Alternative Dispute Resolution and Human Rights Disputes: Harassment and Other Problems

Catherine Morris

January, 1998

DRAFT
Please do not cite or quote without the permission of the author

Catherine Morris, a lawyer in Victoria,B.C., Canada, is the former Executive Director of the Institute for Dispute Resolution at the University of Victoria where her work included the design and implementation of the new Master of Arts in Dispute Resolution. She has been involved in leadership roles in the field of dispute resolution since 1983.

Alternative Dispute Resolution and Human Rights Disputes:

Harassment and Other Problems

A Literature Review

Catherine Morris

Table of Contents

Alternative Dispute Resolution and Human Rights Disputes: Harassment and Other Problems A Literature Review

Catherine Morris

Abstract

This paper reviews literature relevant to the use of mediation or conciliation in resolving human rights issues. Emphasis is on literature pertaining to Australian and American experiences, in the absence of literature on Canadian experiences with mediation and conciliation in human rights cases. Since the topic of sexual harassment is dominant in the literature about conciliation and mediation of human rights and discrimination complaints, harassment is used as the chief example to highlight policy and practice issues, although other kinds of human rights issues are also addressed in the literature reviewed. Insights are drawn from ombudsman literature as well as other relevant dispute resolution literature.

I. Introduction:

Alternative dispute resolution (ADR) methods, particularly mediation and conciliation, are increasingly being considered and evaluated for use by Canadian public complaint processes and quasi-judicial bodies[1] including human rights commissions and tribunals. Backlogs are often cited as the reason for incorporating ADR processes. But mediation is not only vaunted as faster and cheaper, it is also touted as better. Mediation and conciliation are expected not only to produce more efficiency, but also more user satisfaction through increased public accessibility, less onerous processes and more satisfying outcomes for parties.

[1] For example, alternative dispute resolution was the subject of discussion in three plenary sessions, including portions of key note addresses by Chief Justice Bryan Williams and Attorney General Ujjal Dosanjh, and one workshop in a two-day conference on "Reshaping Administrative Justice in B.C." sponsored by the B.C. Council of Administrative Tribunals in Vancouver, November 3, 1997 attended by several hundred tribunal members and administrative justice policy makers from B.C. and elsewhere.

Settlement has commonly been part of the mandate of many human rights commissions in Canada, Australia and the United States,[2] including the work of the B.C. Council of Human Rights. Recently, B.C. human rights legislation was changed to incorporate mediation more deliberately and explicitly within the policy and process framework of a new B.C. Human Rights Commission and Human Rights Tribunal.[3] This is part of a general trend toward inclusion of ADR within the court system and the administrative justice system. Policy makers and agency line workers throughout the administrative justice system are seeking direction in the design and development of effective dispute resolution programs or systems that integrate investigation, mediation and adjudication mechanisms, as well as public education in some programs.

This paper reviews literature relevant to the use of mediation or conciliation to address human rights issues. In the absence of literature on Canadian experiences with mediation and conciliation in human rights cases, emphasis is on literature pertaining to Australian and American experiences. Since the topic of sexual harassment is dominant in the literature about conciliation and mediation of human rights and discrimination complaints, harassment is used as the chief example to highlight policy and practice issues, although other kinds of human rights issues are also addressed in the literature reviewed. Insights are drawn from ombudsman[4] literature as well as other relevant dispute resolution literature.

Harassment and related issues make up a considerable part of the case loads of human rights

---

[2] E. Mendes, K. L. Rudner & P. Jourdain, *Alternative Dispute Resolution Mechanisms in Human Rights Commissions and Analogous Institutions In Australia, The United Kingdom, The United States and Canada* (Ottawa: Department of Justice Canada, 1994)

[3] *Human Rights Code, R.S.B.C. 1996, c. 210*. A number of sections of this legislation came into effect in early 1997, largely based on the recommendations of Bill Black, a member of the Faculty of Law at the University of British Columbia. See W. Black, *B.C. Human Rights Review: Report on Human Rights in British Columbia* (Vancouver, B.C.: Province of British Columbia, 1994).

[4] The term *ombudsman* is a Swedish term that is said to be etymologically gender neutral. While some institutions use the term "ombudsperson" or "ombuds," the term "ombudsman" is still used in jurisdictions in Canada and is adopted for use in this paper.

commissions.[5] A good deal of experience has been amassed in the use of conciliation and mediation in sexual harassment cases in a variety of settings, predominantly universities and human rights commissions. There has also been considerable critique.

