

# **Mediation in Care Matters – a Review of the Outcome Literature**

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## Introduction

The NSW Children's Court has embarked on a program of mediation in child protection matters. The court has offered mediation services for some years but it was given greater impetus with the Report of the Special Commission of Inquiry into Child Protection Services in NSW in 2008<sup>1</sup>. The Wood Commission found that even though there was a legislative basis for mediation<sup>2</sup> and that the Department of Community Services had entered into a Memorandum of Understanding with Community Justice Centres, alternative dispute resolution (ADR) was not being used 'to any great extent.'<sup>3</sup> The service which could have arisen as a consequence of the MoU was never used.<sup>4</sup> The purpose of the following paper is to locate research evaluating the impact of ADR in child protection matters, with a particular emphasis on mediation. Attempts will be made to describe the helpful and unhelpful elements of mediation. Comparative literature about the outcomes of mediation when assessed against litigation; and mediation in child protection matters and Family Law matters concerning children is also reviewed. There is research suggesting that significant proportions of Family Law court matters concern children who have been investigated for child protection issues.<sup>5</sup> Some attempts at critical analysis are made in the latter part of the paper. Social research in the field and reflective material is also considered.

The themes explored in the paper include: the meaning of the term 'mediation'; particular issues arising in relation to its meaning in Australian Aboriginal communities; the benefits of child protection mediation – high settlement rates, speedier resolution of matters, lower direct and indirect costs, high levels of satisfaction; comparative outcome research in the field of Family Law mediation; mediation and mental health and social interactions; topics which should be discussed in child protection mediation; dealing with domestic violence and sexual abuse; participation of children in mediation; obstacles to good mediation; the qualifications and attributes of good mediators; legal representation in mediation; reviving a failing child protection mediation program; special issues arising from mediation in Australian Aboriginal communities; and the dilemmas and limits of mediation.

## Meaning of Alternative Dispute Resolution and Mediation

There is some debate about the meaning of ADR and mediation. Some refer to ADR as any process which does not require a decision maker to determine a dispute, whilst others describe it as an alternative to adversary litigation.<sup>6</sup> There is consensus that mediation is a voluntary process 'in which a neutral third party mediator facilitates the negotiation of a dispute by the parties.'<sup>7</sup> In some mediation programs, the mediator conciliates also. This means that the he/she intervenes actively during mediation sessions, offering expert advice about the content of the evidence and the potential outcome of the dispute.<sup>8</sup>

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1 Referred to as the Wood Commission.

2 *Children and Young Persons (Care and Protection) Act 1998* NSW s 65, s 65A.

3 NSW Report of the Special Commission of Inquiry Into Child Protection Services in NSW, *Final Report* (2008), vol 2, 466.

4 *Ibid* 471.

5 In one study concerning Californian Family Law matters, 25 per cent of the cases had been investigated by child protection services - Isolina Ricci, 'Court Based Mandatory Mediation: Special Considerations' in Jay Folberg, Ann L. Milne and Peter Salem, *Divorce and Family Mediation*, 2004, 397, 400.

6 Stephen Bottomley and Simon Bronitt, *Law in Context*, (3<sup>rd</sup> Edition, 2006) 97.

7 *Ibid* 98.

8 Mieke Brandon and Tom Stodulka, 'A Comparative Analysis of the Practice of Mediation and Conciliation in Family Dispute Resolution in Australia: How Practitioners Practice Across Both Processes' (2008) 8(1) *Queensland University of Technology Law and Justice Journal*, 194, 196. Also in Rosemary Sheehan, 'Alternative Dispute Resolution in Child Protection Matters: The Victorian Experience' (2006) 59(2) June, *Australian Social Work* 157,

The positive features of child protection mediation are described as the development of options, providing an opportunity for the parties to participate in the process equally and 'power balancing'.<sup>9</sup> Some of the techniques used in mediation are: encouraging parties to focus on the best interests of the child, reframing<sup>10</sup>, positive connotation<sup>11</sup>, metaphoric story telling and the establishment of ground rules.<sup>12</sup>

### Evidence Based Research Concerning Outcomes

Mediation in family law and child protection matters has a considerable evidence base.<sup>13</sup> Thoennes is perhaps the leading researcher in the field of child protection mediation. She conducted one study of 146 cases maintained by mediators and she followed up 97 of these 15 months after a mediation session.<sup>14</sup> She also compared her sample with 48 matters of non-mediated cases. 70 per cent of mediated matters reached consensus on all of the issues, with another 20 per cent reaching an agreement on some.<sup>15</sup>

Sheehan writing about the child protection mediation experience in Victoria refers to one study in which 60 per cent achieved settlement.<sup>16</sup> This theme is repeated in many other research papers. Kathol's study found that full agreement was reached in 50 per cent of the time with a partial agreement reached in a great deal of cases.<sup>17</sup> Less than 25 per cent of cases in her sample comprised cases at which no agreement was reached.

