For as soon as one deliberately concentrates his attention to a certain degree, he begins to select from the material before him; one point will be fixed in his mind with particular clearness and some other will be correspondingly discarded, and in the making of this selection he will be following his expectations or inclinations. This however, is precisely what must not be done. In making the selection; if he follows his expectations he is in danger of never finding anything but what he already knows; and if he follows his inclinations he will certainly falsify what he may perceive. It must not be forgotten that the things one hears are for the most part things whose meaning is only recognised later on" (Freud, 1912, p. 432).*

What Freud is suggesting is that therapists allow themselves the space to experience the new, and do not try to understand it until after the experience has been completed. Bion has suggested that if we over-invest in our need to understand what is happening, or become attached to our memories and our desires, it can prevent us from sharing the parties' experience. He postulated that people only grow or evolve through "experiencing an experience" (Grotstein, 1981). He also recommends that we should be open to allowing ourselves to be surprised (Havens, 1989). Freud suggests that it is important that we can fully experience what happens in the session before allowing our thoughts to crystallise. Both Freud and Bion, in effect, recommend de-cluttering our brains, so that there is space for the new to enter. It is by allowing this empty space to be filled with what is actually happening in the here and now of the session that triggers the mediator's intuition response. This response can aid the mediator in deciding what to do next in this session (Rooney 2007).

Theorists such as Zariski (2010) suggest that theory, rather than intuition, should inform the mediator's view of any situation. However, in mediations involving people with deep emotional stress and high levels of conflict, it is important for the mediator to be fully

present to monitor proceedings at each moment. The mediator must be ready to respond instantly. The pre-mediation conference is the opportunity to question and test the complainant in preparation for the mediation session; theory can help us make sense of what happened in that session. However, once the mediation session starts, it is the mediator's prime role to hold the space and respond when required. Our response has to be instantaneous and relevant to what is occurring at each particular point in time. While mediation theory might frame a lot of what we do, it can unwittingly distract us if we stop to ponder the theoretical implications of what is happening before us. Theory is best if it used as a post-mediation reflective tool.

Our memories and desires can seem so natural to us that we can assume that anyone who does not see the world as we do must be somehow wrong in their thinking. We can make the assumption that our worldview and our observations are valid and correct. This is referred to as naïve realism (Ross and Ward 1996, Zariski 2010).

Naïve realism is based on the premise that some people believe that they see the world clearly, and that those who do not share their view see the world through biased eyes due to incorrect beliefs. It is therefore important to be aware of one's own sense of realism, and that it might be divergent from others'. Again, it is not problematic to have differing perceptions of reality; what is problematic is if we become attached to our own worldviews.

If mediators begin to focus on their own emotions and desires, or start assuming that the parties see the world as they see it, they then create obstacles which prevent their being fully present in the here and now of the session.

Other factors can also influence how we behave in the mediation session. People in the helping professions (such as therapists and mediators) can be drawn to these professions by the natural desire to help people. While this desire is admirable, it can have the unintended consequence of distorting our behaviour as professionals. Salzburg Wickenburg (1970) addresses some of these issues in her advice to social workers. She warns against this desire to help, and suggests that it must be tempered by what is realistic and beneficial to the patient. She submits that this need to want to help can lead to social workers seeking approval from the patient, in being reassured that they are providing something of value. The focus thereby moves away from the patient's needs to those of the social worker. This can blur the professional distance that social workers, mediators and other professionals need to maintain when dealing with patients or clients, especially those who have suffered a deep emotional trauma. It can lead to a more directive or parental stance, resulting in a more interventionist style.

The mediation of an apology in sexual abuse claims is enhanced by the ability of complainants to express their thoughts and feelings freely, and the openness of church leaders to receive them. The mediator's role is to create a safe place and to hold that space, allowing such an interchange to occur. The ability to be in the moment and to observe both the claimant and the church leader clearly is extremely important. This helps determine when to turn to the church leader and ask for his/her thoughts on what the complainant has said. The interchange between the complainant and the church leader that follows forms the basis of the apology.

### *Process Architecture*

Preparation is always extremely important for the success of a mediation, especially for parties and disputes with the potential for a highly-charged emotional exchange. All issues leading up to the mediation need to be considered and designed so as to support not only the parties but also the mediator.