The literature reveals a number of problematic issues that must be addressed by any effective system for addressing human rights issues, including those involving harassment. These problematic issues include complicated and intense conflictual interactions among diverse individual parties and public officials in multi-process systems that are highly charged with complex logistical and policy questions. Based on the issues illuminated by interdisciplinary literature selected for this review, this paper suggests that no one approach or process can be considered a magic elixir for resolving human rights issues involving harassment. Rather, this paper suggests the necessity of and proposes a framework for a systemic approach to effective and fair resolution of human rights issues.

The tension between public mandates and individual or "private" concerns is expressed dramatically in the problem of resolving human rights disputes. Harassment is an individual torment for those who experience it. It is also a matter of public concern as a persistent type of discrimination.

Employers in Canada have a legal and ethical responsibility to ensure that workplaces are free of harassment.[6] Many Canadian and North American institutions now have harassment policies and

---

[5] For example, in 1991-92, the B.C. Council of Human Rights intake officers handled 10,008 cases of which 550 (5.5%) were complaints of sexual harassment. Of those cases (863) that went on to become formal complaints, 17% were sexual harassment cases. Approximately 20% of cases referred to hearing and 30% of those that actually went to formal hearing involved sexual harassment. Tina Thor and Judith Williamson, "Sexual Harassment and the B.C. Council of Human Rights" in *Human Rights in the Workplace, Materials prepared for a Continuing Legal Education seminar held in Vancouver, B.C., September 18-19, 1992* (Vancouver, B.C.: Continuing Legal Education Society of British Columbia, 1992) at 2.2.01. See also Office for the Prevention of Discrimination and Harassment, *Annual Report, June 1996 to June 1997* (Victoria, B.C.: University of Victoria, 1997) 6-7, 9, 11 in which Susan Shaw reports that 23.2% of complaints to her office related to sexual harassment. The vast majority of these complaints were by women.

[6] A. P. Aggarwal, "Dispute Resolution processes for Sexual Harassment Complaints" (1995) 3 *Cdn. Labour and Employment Law Journal* 61.

procedures. Sexual harassment is also regarded as a health and safety issue[7] and has been recognized in some cases by workers' compensation tribunals as a compensable work-related injury.[8] Harassment is a crime if it includes harassing phone calls, sexual assault, intimidation or stalking or other criminal behaviour as defined in the Canadian *Criminal Code*. Thus, harassment as an example of human rights conflict fits securely within the sphere of public law and policy. Harassment is not a "private" matter.

Harassment, however, usually occurs in private and involves intense personal relationships and emotions. It is fraught with complex power and gender dynamics. It is under-reported, embarrassing, time consuming, damaging for all concerned, and difficult to address through traditional management processes or adjudicative mechanisms.

Human rights conflict, including gender-based harassment, is characterized by inequalities or abuses of power, including heightened power dynamics which in some cases are extreme. For example, many (if not most) human rights abuses are set within relationships where power is unequal in formal or obvious ways: official-citizen, employer-employee, teacher-student, male-female or adult-child relationships. Human rights conflict is characterized by allegations of the misuse of power or authority together with a sense of powerlessness by the complainant. Human rights conflict is further characterized by a the complainant's sense of fear, victimization, anger and emotional trauma. These are often accompanied by short or long term interference with productivity, health and careers. These features of human rights conflicts are highlighted in cases of sexual harassment. As in other areas of dispute resolution, the literature considering resolution of human rights conflicts does not reflect in depth understanding or consideration of the nature and dynamics of power in conflict and dispute resolution.

---

[7] Laforest J. in *Robichoud v. The Queen* [1987] 2 S.C.R. 84 at 94 stated that "...only an employer can remedy undesirable effects; only an employer can provide the most important remedy -- a healthy work environment."

[8] M. Cornish & S. Lopez, "Changing the Workplace Culture Through Effective Harassment Remedies" (1995) 3 *Cdn. Labour and Employment Law Journal* 95 at 99.

Discrimination disputes in general appear to be under-reported. One study of conflict in the United States[9] found that compared to other conflicts, discrimination resulted in fewer claims than did other kinds of conflict.[10] It is widely held that only about five percent of sexual harassment problems are reported.[11]

Since sexual harassment occupies a large portion of the time of human rights commissions it is useful to understand the particular nature of harassment disputes which has been discussed in literature over a significant period of time.[12] Sexual harassment has been identified as "a social crisis with devastating consequences for those who experience it."[13] It is defined (in the Canadian context) as "unwanted conduct of a sexual nature of other conduct based on gender affecting the dignity of women at work, including unwelcome physical, verbal or non-verbal conduct"[14] or as "unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment..."[15] Two categories of harassment have been delineated: sexual coercion in return for favours or job security ("quid pro quo") and the more insidious and difficult to identify "poisoned work environment" where women are "humiliated, intimidated or denigrated in the workplace."[16] This latter type is in many

[9] R.E. Miller & A. Sarat, "Grievances, Claims, and Disputes: Assessing the Adversary Culture" (1980-81) 15 (3-4) *Law & Society Review* 525.