Crush<sup>18</sup> reported that in the State of Colorado, settlement rates were 95 per cent; in Florida 86 per cent; in Nova Scotia 67 per cent; in the Victoria Child Protection Mediation Project 80 per cent; and the Surrey project 83 per cent.

Martin and Weller conducted a study of child protection matters where parties were appearing also in the criminal jurisdiction because of the same facts. Full or partial agreement was reached in 86

168. The conciliation model is a feature of mediation in the NSW Children's Court – see The Children's Court of NSW, Practice Note No. 3, *Alternative Dispute Resolution Procedures in the Children's Court*, 15.1.

9 Kelly Browe Olson, 'Special Issue: Child Protection in the 21<sup>st</sup> Century. Lessons Learned from a Child Protection Mediation Program. If at First You Don't Succeed then you Don't' (2003) 41 *Family Court Review* 1, 3.

10 Reframing refers to a modification of something said by a party, by the mediator in a supportive way to facilitate communication. See Salvador Minuchin and Herman Charles Fishman, *Family Therapy Techniques* (1981) 76 where they write, 'That the therapist's task is then to convince family members that reality as they mapped it can be expanded or modified.' The concept is explored in detail in Chapter 6.

11 Positive Connotation is technique which arose from the Milan School of Family Therapy. It refers to a mediator or therapist, reflecting back a negative statement or account of events by a party and highlighting its positive features in relation to the party and significant others. The aim is to offer a different interpretation of what was said, one which is perhaps opposite to that held by the story-teller. It also is an attempt to facilitate communication. See Mara S. Palazzoli, Luigi Boscolo, Gianfranco Cecchin and Guiliana Prata, *Paradox and Counter-Paradox* (1978) 58.

12 Allan Barsky, 'Community Involvement Through Child Protection Mediation' (1999) July/August 78(4) *Child Welfare* 481, 482.

13 Marilou Giovannucci and Karen Largent, 'A Guide to Effective Child Protection Mediation: Lessons from 25 Years of Practice' (2009) 47 January, *Family Court Review* 1, 1.

14 Nancy Thoennes, 'Dependency Mediation in Colorado's Fourth Judicial District' (2001) 41 February, *Colorado Lawyer*, 1,1.

15 Ibid 2-3.

16 Rosemary Sheehan, above n 8, 159.

17 Joan Kathol, 'Trends in Child Protection Mediation: Results of the Think Tank Survey and Interviews' (2009) January, *Family Court Review*, 1,6.

18 Linda Crush, 'When Mediation Fails Child Protection: Lessons for the Future' (2007) (23) 1 *Canadian Journal of Family Law*, 55, 63.

per cent of the child protection matters and 71 per cent of the criminal.<sup>19</sup>

Some studies also refer to a speedier resolution by way of mediation. Martin and Weller reported that processing times in their criminal sample were significantly lower – 84 per cent resolving in a single conference.<sup>20</sup> However, for care matters<sup>21</sup> the processing time was the same as through traditional civil process.<sup>22</sup>

Many child protection matters result in a treatment plan in their latter phase which describes performance expectations placed on parents and sometimes care givers to achieve within a period of time. Restoration of a child back to the care of the birth parents might be conditional upon their satisfactory performance or it may occur on the understanding that the plan is implemented concurrently. Thoennes found in her research that whilst treatment plans arising in matters which were mediated and those which were not were similar, they were executed more quickly when created through mediation.<sup>23</sup> Compliance rates were also higher.<sup>24</sup> Most cases in Thoennes' sample had a single session of mediation only, with the average being 1.3.<sup>25</sup> In another review of multiple programs, mediated plans were produced 1-2 months earlier than in matters which were litigated.<sup>26</sup>

It is recognised that whilst most social workers in child protection commence their interventions supporting families, in some cases they are required to take legal action against the parents in order to protect children.<sup>27</sup> When pitted against parents in litigation the social worker's initial role to help the family and children can become lost.<sup>28</sup> In British Columbia mediation programs have a specific goal of improving the relationship between the social worker and the family. The approach has two steps: an orientation meeting conducted separately with each party<sup>29</sup> and a facilitated planning meeting. During the first step, preliminary work is done where the parties are able to make opening statements, develop the story of their experience and describe their interests with the assistance of a mediator.<sup>30</sup> During the facilitated planning meeting, options are generated.<sup>31</sup> 77 per cent of cases conducted in this program complete within 40 days.<sup>32</sup> 93 per cent of the cases resolved in only one planning meeting.<sup>33</sup> This program is explored later as a good example of a mediation program which required significant resuscitation following failings during a phase of its development.

