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Mediation in Universities: Oil on Troubled Water or Perplexity in the Cloisters

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Abstract

Whilst universities are about understanding and knowledge (including knowledge of oneself), they are not immune from disputation at many different levels. This brief paper examines the incidence of mediation in policies of selected universities. It examines the understanding of mediation in universities through an examination of those policies. The question could be asked: Why is this examination of the policies and practices surrounding mediation important? The answer is that we need to know how universities perceive mediation because it gives us an understanding of whether mediation is well understood and whether the policies allow mediation to be effective means for solving problems. That is, if mediation practices are not well understood, it follows that the policies might be difficult to implement and the solution to problems may not be expedited.

First, some clarification as to the nature of mediation is necessary. Mediation is “a process by which parties to a dispute, with the assistance of a neutral third party (the mediator) identify the issues in dispute, develop options around these issues, consider alternatives and endeavour to reach an agreement which encompasses the underlying needs and interests of the parties.”¹ The mediator “has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted”.²

There has been some academic work on complaint handling and grievance resolution in universities, with a few articles devoted to disputes between university management and other staff and some focussing on disputes between staff and students. Stuhmcke wrote about the handling of student grievances against staff and the use of an ombudsman or dean of students in the process,³ whilst Ogawa focussed on disputes between international students and university management.⁴ But there was not much else so that, in 2005, Astor wrote that “there is no study that provides a picture of who handles disputes in universities, what training they have and what methods they use”.

Astor wrote that universities would save money and reputation by improving dispute handling procedures but she also noted that little attention had been paid to improving the process of dispute resolution even though alternative dispute resolution

¹ Ruth Charlton, *Dispute Resolution Guidebook* (Sydney: LBC Information Services, 2000), 5.

² Both definitions are drawn from the glossary of the National Alternative Dispute Resolution Advisory Council, http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/WhatisADR_GlossaryofADRTerms_GlossaryofADRTerms (accessed 1 April 2011).

³ Anita Stuhmcke, “Grievance Handling in Australian Universities: The Case of the University Ombudsman and the Dean of Students”, *Journal of Higher Education Policy and Management* 23, no. 2 (2001).

⁴ M. Ogawa, “University Grievance Handling for Overseas Students: ESOS Act and the National Code”, *AJ Admin L*, 10 (2003).

methodologies had been proved to work in other organisations.⁵ This challenge was not initially taken up by universities and it was left to the NSW Ombudsman at about the same time. Releasing a discussion paper about disputes in universities in 2004 based on an earlier survey, the Ombudsman stated that his concern arose out of a growing number of complaints and the increasing seriousness of the allegations.⁶ As a result of that survey, the Ombudsman released *Best Practice Guidelines* for complaint handling in universities in 2006.⁷ Those guidelines recommended, “ADR techniques should be employed wherever possible in complaint mechanisms. Mediation is one widely recognised technique of resolving disputes internal to an institution or arising from complaints or claims made against an institution.”⁸ The Ombudsman’s initiative in bringing university disputes into the realm of discussion and debate may have had some success, in that—on 18 February 2011—the Ombudsman hosted the third University Complaint Handler’s Forum, attended by representatives from all but one of the public universities in NSW.⁹

As with most matters concerning universities, dispute resolution has elements of confusion. Dispute resolution clauses are mandated in enterprise agreements and their earlier manifestations and mediation is sometimes mentioned in this context. Disputes under the enterprise agreement are concerned only with the provisions of the agreement; that is, any dispute that arises about an aspect of the agreement has to be decided using the dispute resolution provisions of the agreement.

⁵ Hilary Astor, “Improving Dispute Resolution in Australian Universities: Options for the future”, *Journal of Higher Education Policy and Management*, 27, no. 1 (March 2005), 49–50.

⁶ NSW Ombudsman, *Discussion Paper: Complaint Handling in NSW Universities* (2004) 1.

⁷ Ibid.

⁸ Ibid., B-7.

⁹ NSW Ombudsman, “University Complaint Handler’s Forum”, *Newsletter*, 25 February 2011, <http://www.ombo.nsw.gov.au/whatsnew/latestnews.html> (accessed 16 March 2011).

But there are many disputes that have no reference to the enterprise agreement. People may not be talking to others within the group or one group may not be talking to another for some perceived slight, some form of disagreement may occur between supervisor and supervised, there may be some matter of bullying. These do not fall under the umbrella of the agreement but are dealt with under other and various university policies. It is that latter group of grievances that this paper focuses on.