[10] Miller and Sarat, see note 17 at 540-541, 544.

[11] Aggarwal, see note 6 at 63, citing U.S. Merit Systems Protection Board, *Report on Sexual Harassment in the Federal Government: An Update* (June 1988) at 23.

[12] Aggarwal, see note 6; C. A. Bond, "Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace" (1997) 65 *Fordham Law Review* 2489; Cornish & Lopez, see note 8; E. J. Costello, Jr., "The Mediation Alternative in Sex Harassment Cases" (1992) 47(1) *Arbitration Journal* 16.

[13] Cornish & Lopez, see note 8 at 95.

[14] Cornish and Lopez, see note 8 at 96.

[15] Former Chief Justice Dickson in *Janzen v.Platy Enterprises Ltd*. [1989] 1 S.C.R. 1252 at 1284.

[16] Aggarwal, see note 6 at 10.

ways similar to "personal harassment"[17] which is also increasingly the subject of complaints and which does not necessarily involve sexual behaviour, even though (in addition to power) it often involves gender, racial or cultural differences.

Sexual harassment is primarily about power, not sex. It involves abuse of power by the harasser by virtue of the fact that "he is male and sometimes by virtue of his superior position in the workplace."[18] But harassment is not just a set of acts affecting individuals. It is a systemic problem. Harassment has been used as one explanation for continued ghettoization of women in particular occupations. Sexual harassment is more frequent in male dominated occupations. As Lach and Gwartney-Gibbs state:

> Sexual harassment helps maintain occupational sex segregation when it is use to coerce women out of nontraditional jobs or if women choose to stay out of nontraditional jobs for fear of harassment.[19]

Various authors[20] have outlined characteristics of complainants, those accused of harassment,

---

[17] Personal harassment, which involves non-sexual abuse of authority, is an even larger problem than sexual harassment. In 1994-95 complaints of personal harassment (including abuse of power, threats and intimidation and office bullying) at the University of Victoria comprised 65.1% of the case load of the Office for the Prevention of Discrimination and Harassment, up from 49% in 1994-95 and 63.2% in 1995-96. Office for the Prevention of Discrimination and Harassment, *Annual Report June 1996 to June 1997* (Victoria, B.C.: University of Victoria, 1997) at 6-7, 9, 11. See also C. Keri, "Personal Harassment: The Cautious New Workplace" (1997) 6(6) *National* 12.

[18] Cornish & Lopez, see note 8 at 97.

[19] D.H. Lach & P. A. Gwartney-Gibbs, "Sociological Perspectives of Sexual Harassment and Workplace Dispute Resolution" (1993) 42 *Journal of Vocational Behavior* 102, at 112.

[20] Aggarwal, see note 6; Costello, see note 22; H. Gadlin, "Careful Manoeuvers: Mediating Sexual Harassment" (1991) 7 *Negotiation Journal* 139; Lach & Gwartney-Gibbs see note 29; M. P. Rowe, "Dealing With Harassment: A Systems Approach," in Margaret S. Stockdale, ed., *Sexual Harassment in the Workplace* (Thousand Oaks, CA: Sage, 1996) 241; M.P. Rowe, "Options and Choice for Conflict Resolution in the Workplace" In *Negotiation: Strategies for Mutual Gain*, edited by L. Hall (Sage Publications, Inc., 1993) 105; M. P. Rowe, "The Ombudsman's Role in a Dispute Resolution System" (1991) 7(4) *Negotiation Journal* 353; M. P. Rowe, "People Who Feel Harassed Need a Complaint System with Both Formal and Informal Options" (1990) 6 *Negotiation Journal* 161; M. P. Rowe, "An Effective, Integrated Complaint Resolution System" in Robert Shoop et al, eds., *Sexual Harassment on Campus* (Needham Heights, MA: Simon and Schuster, 1997); B. Whittington, "Mediation and Sexual Harassment: Strange Bedpersons" in (1992) 4(1) *Interaction* (Waterloo, ON: The Network: Interaction for Conflict Resolution), 5

employers and policy makers based on experiences in processing sexual harassment complaints. Although it must be acknowledged that peoples' experiences and needs are unique, it has been generally found (in US and Canadian literature) that complainants in sexual harassment cases:

- blame themselves;
- want the harassment to stop;
- suffer humiliation and loss of dignity;
- feel there is nothing they can do about the problem;
- often do not report the problem;
- want control over options for addressing the problem including informal options such as mediation;
- have strong feelings about whom they can/cannot trust with a grievance, for example, they may trust only members of a particular group, gender or race;
- want to avoid damage to their careers, or compensation for damage to careers caused by harassment;
- do not want the same thing to happen to others;
- in few cases desire revenge or retribution.