A mediation does not typically take place in isolation; there is always a process leading up to the first mediation session, which in turn gives the mediation a context. This context is a construct of the drivers that led the parties to choose mediation, the dominant mediation model that is agreed upon, the jurisdiction within which the mediation takes place and which any agreement will be subject to, and other factors including the choice of venue, the presence or otherwise of legal representation and support personnel. The mediation takes place in the shadow of these factors, all of which influence what happens in the face-to-face session.

This influence has a subtle but significant effect on the parties and the mediator within the mediation session. It is similar to the influence that the architecture of a building has on its inhabitants. The shape, design and ambience of a building and the effects of light and shade have an impact on those who inhabit the building. In much the same way, the architecture and shape of the context or process within which the mediation takes place has a direct impact on the behaviour of the parties and the mediator.

It is therefore important fully to consider the design of the process architecture that is built around the mediation session, particularly where the parties have suffered deep emotional trauma. The underlying process architecture is more than just carrying out an effective pre-mediation meeting.

### *The Process Architecture of the "Towards Healing" process*

The sexual abuse of young children by religious clergy can result in significant psychological damage and emotional trauma, which can impact on children for the rest of their lives. Any attempt to mediate between victims and current church authorities has to proceed with caution. An example of a process architecture that is supportive of both the parties and the mediator is one set up by the Catholic Bishops of Australia in 1996 to resolve complaints of sexual abuse made against the church. This process has been called "Towards Healing", and has been refined and developed over the past 16 years (Parkinson 2002, Rooney & Ross 2007).

The essential feature of the architectural design of this process is that it is voluntary, and open to anyone who wishes to make a complaint of sexual abuse and who is willing to enter the program. Its primary focus is to deliver a pastoral response to complainants without them needing to prove legal liability.

Other features include the creation of a Professional Standards office in each state of Australia to manage all complaints of sexual and physical abuse. Although this is a church body, it is designed to be one step removed from the clergy about whom the complaints are made. The director of each Professional Standards office is required to advise complainants

of their rights to make a formal complaint to the police or to take civil action against the church. The director is also required to assist complainants in contacting the police, and to act with concern with respect to their well-being in cases where they choose to pursue civil claims against the church.

If a complainant chooses either to go to the police or to commence legal action, then the process is suspended until such action is completed. The Towards Healing process is specifically designed for people who do not want to or are not able to mount a successful legal case for compensation. It does not depend on the complainant proving that the church is legally liable for the abuse. All that is required is, firstly, that there is evidence that the complainant was actually present at the time of the alleged abuse, and that on the balance of probabilities the alleged abuse occurred. Even in situations where, for historical reasons, the complaint cannot be verified because of the passage of time, there is still provision for a pastoral response from the church.

The Towards Healing process is a good example of a process architecture that has a direct impact on a face-to-face mediation session. The most important part of the design is that the complainant has direct personal contact with the director of the Professional Standards Office throughout the investigatory part of the process. The complainant is given personal assistance in progressing the complaint, and can be provided with immediate counselling at the expense of the church if in emotional distress.

In many cases, complaints can be quickly accepted in a short space of time, especially where the accused has a well-documented history of abuse. There can sometimes be delays in the assessment process, due to lack of records and other factors. At all times, the director of professional standards maintains personal contact with the complainant. There is a requirement on the director to limit the number of times complainants have to relate their story.

For the mediator, this process can be of great value. By the time the complaint is ready for mediation, the director has built up an understanding of the complainant's needs and fears. The mediator is then able to build on that work. In difficult and highly emotional cases, much of the groundwork in preparing the complainant for the session can be undertaken, including the provision of significant amounts of therapy prior to the face-to-face session.

The other advantage is that the Director of Professional Standards can work with bishops and heads of religious organisations who will be present at the face-to-face meeting. The director can help church representatives to prepare for the mediation session by getting them into the right frame of mind for the meeting.

For victims of sexual abuse, it is important that not only do they get an apology but they also get something that is a real and tangible representation of acknowledgement — usually money, or some direct in-kind assistance. In a family law separation, both parties also require something that is a real and tangible representation of their contribution to the relationship. The true value of someone's contribution to a relationship over many years or the loss caused by being sexually abused as a child is incalculable. Therefore any attempt to perform such a calculation can trigger a significant emotional response.