When it comes to these policies, significant differences occur around the policies and practices involving mediation. It's not rocket science to state that different constructions of mediation as a practice are likely to result from different understandings as to what mediation is. So, whilst it may be a "good thing" to have clauses about mediation and what it can do, those clauses will be framed by the writers' understanding of what mediation is. If there is little understanding of mediation practice it is likely that resulting clauses will reflect this lack of understanding of the nature and practice of mediation.

Is such a lack of understanding likely to result in a problem? Not necessarily although it is quite conceivable and just as likely that it will. In some instances a lack of knowledge of the nature and practice of mediation is evident from articles that purport to suggest ways forward in mediation, but display an ignorance of the practice in their zeal to reform.¹⁰

In some universities, mediation plays only a small part in the policies that cover grievances and complaints. Whilst the first step in grievance procedures at the Australian National University (ANU) is to have the complaint dealt with informally,

¹⁰ Dorothy Spiller, "ADR in the University: The Limits of a Problem-Solving Paradigm", *ADR Bulletin* 5, no. 8 (December 2002), 1-7.

the first stage in the formal grievance procedure may result in a recommendation that the “requesting parties seek mediation”.¹¹ However, there is no discussion about what this means nor how it is to be achieved and it is only one in a number of recommendations for action at the first level of dispute resolution. That is, there are no guidelines or further information as to how the requesting parties might seek mediation, nor how anyone else named in the process might be able to facilitate such mediation. Nor is mediation mentioned as a possible course of action at other levels of dispute resolution. Possible conclusions are that ANU hasn’t really thought through the processes of dispute resolution of which mediation is a significant player, or they have rejected the potential for mediation to resolve disputes.

The University of NSW also mentions ADR in passing. It too has a “Staff Complaint Procedure” which details quite carefully the procedure to be followed in case of staff complaints.¹² In this procedure, the only mention of mediation is in the “Informal Complaint Procedure” where one possible option is “the supervisor arranging a mediation or conciliation”.¹³ There is not further advice or statement about who should facilitate such mediation or other guidelines. Clearly, the procedure is lacking when it discusses mediation.

Some policies or procedures related to grievances or complaints make no mention of mediation. For example, Queensland University of Technology’s policy makes mention of conciliation, initially as a general approach at the first level of the

¹¹ Australian National University, “Procedure, Staff Grievance Resolution”, *Policies*, Approved on 19 August 2010, 31
http://policies.anu.edu.au/procedures/staff_grievance_resolution_procedure/procedure (accessed 21 March 2011).

¹² University of New South Wales, “Staff Complaint Procedure”, September 2009,
<http://www.gs.unsw.edu.au/policy/documents/staffcomplaintproc.pdf> (accessed 16 March 2011).

¹³ Ibid, part 5.3.

procedure where the matter may be resolved.¹⁴ The second level involves “further conciliation” which may involve “conciliation by an independent person” but such involvement is not mandatory. Nor are any guidelines provided as to how this process might take place.

Also in Queensland James Cook University (JCU) makes some attempt at using mediation in grievances.¹⁵ Its grievance resolution policy is not intended to be invoked in allegations of harassment or workplace bullying, in which case other policies and procedures are used. Under the policy, mediation is invoked in the second level of a dispute; that is, after the action in the first level, involving face to face discussion with the other party. The mediation process is not explained in the policy; however, the mediator must be independent and neutral.

At JCU, mediation is also recommended in the Discrimination and Harassment Policy. However, the mediation that is mentioned here seems different from that of the Grievance Resolution Policy. In the Discrimination and Harassment Policy, mediation is not carried out by an independent and neutral mediator, as required in the other policy.¹⁶ Here, the director of equity counselling and careers or her nominee may “act as an intermediary between the parties with the aim of reaching an agreed solution”. There is no indication that the director of equity etc is independent and neutral. Another, form of mediation is mentioned, which is probably unique to JCU; co-mediation, which is “two advisers work together, one working primarily with the complainant and the other with the respondent. This option can

¹⁴ Queensland University of Technology, “B/10.1 Grievance resolution procedures for workplace related grievances and bullying”, *Manual of Policies and Procedures*, 27 July 2007.

¹⁵ James Cook University, “Grievance Resolution Policy”, 3 August 2006, http://www.jcu.edu.au/policy/hr/allhr/JCUDEV_008591.html (accessed 15 March 2011).