By contrast, those accused of harassment (acknowledging the diversity of people in this situation) generally:

- blame the accuser, not themselves;
- want to know what action caused offence;
- want a chance to explain their conduct;
- want fair resolution;
- fear punishment;
- fear loss of reputation;
- want to return quickly to a normal work environment;
- want confidentiality;

- want to avoid losing control of the complaint.

The asymmetry in complainant and respondent perceptions of who is to blame is startling; this factor alone illustrates the serious nature of power imbalance in harassment situations. If victims consider themselves blameworthy they will surely not want to report harassment to those in authority. This adds to the harasser's power. Harassers who consider their victims blameworthy add a sense of righteousness to their existing sources of power which often include connections with the informal power and support networks. These factors, together with systemic problems such as lack of active support from management, emphasize the imbalance and unfair power dynamics present in harassment situations. Lack of active support often includes management failure or refusal to take initiative to address bad conduct of an employee unless the victim makes formal reports and maintains active involvement, or is somehow able to garner support from powerful individuals in management. In a situation of extremely vulnerability, securing consistent support and maintaining stamina for active involvement is exhausting for a person experiencing harassment. It is no wonder that problems of discrimination, including harassment, are often resolved by lumping them and leaving.[21] Under-reporting of harassment and other discrimination problems will surely continue unless the systemic factors that militate against both reporting and resolving harassment are addressed at individual, institutional and societal levels.

According to Costello, employers want:

- productive and cooperative workplaces;
- speedy and inexpensive end to disruption of workplace productivity and harmony;
- to avoid adverse publicity;
- to provide credible mechanisms for resolving workplace disputes.

[21] This lumping and leaving phenomenon has been documented by the legal profession in Canada in which women lawyers leave the legal profession in much high numbers than men. Law Society of British Columbia, *Women in the Legal Profession: A Report of the Women in the Legal Profession Subcommittee*. (Vancouver, B.C.: Law Society of B.C., 1991)

Note that Costello does not record that employers are concerned about employee well-being, equity or correction of discrimination or harassment problems.

According to Costello,[22] legislators and policy makers want:

- safe, productive, harassment and discrimination-free workplaces;
- efficient spending;
- efficient and fair resolution of disputes;
- confidentiality.

II. Summary Overview of Mechanisms for Addressing Sexual Harassment

This section reviews the general taxonomy of mechanisms for dealing with human rights issues with emphasis on consensual methods of dispute resolution. A discussion of the law pertaining to sexual harassment as a human rights issue is beyond the scope of this review. While in general this section emphasizes the Canadian context, the approaches of Australia and the United States are discussed. There is little Canadian literature on mediation and conciliation of discrimination issues.

Aggarwal[23] surveys the main mechanisms for resolution for sexual harassment complainants in Canada. Options include the statutory complaint processes under provincial human rights legislation; internal workplace grievance procedures in the case of workers who are parties to collective agreements; employers' internal complaint procedures, for example under anti-harassment policies; and civil action. Within all these frameworks mediation and conciliation have been applied or considered.

[22] Costello, see note 22.

[23] Aggarwal, see note 6.

1. Civil Action

While there have been significant substantive changes in Canadian law pertaining to human rights and discrimination during the past fifteen years, sexual harassment was not confirmed to be discrimination by the Supreme Court of Canada until 1989.[24] Enforcement machinery has not kept up, and according to Black there is a "disparity between promise and delivery."[25]

In Canada, civil action is not an attractive option for addressing complaints of discriminatory harassment except in cases of wrongful dismissal or torts such as assault or defamation.[26] The Supreme Court of Canada found that tort actions do not flow from breaches of human rights statutes *per se*. Therefore, victims are largely restricted to seeking relief through human rights statutes.[27] Civil action does not preclude a complaint to a human rights commission, but waiting for a case to be heard by a human rights commission, most of which have significant backlogs, means risking missing civil limitation periods.[28] Pre-trial mediation may be conducted in civil cases on a voluntary basis using private mediators. Several Canadian jurisdictions are considering or implementing increased use of mediation either through judicial mediation conferences (such as Alberta), mandatory mediation schemes (such as is being implemented in Ontario), or through rules that provide incentives to the use of mediation and development of rosters of approved mediators (such as British Columbia).

---

[24] *Janzen v. Platy Enterprises Ltd.* [1989] 1 S.C.R. 1252.