In one study the time from removal of the child to a final order was shortened by 30 per cent with the aid of mediation.<sup>34</sup> In another, resolution took 8-10 weeks.<sup>35</sup>

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19 John A. Martin and Steven Weller, 'Mediated Child Protection Conferencing: Lessons from the Wisconsin Unified Family Court Project' (2005) 6 Spring, *The Judges' Journal* 6, 7-8 and 48.

20 Ibid 7-8 and 48.

21 This is an alternative term for child protection matters.

22 John A. Martin and Steven Weller, above n 19, 7-8 and 48.

23 Nancy Thoennes, above n 14, 1 and 5.

24 Ibid.

25 Ibid, 1.

26 Kelly Browe Olson, above n 9, 5.

27 Ibid 3.

28 Linda Crush, above n 18, 66.

29 M. Jerry McHale, Irene Robertson and Andrea Clarke, 'Building a Child Protection Program in British Columbia' (2009) 47 *Family Court Review* 1, 7.

30 Kelly Browe Olson, above n 9, 8.

31 Ibid 8.

32 Ibid 8.

33 Ibid 8.

34 Linda Crush, above n 18, 61-62.

35 Ibid 63.

Another theme in the literature is the cost saving associated with mediation. In Surrey in British Columbia, the costs of mediated matters were between one third and one tenth of contested litigation matters.<sup>36</sup> There were also in-care cost savings of between \$12-14,000 per child.<sup>37</sup> The funding for a California mediation program occurred innovatively by way of a \$3 levy on each birth registration.<sup>38</sup>

Some similar and some different results to those described above have been found in the area of mediation in Family Law. Beck et. al. comprehensively reviewed the literature and described four themes related to outcome:<sup>39</sup>

- the efficiency of the legal process;
- client satisfaction with mediation;
- the impact of mediation on client mental health and subsequent relationships; and
- mediation process characteristics.

On the issue of costs the authors note that some studies suggest that mediation will save a couple 50 per cent when compared to couples who litigate.<sup>40</sup> However costs might be higher when there is a dual system in operation i.e. mediation and litigation.<sup>41</sup> Other studies suggest that mediated matters move more quickly through the court system because: the disputing parties are given the opportunity to be present in a room together to work towards a solution; they have a disposition towards agreement and a ready access to mediation dates when compared to list dates for court hearings.<sup>42</sup> The authors caution that mediation is not always faster.<sup>43</sup>

Satisfaction rates in child protection mediation are high. In one study which reviewed multiple programs rates were between 75-90 per cent.<sup>44</sup> In another, during the pilot phase, 85 per cent of families said that they preferred mediation; 100 per cent of single mothers preferred it and 79 per cent of the families felt that they had a real say in working out an agreement.<sup>45</sup> In the divorce and family mediation group client satisfaction with mediation varied between 33 – 90 per cent.<sup>46</sup> 30-50 per cent of clients who engaged in litigation were also satisfied.<sup>47</sup> Fathers were more satisfied with mediation than mothers in one study, but both men and women were equally satisfied with litigation.<sup>48</sup> The authors speculate that this outcome might reflect the perception that women were more likely to win custody disputes.<sup>49</sup> An encouraging finding from one study was that non-residential parents who undertook mediation in the divorce and family mediation group 'remained more involved with their children without increased levels of conflict.'<sup>50</sup> One paper suggests that this positive change was sustained even 12 years post divorce.<sup>51</sup>

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36 Ibid 61.

37 Ibid 61-62.

<sup>38</sup> Linda Crush, above n 18, 89.

39 Connie J.A. Beck, Bruce D. Sales and Robert D. Emery, 'Research on the Impact of Family Mediation' in Jay Folberg, Anne L. Milne and Peter Salem, *Divorce and Family Mediation*, 2004, 447, 448-9.