The Towards Healing process attempts to address this issue by using the word 'reparation' rather than 'compensation'. This is an attempt to acknowledge that no amount of money can repair the damage caused by this form of abuse. It seeks to differentiate itself from a court process that is simply designed to measure a loss. The prime aim of Towards Healing, as its name implies, is to help victims move forward with their lives. The Towards Healing process defines reparation as:

*“ A monetary sum or some form of in-kind assistance that is directed to the provision of practical means of support in order to promote healing for the victim. It is provided by the church authority as a means of recognising the harm suffered by a victim of a criminal offence or civil wrong, and as a tangible expression of the church authority’s regret that such abuse occurred. Reparation may be offered independently of whether the church authority is legally liable.”*

Paragraph 41 of the the Towards Healing principles and procedures document outlines the outcomes that relate to the victim. This section provides :

*“ 41.1 in the event that the church authority is satisfied of the truth of the complaint, whether through admission of the offender, a finding of a court, a penal process under canon law, an assessment under these procedures or otherwise, the church authority shall respond to the needs of the victim in such ways as are demanded by justice and compassion. Responses may include the provision of an apology on behalf of the church, the provision of counselling services or the payment of counselling costs.*

*41.1.1 financial assistance or reparation may also be paid to victims of a criminal offence or civil wrong, even though the church is not legally liable.*

*41.2 a bishop or leader must seek the advice of the consultative panel in determining how to respond to the complaint.*

*41.2 and the church authority may seek such further information as it considers necessary to understand the needs of the victim, including a report from a suitably qualified and independent professional concerning the impact of the abused on the victim. Such a report will be at the church authority’s expense.*

*41.3 the facilitation shall be the normal means of addressing the needs of the victim.”*

These protocols are built around the facilitative or mediation process, with a pastoral approach as its key driver.

There are a number of other approaches aimed at resolving sexual abuse claims against religious institutions. Firstly, there is the traditional legal approach, where complainants instruct lawyers to represent them in claims for damages against the church. In many of these cases, lawyers are happy to advise their clients to work through the Towards Healing process because it offers a without prejudice opportunity to resolve the matter quickly, as well as allowing clients to have face-to-face meetings with religious leaders as a way of obtaining some personal and emotional closure. If complainants are not satisfied with the

outcome of the Towards Healing process, they can still commence a civil action for damages against the church.

However, there are many lawyers who understand their duty to act in the best interests of their clients to exclude opportunities to obtain a personal apology from a religious leader. This group tends to see the lawyer's duty as limited to maximising the compensatory dollar return to their client. They often see the face-to-face apology as an attempt by the church to mitigate its own losses by providing some form of on-the-spot healing, and take the attitude that, the longer their client is able to remain in a distressed state through the negotiation period, the better their dollar return. They therefore resist any attempt at a face-to-face apology.

The process architecture of this approach remains adversarial and accusatory, and often includes the use of the media as a means of putting negotiation pressure on the church's representatives. The negotiations hinge only on the strength or otherwise of the complainant's legal case. The claims are often drawn out over a longer period of time, with significantly higher legal costs. This process architecture has a marked effect on the mediation session, with some lawyers keeping the client well away from the church leader and, in some cases, away from the mediator.

Some lawyers request access to the Towards Healing process as a vehicle for negotiation, but do not want a face-to-face meeting nor any pastoral element other than monetary compensation. This issue was dealt with in a recent review of the Towards Healing program by Professor Patrick Parkinson from the University of Sydney. In his second review in 2010, Professor Parkinson made the following comments with respect to the two approaches for dealing with victims of abuse:

*" The first is the legal approach-both to complaints and accused. The strengths of this approach are the emphasis on due process including proving claims to a requisite standard, assessing compensation fairly in accordance with the objective gravity of the harm caused, and treating like cases alike.*

*The second is the pastoral approach of giving a compassionate response, seeking to promote healing for the victim, and to the extent that it is possible, bringing about some level of reconciliation between the victim and the church, while also being fair to the accused persons. This also has great strengths. It does not aim to offer a quality legal approach to the resolution of civil claims for compensation, but rather to engage in restoration and healing, acknowledging within that the importance in many cases of making reparation is a tangible expression of sorrow and also as a means, but not the only means, of promoting healing for the victim. The pastoral approach also needs to address properly the requirements of due process for the accused."*

There is a deliberate separation between the Towards Healing process and formal legal claims for compensation. If the complainant does not participate directly in the process, then by definition, it is not a Towards Healing case. However, even within the Towards Healing protocols there have evolved two different variations with respect to the process architecture for negotiating the amount of reparation.