¹⁶ James Cook University, “Discrimination and Harassment: Policy and Procedure”, 3 October 2003, para. 6.4 (accessed 15 March 2011).

result in a feeling of support by both parties, and in less stress on each of the Discrimination Advisers...”. Such co-mediation is difficult to envisage, as in this model the mediators are advisors and may themselves require the services of a mediator to arrive at a satisfactory conclusion. Co-mediation is sometimes used in community mediation, matrimonial matters and other matters where more than one person is involved on either side.¹⁷

JCU adds another level to the dispute resolution process and that is that a party may request conciliation. Mediation and conciliation are similar and mediators may act as conciliators. The difference between conciliation and mediation is that the conciliator may have an advisory role about the matter in dispute, where the mediator does not. The conciliator may be more active in assisting the parties to arrive at a solution.¹⁸ Conciliation often occurs when one party has a complaint against another; that is, the two parties are not necessarily in dispute and in this sense JCU has a good understanding of the process. However, there is no indication in this policy that the conciliator has to be independent, neutral or trained and accredited; rather he is appointed by the director of equity, counselling and careers and this is different from the grievance resolution policy discussed earlier. The reason for the difference between the two policies is not clear.

Mediation at James Cook University is reasonably well developed although significant weaknesses remain.

Other universities seize on ADR as the primary tool in dispute resolution. Arguably, the University of Western Sydney (UWS) is the best example in the sample

¹⁷ Charlton, *Dispute Resolution Guidebook*, 5–6.

¹⁸ National Alternative Dispute Resolution Advisory Council, “Conciliation”, 2007. http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/What_is_ADRConciliation (accessed 1 April 2011).

I have examined so far. And I'd like to draw your attention for a moment to the NSW Ombudsman's work with mediation policies that I mentioned earlier. The University of Western Sydney has taken the Ombudsman's work to heart and that university's position on complaint handling reflects the position of the NSW Ombudsman with respect to the positive nature of complaints. UWS begins its policy statement with:

(10) The University considers effective and efficient complaint management essential to the provision of quality service and to establishing and maintaining a harmonious and productive environment. Legitimate complaints enable the University to identify inconsistencies between the standard of service promised and/or provided, and client expectations. This information can then be used to instigate preventative strategies to limit the possibility of recurrence and to initiate continuous improvement targeted toward established areas of need.¹⁹

UWS has embraced mediation as a means of dispute resolution and offers "mediation services" that are described in detail on a website devoted to mediation services.²⁰ The page explains mediation using the definition of mediation and mediator used at the beginning of this presentation. The "guidelines" explain how mediation occurs, using an accredited mediator, who is "professionally trained in dispute resolution, who is neutral and helps parties in disputes to discuss their differences constructively and come to an agreement that suits them both". Other elements of the guidelines include the voluntary nature of the mediation, stating that both must agree to attempt mediation; that, if successful, the mediation will conclude

¹⁹ University of Western Sydney, "Complaint Handling and Resolution Policy", 10 August 2006, <http://policies.uws.edu.au/view.current.php?id=00098> (accessed 17 March 2011).

²⁰ University of Western Sydney, "Mediation Services", http://www.uws.edu.au/human_resources/hr/employee_relations/mediation_services (accessed 6 April 2011).

with a private written agreement that “does not involve the university”; and that other redress may be sought if mediation is not successful. The guidelines also detail the way mediators are to be chosen (from a list provided by the university, agreed to by both parties).

UWS might be unique in its acceptance and promoting of mediation as a dispute resolution process. It has provided not only verbal support for mediation but has indicated what the process is and how it would be conducted. Unlike many universities mentioned here, UWS has a clear understanding of the nature of mediation as well as that of the mediator. Professional training, independence and accreditation are essential qualities of mediators. Thus, academic and professional staff have a clear description of the process as do supervisors to whom a complaint might be made in the first instance. Clearly, UWS has come to grips with the issue of dispute resolution and has identified best practice.

This brief examination of the policies of selected universities shows that universities understanding and use of mediation as a tool for dispute resolution is inconsistent. Some policies suggesting that mediation can be performed by non-accredited people or apparently anyone are distinctly dangerous to the process of mediation and more importantly, to the participants. Great harm can be done to the peaceful resolution process by untrained and inexperienced people acting as mediators. On the other hand some universities have adopted mediation as a positive step and have fully informed staff and others about the process and practice of mediation as it is intended to occur. These universities see complaints as being part of the quality assurance process.

The resolution of dysfunction in a peaceful way is one way the university can lead the community in peaceful living. It would appear to be incumbent on every

university to ensure that the policies and practices it puts in place to resolve disputes would reflect best practice and would indicate to the wider community its commitment to peace in a practical way.