40 Ibid 449.

41 Ibid 450.

42 Ibid 451-2.

43 Ibid 452.

44 Kelly Browe Olson, above n 9, 5.

45 M. Jerry McHale, Irene Robertson and Andrea Clarke, above n 29, 2-3.

46 Ibid 454.

47 Ibid 454.

48 Ibid 456.

49 Ibid 456.

50 Ibid 465.

51 Ibid 466.

## Obstacles to Mediation

Specific obstacles to successful mediation in child protection have been identified as<sup>52</sup>: the difficulty of negotiating all or nothing agreements; a lack of time; parties not attending; mental health and/or substance abuse issues; an unwillingness to discuss the future of the children in any meaningful way; power imbalances; criminal charges; lack of support from judges.

## Mediation, Social Interactions and Mental Health

On the issue of mediation and subsequent interactions in the disputing couples in the divorce and family mediation group, the researchers suggest that changing the underlying pattern of interaction in a couple is very difficult.<sup>53</sup> There does seem to be an association between high conflict spouses and problems for children, regardless of the conflict resolution method used.<sup>54</sup>

In relation to mental health, if a parent is angry through the process of separation and proceeds to either mediation or litigation, it may protect him or her from developing depression.<sup>55</sup> This may help to explain why some in either the divorce and mediation group and the child protection mediation group seem intent on asserting their positions uncompromisingly, perhaps to contested litigation. The authors also note that the presentation of competing positions by lawyers during the course of contested litigation created lasting distress.<sup>56</sup>

Some studies in the field of Family Law suggest that mediation leads to less symptoms of depression for the parents, this having a ripple effect on the children.<sup>57</sup> Other studies suggest however that this may not be the case.<sup>58</sup> In one study, no behavioural or mental health differences were found in the children whose parents went through litigation when compared to those who underwent mediation.<sup>59</sup>

One author comments that an underlying feeling for parents facing divorce and custody issues and their children is humiliation.<sup>60</sup> One can speculate that this is experienced by some who go through child protection mediation and that it is exacerbated by the intervention of a government child protection authority. Whilst the privacy and confidentiality offered by mediation must assist greatly, it may suggest that mediators may in some cases need to find some way of addressing the way in which parents can save face in the long term. This might be difficult given that in all cases it is the parents' actions or inaction which led to the involvement of the child protection authority in the first place. In one study by Barsky about child protection mediation, not one family surveyed wished to have a long term working relationship with the child protection authority.<sup>61</sup>

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52 Joan Kathol, above n 17, 7.

53 Ibid 465.

54 Katherine M. Kitzmann and Robert E. Emery, 'Children and Family Coping One Year After Mediated and Litigated Child Custody Disputes' (1994) (8) 2 *Journal of Family Psychology*, 150, 156.

55 Connie J.A. Beck, Bruce D. Sales and Robert D. Emery, above n 38, 461.

56 Ibid 459.

57 Katherine M. Kitzmann and Robert E. Emery, above n 54, 150.

58 Ibid 150.

59 Ibid 156.

60 Janet R. Johnston, 'A Child-Centred Approach to High-Conflict and Domestic Violence Families: Differential Assessment and Interventions' (2006) (12) 1 May, *Journal of Family Studies*, 15, 16.

61 Linda Crush, above n 18, 72.

## What Topics Should Be Discussed in Mediation?

There is debate about what topics should be discussed in child protection mediation. One study suggests that the following are appropriate: living arrangements, parental contact, permanency planning, relinquishment, kinship care arrangements, and adoption.<sup>62</sup> Some respondents to this study indicated that no subject matter should be left off the table.<sup>63</sup> This issue is controversial.

Beck et. al. comment that mediation in Family Law disputes is contraindicated where there is a pattern of partner physical abuse.<sup>64</sup> Their concern is that mediation allows the pattern to continue even though no violence occurs in a mediation session. Spouse abuse occurs in the USA and UK in 25-28 per cent of married couples at some time in the marriage.<sup>65</sup> There is an association between domestic violence and all forms of child abuse. In 40 to 78 per cent of families where a mother is victim of domestic violence, child maltreatment also occurs.<sup>66</sup> Domestic violence however is under-reported. Beck et. al. suggest that it is under-reported in psychotherapy.<sup>67</sup> One suspects that under-reporting occurs in populations of people who present for child protection mediation. It is likely that in some child protection matters which proceed to mediation, where no domestic violence is reported, or suspicions unsubstantiated, that domestic violence has occurred. What complicates this issue is that there is evidence of false allegations of domestic violence permeating Family Law disputes. Again there is no reason to think that this does not occur in the child protection mediation matters. In a random sample of 300 Family Court of Australia files it was discovered that serious allegations of violence were made with little evidentiary support.<sup>68</sup> The same researcher expresses concern also that some serious allegations appear to be ignored.<sup>69</sup>