[25] W. W. Black, "Implementing Human Rights -- From Substance to Process" in *Human Rights in the Workplace* (Vancouver, B.C.: Continuing Legal Education Society of B.C., 1992)

[26] Aggarwal, see note 6, at 81.

[27] *Seneca College v. Bhadauria* (1981), 2 C.C.H.R. D/468, [1981] 2 S.C.R. 181, 1245 D.L.R. (3d) 193.

[28] For a discussion see Aggarwal, note 6, at 82-83.

2. Arbitration under grievance procedures

In a unionized work setting, both complainant and respondent employees may seek relief through grievance and arbitration procedures.[29] However, victims of harassment discrimination are generally unsuccessful in arbitration in Canada[30] and the United States.[31] Bond suggests (speaking from the American context) the following reasons: Arbitration in a collective agreement may not be available to victims because supervisors (generally the alleged harassers) are not part of the victims' bargaining unit. Second, arbitrator pools lack gender or racial diversity and are overwhelmingly white, highly educated, older males. Third, few arbitration decisions are published, so it is difficult for employers to discern illegal conduct from the results of arbitration. "Arbitration is ill suited for sexual harassment disputes because it lacks both the flexibility of negotiation and the safeguards of litigation."[32] As an alternative, grievance mediation is now being more aggressively promoted both in Canada and the United States.[33]

3. Employers' internal complaint procedures.

Employers are responsible to maintain harassment and discrimination free workplaces:

> [A]n employer cannot afford to wait for someone to come forward to file a complaint before taking action. Employers, to avoid legal liability, have to take all reasonable steps

---

[29] See A. Aggarwal, "Arbitral Review of Sexual Harassment in the Canadian Workplace" (1991) 46 *Arbitration Journal* 4. A great deal of literature has been generated on this issue in the United States pertaining to mandatory arbitration of discrimination issues in employment agreements, particularly with reference to the case of *Gilmer v. Interstate/Johnson Lane* 500 U.S. 20 (1991).

[30] Aggarwal, 1991, see note 49.

[31] Bond, see note 22 at 2509.

[32] Bond, see note 22 at 2510.

[33] For a Canadian example, see D. C. Elliott & J. Goss, *Grievance Mediation: Why and How it Works* (Aurora, ON: Canadian Law Book, 1994). This book mentions but does not discuss issues specifically relevant to mediation of harassment or other forms of discrimination.

> to combat sexual harassment and to provide harassment-fee environments. On receipt of a specific complaint, the employer must take immediate steps to resolve, not only the complaint, but the problem that has been the source of harassment in the workplace... [I]f the alleged victim, for some reason, does not want the alleged perpetrator to be informed of the allegation or does not want an investigation to made into the allegation, the employer should not simply let the matter drop. Even if a remedy is no longer being sought for the victim, the employer can not allow harassment to continue unchecked.[34]

While human rights statutes do not require employers to have anti-harassment policies or mechanisms, they do require employers to maintain non-discriminatory work environments. The *Canada Labour Code*[35] requires employers in the federal jurisdiction to have policy in place to keep working environments free from sexual harassment. The Code places a positive duty on employers to provide effective mechanisms to address sexual harassment.

Usually employers' internal policies and mechanisms establish both formal and informal options including confidential listening, investigation, conciliation or mediation, and adjudication. These elements of complaint systems are discussed in more depth later in this paper.

4. Human rights commissions

This section briefly reviews the main features of the processes of human rights commissions in Canada, the US and Australia with emphasis on settlement mechanisms. A detailed summary of the main features of ADR mechanisms in Canadian human rights commissions is found in a 1994 survey by Errol Mendes, Karen Rudner and Patrice Jourdain.[36]

---

[34] Aggarwal, see note 6 at 64-65.

[35] R.C.S. 1985 (1st Supp.) c.9, s.17.

[36] Mendes, Rudner & Jourdain, see note 2.

a) Canada

Generally speaking, in Canada the process used by human rights commission includes investigation and fact finding, attempts at settlement, followed by appointment of a adjudicative tribunal.[37] Results of tribunals are binding, and remedies normally include damages for loss or earnings, damages for loss of job opportunities, damages for loss of dignity and humiliation, or exemplary or punitive damages.[38] Commissions generally try to settle as many cases as possible.[39]

b) United States

The American approach has emphasised investigative, settlement and adjudicative mechanisms. The Equal Employment Opportunity Commission (EEOC) was created by the Civil Rights Act 1964 to settle employment discrimination claims under the Civil Rights Act, the Equal Pay Act, the Age Discrimination in Employment Act and the Americans with Disabilities Act. There are slightly different complaint handling mechanisms depending on the particular legislation involved, and there are work sharing agreements between some state agencies and the EEOC.[40]

People can use either the EEOC process or the civil courts, although if a charge is filed with the EEOC there is a 60-day waiting period before a civil suit can be launched.[41] The EEOC process includes intake, a fact-finding conference, investigation and conciliation, and finally referral to

---

[37] Aggarwal, see 6 at 66; Mendes, Rudner & Jourdain, see note 2.