The traditional approach is to provide the opportunity to deal with an apology and a resolution of the reparations issue at the one mediated meeting. This process proceeds along lines of a welcome and introduction by the mediator, the opportunity for the complainant to express his/her current thoughts and feelings about what has happened and where s/he would like to get to in the future, and a personal response from the church leader. There is then a break, followed by a negotiation to consider a fair and reasonable sum of money to represent a reparation. The parties' lawyers are usually in attendance, and take part in both the apology stage and the negotiation for the payment of reparation. These meetings usually take between three to four hours; in situations where final agreement on the reparation has not been completed, offers are usually left on the table for a number of weeks for parties to reconsider their positions.

An alternative approach favoured by some directors of professional standards is to have the negotiations with respect to the amount of reparations resolved by arm's-length negotiation before having the face-to-face pastoral meeting. If and when that agreement is reached, the face-to-face meeting is scheduled for the formal apology. The stated reason for this approach is that it avoids a situation where a complainant feels let down after the apology, particularly when the amount of reparation does not meet what s/he considers to be an adequate response.

While these two approaches both fall within the context of the Towards Healing protocols, they have a different effect on the dynamics of the mediation, as well as on the parties and the mediator themselves.

#### *Separating the apology from the calculation of reparation*

An example of a successful mediation program in which the apology was separated from the payment of reparation was the Goodwood Orphanage Program, developed by the Archdiocese of Adelaide and the Sisters of Mercy. The Goodwood Orphanage was set up in Adelaide in the early 1900s by the Sisters of Mercy. During the 1950s and 1960s, the orphanage exhibited a culture (or process architecture) of discipline, regimentation, corporal punishment and deprivation. This paralleled the post war culture that existed in Australia at the time. Two teaching nuns were appointed to live with and educate 100 orphans, 24 hours a day and seven days a week. Many of these orphans were British child migrants sent to Australia after the Second World War.

Over the last two decades, there has been a growing number of complaints from those orphans about the physical and emotional abuse they suffered at the orphanage at that time. The complaints included harsh and excessive physical punishment, bedwetting programs that involved ritual humiliation of the children, poor food, lack of the provision of a proper education, forced unpaid labour and the general lack of Christian love and compassion.

The archdioceses commissioned a study into what would have been considered a proper level of education and proper care practices for the time. Each complaint was measured against those standards, and when it fell below that general standard, a set amount of reparation was offered for each claim. The decision as to whether the care fell above or below that standard was referred to an independent lawyer for assessment. As with

Towards Healing, the process architecture of the Goodwood program had at its heart a pastoral response. This was achieved by providing an additional amount of money for extra services, provided the complainant agreed to a face-to-face pastoral meeting. The aim was to encourage the orphans to engage in the pastoral part of the process. At first, a small number of people took up this option. However, as the word spread from those who had experienced the mediation process and received the personal apology, more chose this option.

Each claimant knew in advance that his/her claims had been accepted, and knew the amount of reparation which would be received. The meeting provided an opportunity for claimants to give their personal accounts of what had happened, and to allow the current Sisters of Mercy to express their personal regret and sorrow. These meetings often ended in an emotional release, involving tears and hugs.

In a sense, the program worked because the Goodwood protocols contained an element of uniformity that reflected the culture of the institution at the time. The protocols effectively paralleled this, by looking at the levels of abuse in a group sense that reflected the shared institutional suffering of the orphans.

However, claims of child sexual abuse by members of religious orders are unique to each victim. In some sense, they lack the uniformity of the institutional abuse that occurred in the orphanage situation. For example: some victims suffered horrendous sexual abuse over long periods of time, yet through their personal coping mechanisms were able to cope with life reasonably — notwithstanding retaining a deep emotional scar. Others, whose abuse could be described as occurring at the lower end of the scale, suffer hugely disrupted lives through the deep emotional scarring of the event. It is thus much harder to characterise victims into groupings without appearing overly callous.