Martin and Weller comment that, 'There is a common wisdom among the mediation community and many domestic violence practitioners that issues of family violence should not be mediated.'<sup>70</sup> In their study of child protection mediation matters in Wisconsin in which there were also criminal concerns, their outcomes were positive: agreements reached in 85 per cent of care matters, and in 71 per cent of felony matters.<sup>71</sup> The authors stress that in their program, 'difficult cases' were mediated – those with multiple parents and relatives, long histories of family violence and involvement with the criminal justice system, substance abuse, mental health history and cross cultural issues. The authors go on to state that the program they reviewed, 'not only successfully handled civil and criminal child abuse cases using mediation child protection conferencing, but also produced better results in those cases than was typically being obtained through the normal trial process.'<sup>72</sup>

Thoennes comments that when mediation first commenced in child protection, judges would not refer matters where there were allegations of sexual abuse because of the concern that parent/s would simply deny. She concludes in her review that, 'Evidence shows that settlement is not

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62 Joan Kathol, 'Trends in Child Protection Mediation: Results of the Think Tank Survey and Interviews' (2009) January, *Family Court Review*, 1, 4.

63 Ibid.

64 Connie J.A. Beck, Bruce D. Sales and Robert D. Emery, above n 38, 467.

65 Kevin Browne and Martin Herbert, *Preventing Family Violence* (1997) 15.

66 Leslea Peirson, Marie-Claire Laurendeau and Claire Chamberland, 'Context, Contributing Factors, and Consequences' in Isaac Prilleltensky, Geoffrey Nelson and Leslea Peirson (eds), *Promoting Family Wellness and Preventing Child Maltreatment: Fundamentals of Thinking and Action* (2001) 85.

67 Ibid 469.

68 Lawrie Moloney, 'Violent Allegations in Parenting Disputes: Reflection on Court-Based Decision Making Before and After the 2006 Australian Law Reforms' (2008) 14, 2-3 October *Journal of Family Studies*, 254, 256.

69 Ibid 260.

70 John A. Martin and Steven Weller, above n 19, 48.

71 Ibid 48.

72 Ibid 48.

significantly affected by most characteristics, such as type of maltreatment or the stage of the legal process.<sup>73</sup>

### **Qualifications and Attributes of Mediators**

The Wood Commission specifically recommended that mediators be legally qualified.<sup>74</sup> Studies are less firm on this issue. Respondents to one suggested that mediators should come from a diversity of backgrounds and they should have particular characteristics.<sup>75</sup> These attributes include objectivity, evidence of ongoing professional training, cultural sensitivity, a capacity to empower participants where possible and principles based work.<sup>76</sup> Respondents indicated that mediators in their programs were lawyers, court staff, social workers, child welfare professionals and family mediators.<sup>77</sup>

For an unclear reason, in the Canadian province of Manitoba, judges are the preferred profession to conduct mediation.<sup>78</sup> This raises a particular dilemma if the mediation sessions are intended to be 'without prejudice' and they do not resolve all of the issues. The judge concerned would have to recuse him/herself following such a mediation. If he/she did not, it would not be possible for issues arising in the mediation to not influence the outcome of contested litigation.

Giovannucci and Largent sound a note of caution about the issue of the practice background of mediators. They reflect on the fact that in the early days of child protection mediation, mediators trained and working in other areas were recruited into child protection. They comment that, 'What we have learned is that some, not all, family mediators and mediators who work in other areas make good child protection mediators...'<sup>79</sup>

The stereotype of mediators is that they are good listeners and compassionate people who facilitate parties to create their own solutions. These are no doubt, essential attributes for mediators in many circumstances. Two authors writing about civil law mediation generally identified one study which concluded that the most successful divorce mediators were assertive.<sup>80</sup> Their discussion is also about civil disputes such as product liability cases and at their conclusion they identify specific assertive techniques used by judges when they act as mediators – arguing one attorney's case against the other; attempting to convince a lawyer that he/she has a distorted view of a matter; caucusing and commenting on the credibility of some of the evidence.<sup>81</sup>

### **Participation of Children in Mediation**

An issue discussed by some in the literature is the extent to which children capable of understanding the issues in dispute and the nature of mediation should participate in mediation. The Australian Law Reform Commission makes reference to one Scottish study of 28 children who had attended a conciliation concerning themselves.<sup>82</sup> 24 stated that they benefited from the experience.<sup>83</sup>

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73 Nancy Thoennes, above n 14, 5.