[38] Aggarwal, see note 6 at 66.

[39] Mendes, Rudner & Jourdain, see note 2 at 43.

[40] For example, the Utah Anti-Discrimination Division processes complaints under the Utah Antidiscrimination Act (UADA) and also enforces federal law under a work sharing agreement with the EEOC. L. A. Baar & M. A. Zody, "Resolution Conferences Conducted by the Utah Anti-Discrimination Division: The Elements of a Successful Administrative Mediation Program" (1995) 21 *Journal of Contemporary Law* 21.

[41] Mendes, Rudner & Jourdain, see note 2 at 25.

the Regional Attorney who makes a recommendation as to whether the EEOC should litigate the complaint. The fact-finding conference includes confidential, off-the-record discussion and settlement negotiations as well as on-the-record fact finding. Settlement at this predetermination stage is estimated at about 43%.[42] Remedies include compensation.

The main challenge perceived in the United States is the huge backlogs of complaints.[43] To address this problem, a number of projects using mediation have been developed to resolve discrimination complaints.[44] The main focus of American literature on mediation of human rights complaints is the work of the EEOC as well as literature on conciliation in human rights programs of various US states. There is also literature on the use of grievance arbitration for discrimination complaints (not canvassed in this paper) and some associated literature on sexual harassment grievance mediation.[45]

c) Australia

Unlike Canada, Australia does not provide constitutional protection for human rights. This situation has been the subject of much criticism.[46] Human rights complaints are handled through the Human Rights and Equal Opportunities Commission (HREOC) created by the Human Rights and Equal Opportunities Commission Act, 1986. HREOC has no power to enforce existing human rights legislation; its mandate is exclusively conciliation, referral to a recommendatory

---

[42] Mendes, Rudner & Jourdain, see note 2 at 26.

[43] Bond reports an EEOC backlog of over 80,000 sexual harassment cases alone, which she notes as remarkable given estimates that 90% of harassment cases are unreported. Bond, see note 22 at 2490, including Bond's footnote 6.

[44] A. C. Hodges, "Mediation and the Americans With Disabilities Act" (1996) 30 *Georgia Law Review* 431; R. G. Silberman, S. E. Murphy & S. P. Adams, "Alternative Dispute Resolution of Employment Discrimination Claims" (1994) 54 *Louisiana Law Review* 1533.

[45] M. Irvine, "Mediation: is it appropriate for sexual harassment grievances?" (1993) 9 *Ohio State Journal on Dispute Resolution* 27.

[46] For example, see H. Charlesworth, "The Australian Reluctance About Rights" (1993) 31 *Osgoode Hall Law Journal* 195.

tribunal, reporting to the Attorney General (who must table the report in Parliament) and public education.[47] Outcomes of HREOC procedures can include a range of remedies from apology to monetary compensation.[48]

III. Mediation and conciliation[49] of sexual harassment complaints

1. Values and goals for dispute resolution processes

Most human rights commissions have emphasized settlement in their mandates, however actual settlement processes vary. No Canadian literature was found to describe the actual detailed processes of "settlement," "conciliation" and "mediation" in human rights commissions, and therefore it is sometimes difficult to know exactly what is contemplated by these terms. It is important in reading the literature not to assume that terms are necessarily always used in the same ways. Recent discussions, such as Black's 1994 report[50] and a 1997 discussion paper of the Ontario Human Rights Commission[51] do appear to distinguish mediation processes from the existing conciliation processes, but exact process distinctions are not completely clear. What is clear is that there is increasing attention in Canada to more careful and knowledgeable design and implementation of settlement mechanisms, and to a more deliberate understanding of their roles and potential, including attention to training of mediators and conciliators.[52]

---

[47] For detail, see Mendes, Rudner & Jourdain, see note 2 at 8.

[48] Mendes, Rudner & Jourdain, see note 2 at 6.

[49] While mediation and conciliation are sometimes defined differently, they are often used synonymously. In fact, mediation and conciliation processes often lack detailed description in the literature, and it appears that processes vary according to localized practices.

[50] Black, see note 3.

[51] L. Rainone, *A Discussion Paper: Mediation Within the Context of Human Rights Legislation: The Ontario Human Rights Code* (Ontario, Canada: Ontario Human Rights Commission) April, 1997.