Negotiating the reparation package separately from the apology tends to put a focus onto a comparative mathematical exercise. It can descend into an exercise of comparing levels of abuse. However, combining the apology and the monetary negotiation provides a greater visible link between the two. Often religious leaders will be so moved by the interaction surrounding the apology that they will draw deeper into their financial reserves to assist the complainant — more than they would otherwise have done in the standard commercial arm's-length type negotiation.

The writer has experienced a situation in which two cases of child sexual abuse by clergy were resolved on the same day. The levels of abuse and the effects on both victims were very similar. The first was resolved under the Towards Healing protocols, with a personal apology given by the head of the religious organisation. The process took three months to set up from the first complaint. The reparation was 20% higher than what would have been the normal amount of reparation, mainly because the religious leader was so moved by the complainant's experience.

The second matter was the resolution of a class action of twenty claimants brought by a lawyer. They each received 20% less than the Towards Healing complainant. In addition, each of the claimants had to pay five times the legal costs to the lawyers than the legal costs

paid by the Towards Healing claimant. The class action took two years of bitter negotiations, and resolved without any formal face-to-face apology. This is one example of where the non-adversarial Towards Healing approach delivered a larger monetary package to the claimant, in addition to all the benefits associated with receiving a personal apology.

The difficulty with negotiating the reparation package first is that it can leave the more pastoral aspects of the process and the apology as simply a postscript. It can have the effect of downgrading the apology to a mere afterthought. Combining the apology and the negotiation for reparation in the one mediation session is a more holistic approach. It allows for a much more dynamic interaction to occur between the parties, and establishes a direct link between the apology and the reparation which stand or fall together. This creates a lot more pressure on mediators; however, if it is handled well by the religious leader, it can open the door to a greater level of experience and, in many cases, deliver a more profound apology.

The mediation of claims of sexual abuse has to proceed with caution. At all times, it has to be assumed that the victim has suffered some deep psychological impact that will have an effect on the process. All structures that are put in place to bring the victim and the church authority together have to have a process architecture that is supportive of both the victim, the church authority and the mediator.

### *Summary*

The presence of deep emotional scarring and heightened emotions by a party in a mediation creates unique challenges, both in deciding whether to mediate and — if so — how to mediate. This is applicable whether the issue is the division of matrimonial property, access to children in a family law dispute, or the apology to the victims of child sexual abuse within religious institutions.

The decision whether to mediate must be made carefully. The process of deciding must include continual assessment and monitoring of the party or parties. It is also important to encourage active involvement by the parties in helping make the final decision whether to go ahead with the process.

In court-appointed mediations or mediation arising out of a government or private sponsored programs, it is important that there is sufficient flexibility in the process architecture of those programs to cater for people who suffer from deep emotional traumas. The Towards Healing process and the Goodwood Orphanage Program are two examples of a process architecture that is both supportive of the mediator's decision-making process and promoting the ownership of the process by the emotionally damaged party. Some family law jurisdictions have adopted less adversarial processes, particularly in determining children's matters. They include options for court-appointed mediation to be part of the actual decision-making processes.

Once the decision has been made, and it has been accepted by all parties that the mediation should proceed, then the onus is on the mediator to manage the facilitation in such a way to maximise the chance of a resolution without re-traumatising any party. The key to achieving

this rests with mediators' ability to detach from their own emotional state. This allows the parties uncluttered space to engage with each other. Mediators can benefit from having regular supervision, particularly with respect to recognising and then detaching from their memories and desires.

It is the mediator's ability to achieve a form of reverie that allows him/her to be fully aware and awake and attuned to the parties' individual and collective needs. This is the key for any professional who works with people who have suffered deep emotional traumas. It allows the mediator to form a connection with the parties in the here and now of each particular moment of the session. For the mediator, it allows a more heightened awareness, and thereby greater access to his/her intuitive thoughts. This connection helps the mediator to sense when and how to intervene.

Mediation has a place in resolving practical issues for people who are suffering an emotional trauma, whether as a result of being the victim of sexual abuse, or through the trauma of a relationship breakdown. However, mediators need to be at one with their own emotions, and have the support of the institutions that are involved in this challenging area of work.

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