74 NSW Report of the Special Commission of Inquiry Into Child Protection Services in NSW, above n 3, [12.31].

75 Joan Kathol, above n 17, 3.

76 Ibid 3.

77 Ibid 3.

78 Linda Crush, above n 18, 81.

79 Marilou Giovannucci and Karen Largent, above n 13, 6.

80 James A. Wall and Dale E. Rude, 'The Judge as Mediator' (1991) 76, No. 1 *Journal of Applied Psychology*, 54, 55.

81 Ibid 59.

82 Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No. 84, (1997) [16.18].



Specifically they referred to improvements in communication and the opportunity to express their feelings.<sup>84</sup> The ALRC adopted the position that children should not be required to attend ADR but their involvement should be decided on a case-by-case basis of the wishes and the needs of the child involved.<sup>85</sup>

Jordan expresses concern about the lack of participation of children 12 years of age and over in child protection mediation. She argues that children are generally excluded from mediation. She refers to one US nationwide survey in 2005 which showed that in 50 per cent of mediation sessions, children were rarely or never present and in 30 per cent, the solicitor for the child was rarely or never present.<sup>86</sup> It is a particular concern that the solicitor is absent. Concerns<sup>87</sup> have been expressed within Australian jurisdictions that some solicitors acting for children, do not express their wishes and some do not speak to children to attempt to gain instructions.<sup>88</sup> One 12-year-old girl informed the ALRC that her solicitor would not speak with her despite her mother's request that he/she needed to.<sup>89</sup>

In some cases, when lawyers do seek instructions from children and they do not communicate them in proceedings, whether it be in litigation or mediation, perhaps what is occurring is that the lawyers are genuinely attempting to do what they think is best. Ross, writing about representation in matters of juvenile crime writes that lawyers 'sometimes found themselves doing what they thought was in the best interests of the child rather than acting strictly in accordance with the child's instructions...'<sup>90</sup>

Jordan argues for the following standards to be adopted by child protection mediators:<sup>91</sup>

1. The mediator must take reasonable care to properly assess the child's ability to participate and he/she should not rely on a single examination.
2. The mediator shall engage the child without sacrificing their neutrality.
3. The mediator shall conduct a face-to-face orientation with the child about proposed mediation.
4. The mediator shall discuss security issues arising about the mediation session with the child.
5. The mediator is to conduct the mediation in a safe and convenient setting.
6. The child's satisfaction should be measured.

The above standards seem reasonable at face value however:

- assessing the child's ability to participate requires the mediator to have a good understanding of child development and for him/her to consult with other relevant people (caseworkers, psychologists, independent children's lawyers) in the planning phase of each mediation session;<sup>92</sup>

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83 Ibid.

84 Ibid.

85 Ibid 16.19.

86 Krystal Jordan, 'Need to be Heard: Increasing Participation in Protection Mediation Through the Implementation of Model Standards' (2009) October *Family Court Review* 2, 6.

87 These concerns relate to litigation as well as mediation.

88 Australian Law Reform Commission, above n 81, [13.57-13.58].

89 Ibid [13.57].

90 Nicola M Ross, 'Legal Representation of Children' in Geoff Monahan and Lisa Young, *Children and the Law in Australia* (eds), 2008 Reed International Books, Australia 544, 565.

91 Krystal Jordan, above n 86, 7-12.

92 In my own practice as a mediator in child protection, I am significantly guided by the views of independent

- engaging the child and conducting an orientation might require the consent of all the parties to give them an opportunity to raise any objections about bias; and
- a face-to-face orientation could be time consuming and it's possible that some children might refuse.

Items 4-6 present no issues.

Jordan rejects the view that a child attending a mediation session will be traumatised by his/her participation. She believes that the rearrangement of a child's life without consultation is more traumatic.<sup>93</sup>

### **Representation of Parents**

In a related issue, it is a concern that one researcher in the field of child protection mediation found that some solicitors acting for parents did not properly represent their instructions. The researcher referred to this as the 'blurring over instructions' where a parent appeared willing to settle a dispute and their solicitor remained committed to contesting a matter at a hearing.<sup>94</sup>

### **Reviving a Problematic Child Protection Mediation Program**

It is important to consider the topic of child protection mediation at a program level. There is some literature describing difficulties which some providers have encountered, particularly in Canada. Crush comments that no province in Canada at the time of writing her paper had developed a workable model of mediation, despite several attempts. Some provinces have avoided creating mediation programs whereas others created them hastily.<sup>95</sup> In Nova Scotia for example, child protection workers offered some resistance to the establishment of a mediation program this being based on fear that it would undermine their roles.<sup>96</sup> In the Yukon social workers were disinterested in mediation.<sup>97</sup>

Crush comments that some child protection programs have been hampered by a lack of resources. This theme has been echoed in rural parts of Australia in relation to legal intervention about children generally. The ALRC commented that children in rural and remote areas have half the range of community services available to them when compared to those in urban regions.<sup>98</sup> Such services are often crucial to the practicability of treatment plans and they may have a bearing on whether restoration of a child to his/her birth parents can occur.