[52] M. Cornish. *Achieving Equality: A Report on Human Rights Reform. Report of the Ontario Human Rights Code Review Task Force*. (Ontario: Government of Ontario, 1992) at 118; Rainone, see note 74.

Proponents claim a number of benefits of mediation and conciliation with emphasis on efficiency and user satisfaction. Critics have issued warnings for over a decade about possible problems in mediation for vulnerable people or groups of people including women,[53] indigenous peoples and minority cultural groups, including critiques of mediation in human rights cases.[54]

With increasing emphasis on the institutionalization of ADR, policy makers and practitioners need to pay more attention to these critiques as well as to the stated values and goals of mediation.[55] The goals of mediation, as well as the values motivating its adoption into a particular program, will drive the policies and practices surrounding its use. For example, some

---

[53] M. J. Bailey, "Unpacking the `Rational Alternative': A Critical Review of Family Mediation Movement Claims" (1989) 8 *Canadian Journal of Family Law* 61; T. Grillo, "The Mediation Alternative: Process Dangers for Women" (1991) 100(6) *Yale Law Journal* 1545; B. Hart, "Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation" (1990) 7(4) *Mediation Quarterly* 317; B. Landau, "Qualifications of Family Mediators: Listening to the Feminist Critique" in *Qualifications for Dispute Resolution: Perspectives on the Debate*, edited by C. Morris & A. Pirie (Victoria, B.C.: UVic Institute for Dispute Resolution, 1994) 27; J. L. Maute, "Mediator Accountability: Responding to Fairness Concerns" (1990) 2 *Journal of Dispute Resolution* 347; J. L. Maute, "Public Values and Private Justice: A Case for Mediator Accountability" (1991) 4 *Georgetown Journal of Legal Ethics* 503; J. Rifkin, "Mediation From a Feminist Perspective: Promises and Problems" (1984) 2 *Law & Inequity* 21; M. Shaffer, "Divorce Mediation: A Feminist Perspective." (1988) 46(1) *University of Toronto Faculty of Law Review* 162.

[54] R. Delgado, "ADR and the Dispossessed: Recent Books about the Deformalization Movement" (1988) 13(1) *Law and Social Inquiry* 145; R. Delgado et al., "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution" (1985) *Wisconsin Law Review* 1359; K. Avruch & P. Black, "Conflict Resolution in Intercultural Settings: Problems and Prospects" in *Conflict Resolution Theory and Practice: Integration and Application*, edited by D. J.D. Sandole & H. van der Merwe (New York: St. Martin's Press, 1993) 131; M. LeBaron Duryea, "The Quest for Qualifications: A Quick Trip Without a Good Map" in *Qualifications for Dispute Resolution: Perspectives on the Debate*, edited by C. Morris & A. Pirie (Victoria, B.C.: UVic Institute for Dispute Resolution, 1994) 109; M. Hermann et al, *An Empirical Study of the Effects of Race and Gender on Small Claims Adjudication and Mediation* (New Mexico: Institute of Public Law, University of New Mexico, 1993); P. A. Monture-OKanee, "Alternative Dispute Resolution: A Bridge to Aboriginal Experience?" in *Qualifications for Dispute Resolution: Perspectives on the Debate*, edited by C. Morris & A. Pirie (Victoria, B.C.: UVic Institute for Dispute Resolution, 1994) 131; L. Nader, "Harmony Models and the Construction of Law" in *Conflict Resolution: Cross Cultural Perspectives*, edited by K. Avruch, P. Black & J. Scimecca (Westport, Connecticut: Greenwood Press, 1991); L. Nader, "Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology" (1993) 9(1) *Ohio State Journal on Dispute Resolution* 1; M. Thornton, "Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia" (1989) 52 *Modern Law Review* 733.

[55] See R.A.B Bush, "Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments." (1989) 66 *Denver University Law Review* 335 at 347-48; R.A.B. Bush and J. Folger, *The Promise of Mediation: Responding to conflict through empowerment and recognition* (San Francisco, CA: Jossey-Bass Publishers, 1994.

see ADR as a way of working toward peace and social justice and see breakdowns of relationship as requiring reconciliation and harms requiring restorative remedies, rather than as violations requiring punishment. Others see the goal of ADR as promoting social order based on increased consensus; in this view, ADR offers resolution of underlying conflicts rather than mere settlement of the manifest disputes. A third view is that ADR provides opportunities for disputant access, participation and satisfaction, including control over process and outcomes. A predominant view among government officials is that the goal of ADR is to provide increased efficiency; this view favours options that will save time and money and that will offer lasting settlements. Programs may emphasize one or the other (or a combination) of these values and goals. As values and goals differ, so do processes, practices, definitions of success, and evaluative criteria. For example, dispute resolution programs driven by goals of clearing backlogs may tend to define issues narrowly and pressure mediators to use short recommendatory processes. In contrast, programs driven by goals of participant satisfaction, restorative justice, education of parties, or development of long-lasting agreements may utilize processes which take longer and which define parties or issues more broadly. Thus, the relative importance of values and goals will be reflected in the way various conflict resolution processes are developed.