A mediation program in British Columbia commenced very favourably with high levels of satisfaction and good settlement rates.<sup>99</sup> Appropriate alliances were developed and policies. McHale et al comment however that,

'It became clear that we had underestimated the power of the existing culture and the durability of adversarial values that were deeply held by lawyers, judges, social workers

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children's solicitors in my pre-mediation consultations about the merits of a child attending a mediation.

93 Ibid 12.

94 Rosemary Sheehan, above n 8, 166.

95 Ibid 71.

96 Ibid 79.

97 Ibid 80.

98 Australian Law Reform Commission, above n 81, [4.52].

99 M. Jerry McHale, Irene Robertson and Andrea Clarke, above n 29, 2-3.

and administrators in the child welfare system. Words on paper--be it policy document or legislation--are not sufficient to displace long-standing values. If we change the system to introduce fundamentally new processes without changing the values of the people who work in the system, nothing happens except that the old values are asserted and ultimately undermine the new system.<sup>100</sup>

A planned approach was developed to deal with the above difficulties and it became known as the Surrey Court Project. The following steps were implemented:<sup>101</sup>

- mediation sessions became known as 'Facilitated Planning Meetings';
- ground level support was implemented by the employment of a senior social worker whose role was to promote the program;
- a pre-mediation orientation session was introduced conducted by the mediator with each party separately. During this session the process was explained to the parties who were then given an opportunity to explain their situation and to help them identify their issues and interests. This session helped all to focus on the next steps. Confidentiality was also explained at this phase.

The above steps proved to be very successful. It became possible to identify key personalities in the mediation process during the orientation sessions. Child protection social workers were able to participate without a fear that their role would be usurped and they also came to realise that the mediation sessions were a good use of their very precious time. Resistance encountered from families was dealt with by emphasising that the process was voluntary and by encouraging the attendance of support people. Lawyers also expressed initial doubts about whether a complex matter could be settled in one mediation session. Providing an opportunity for them to express their concerns proved valuable.<sup>102</sup>

The subsequent outcomes were outstanding.<sup>103</sup> Among other things, 89 per cent of cases were finalised in one facilitated planning meeting; 69 per cent were completed in less than 40 days; 83 per cent had all of the issues resolved; and the satisfaction ratings were 6.2 out of 7 for parents, social workers, lawyers and judges.

The process and outcomes of the program are described in the paper as having significant potential for servicing the First Nations people of Canada.<sup>104</sup>

### **Child Protection Mediation and Aboriginal Communities in Australia**

There is very little literature about indigenous child protection mediation and the author found no outcome literature using social research methods. Government services in the field of health and welfare in NSW have gained enormously by the recruitment of Aboriginal peoples both to provide knowledge and insights to non-Aboriginal service professionals and to deliver direct services to Aboriginal peoples. Aboriginal mediators are likely to be a benefit in the field of child protection mediation. However, such mediators will face unique issues.

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100 Ibid 4.

101 Ibid 5.

102 The discussion in this paragraph is a summary of Ibid 6-7.

103 Ibid 6-7.

104 Ibid 8.

A key theme in the general mediation literature is that a mediator must be neutral.<sup>105</sup> Some writers suggest that Aboriginal mediators are likely to have an interest in the particular disputes they mediate. Their interest might be to preserve harmony amongst the particular people they are attempting to assist.<sup>106</sup> This obviously may impact on an Aboriginal mediator's neutrality, however the advantage may be that because of the interest, he or she is trusted by the parties to the dispute.<sup>107</sup> Kelly writes, "That a mediator has intimate relations with the parties or direct knowledge of the situation may be regarded by the parties as beneficial in assisting them to reach a decision."<sup>108</sup> Behrendt and Kelly argue that despite such an interest, an indigenous mediator can still act impartially.<sup>109</sup>

Kelly writing in another paper, suggests that confidentiality is also a major challenge in indigenous dispute resolution because of what she refers to as 'the Murri grapevine.'<sup>110</sup> Despite the interconnectedness of Aboriginal groups, Kelly further comments that confidentiality may be the foundation upon which certain mediations can only take place.<sup>111</sup> It would be the case that if serious breaches of confidentiality are a major risk, that a mediation session cannot proceed.

Mediation of domestic violence issues which may impinge on child protection is likely to raise a major dilemma in Aboriginal communities. This is because, all support the notion that any intervention directed at protecting mothers and children is desirable, however, there is concern about the safety of Aboriginal men should they need to be placed in custody.<sup>112</sup> Kelly suggests that one strategy for dealing with this issue is to focus the mediation upon issues such as the residence of the children and contact, rather than the violence itself.<sup>113</sup> She favours restorative justice methods for dealing with the violence.<sup>114</sup>

Mediators when dealing with Aboriginal people may encounter greater displays of emotion than what they may be accustomed to. Behrendt and Kelly comment that in child protection mediations conducted by Aboriginal mediators the following has occurred: someone has:

- wept uncontrollably;
- become irate with the caseworkers representing the child protection authority; and
- labelled the situation as resembling what has been described in records of the *Stolen Generation*.<sup>115</sup>

The same authors also suggest that the notion of 'mediation' itself is likely to need greater promotion and clarification in Aboriginal communities. It could mean to some:<sup>116</sup> practices alternative to litigation in civil matters; or practices which are alternative to criminal justice procedures such as youth justice conferences or sentencing circles; or practices which are

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105 Ruth Charlton and Micheline Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners* (2004). 291.

106 Larissa Behrendt and Loretta Kelly, *Resolving Indigenous Disputes: Land Conflict and Beyond* (2004) 63.

107 Ibid 64.

108 Loretta Kelly, 'Mediation in Aboriginal Communities: Familiar Dilemmas, Fresh Developments' (2002) 5(14) *Indigenous Law Bulletin* 7.

109 Ibid.

110 Ibid.

111 Ibid.

112 Ibid.

113 Ibid.

114 Ibid.

115 Larissa Behrendt and Loretta Kelly, above n 106, 63.

116 Ibid 68.

alternatives to custodial sentences for criminal offences such as cautions, bonds or community service orders.

### **Limits of Mediation**

It is important to recognise that there are some difficulties with mediation per se. Concerns have been expressed about the possibility of procedural abuse in mediation and that it may disguise power imbalances between the parties.<sup>117</sup> In litigation, a skilled lawyer can mitigate the powerlessness of their client to some degree. The formal nature of litigation might protect the rights of some.<sup>118</sup> An appeal is not available usually from the outcome of a mediation yet it is in litigation.<sup>119</sup>

One author suggests that the availability of mediation in child protection places great pressure on defendants to settle.<sup>120</sup> Conversely some believe that plaintiffs can sometimes achieve better results by litigating. By encouraging them to mediate, the effect may be that they settle for less.<sup>121</sup>

With some issues such as violence against women and children, the confidential nature of mediation may be undesirable. From contested litigation important principles can emerge which are in the public interest.<sup>122</sup>

Litigation might be the preferred way of resolving disputes for some Aboriginal peoples who have been severely traumatised as the strong emotions associated with such experiences may make it difficult for them to engage meaningfully in mediation.<sup>123</sup> Negotiation can be very difficult from a position of psychological weakness. One obviously could not completely protect the traumatised from a re-ignition of their strong feelings and painful memories in the event of litigation either.

Thoennes describes further concerns that<sup>124</sup> mediation might not protect children; a compromise arising from mediation might not be in the child's best interests; the key issues, if they are not negotiable might not be appropriate for mediation and parental rights might be violated.

### **Final Remarks**

The preceding paper has been a review of both social research and reflective literature in the field of child protection mediation. Since its inception, it has been a great benefit to the field and the main beneficiaries have been children and parents. Practitioners and researchers need to however consider its limitations carefully. Evaluation with an emphasis on

- the relationship between child protection mediation and the long-term outcomes for children; and
- the nature of the compromises made by parties during the mediation process and how each party came closer to an initially opposing party's view;

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<sup>117</sup> Stephen Bottomley and Simon Bronitt, above n 6, 100.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

<sup>120</sup> Dana E. Prescott, 'Child Protection: Kinship and Family Group Conferencing' (2004) 19 Summer *Maine Bar Journal* 1, 7.

<sup>121</sup> Stephen Bottomley and Simon Bronitt, above n 6, 101.

<sup>122</sup> Ibid 100.

<sup>123</sup> Larissa Behrendt and Loretta Kelly, *Resolving Indigenous Disputes: Land Conflict and Beyond* (2004) 66.

<sup>124</sup> Nancy Thoennes, 'Child Protection Mediation in the Juvenile Court', (1994) 14 Winter, *The Judge's Journal*

could be a useful direction for future research.

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