This section attempts to provide a summary and discussion of the chief areas policy and practice that must be addressed with the increasing institutionalization of conciliation and mediation in the administrative justice system, with particular reference to human rights complaints.

2. Successful elements

a) Complaint generation and party satisfaction

It has been noted that human rights complaints, and particularly gender harassment complaints are remarkably under reported. Some literature suggests that the availability of mediation or other informal options for addressing human rights complaints increases the possibility that victims

will increasingly come forward to have their complaints addressed.[56] An important goal of many dispute resolution programs is to provide satisfying processes and outcomes to disputants. The literature indicates that this, together with efficiency goals, is an important measure of success of human rights dispute resolution programs.[57] Results are not universally positive regarding party satisfaction. The chief concern relates to coercion of parties, particularly complainants, during conciliation and mediation.

b) Privacy and confidentiality

A chief desire of complainants and respondents is maintenance of privacy and reputation. In many settings, mediation and conciliation options meet this need by maintaining confidentiality. In some settings, information exchanged in mediation and conciliation meetings is privileged and may not be used in subsequent adjudication hearings. Virtually all the literature suggests confidentiality makes mediation and conciliation attractive to both complainants and respondents.

c) Flexibility and choice

Rights-based adjudicative mechanisms that focus on evidence of past behaviour and result largely in monetary compensation may not address the desires of complainants and respondents for restoration or maintenance of employment relationships, or help individual complainants and respondents maintain control of complaint processes and outcomes. Party control over process and outcome is seen as an important goal of complainants, respondents and employers in harassment cases. Processes such as mediation and conciliation keep more control over decisions in the hands of the parties.

---

[56] Rowe, 1996, see note 30 at 269-270; Gadlin, see note 30.

[57] T. Barrett & L. D. Tanner, "The FMCS Role in Age Discrimination Complaints: New Uses of Mediation" [1981] *Labor Law Journal* 744; Bond, see note 22; Hodges, see note 64; Annemarie Devereux, "Human Rights by Agreement? A Case Study of the Human Rights and Equal Opportunity Commission's Use of Conciliation" (1996) 7 *Australian Dispute Resolution Journal* 280.

d) Speed and cost

Policy makers are chiefly attracted to the use of ADR because of its promise of efficiency and speed. This is particularly emphasized in the American literature. Success is being reported in the use of mediation to process cases quickly and clear backlogs.[58]

e) Educational opportunities and social transformation

Mediation and conciliation proceedings are also said to provide more opportunities than do adversarial rights-based hearings for education of parties about responsibilities and standards concerning human rights.[59] Gadlin emphasizes that many complainants prefer mediation because they want education, not punishment, of their harassers.[60] Some authors report a public education value during the process of conciliation of human rights complaints.[61] Proponents and critics in the Australian literature about HREOC have emphasized HREOC's goal of social transformation in the area of human rights.

2. Critiques, defences and challenges

Margaret Thornton's[62] leading article provides a comprehensive summary of the critiques of mediation in the context of human rights complaints. This section discusses the major critiques and defences of mediation and conciliation.

---

[58] Baar & Zody, see note 60; Barrett & Tanner, see note 81; Bond, see note 22; Hodges, see note 64 .

[59] Baar and Zody, see note 60 at 32.

[60] Gadlin, see note 30 at 145.

[61] Baar and Zody, see note 60 at 32.

[62] Thornton, see note 78; Devereux, see note 81.

a) Conciliation has "no teeth"

Institutions that focus exclusively on conciliation and education to the exclusion of adjudicative mechanisms, such as Australia's HREOC and its predecessor, have been accused of being like a "toothless tiger."[63] Devereux, in a 1996 article reporting evaluation research of the HREOC pointed out that the conciliation process seemed to be one of minimal intervention, facilitating party communication, using persuasion, and bringing the parties together occasionally. "In the context of such minimal intervention, it is certainly questionable whether the Commission can hope to effect longer term attitudinal changes" through conciliation[64] although she suggests that HREOC has been

> remarkably successful both in securing redress for individual complainants and promoting some degree of attitudinal change. Not only were complaints resolved within a fairly short time period, but the outcomes in conciliated cases show a concern for lasting solutions and future relationships.[65]

b) Second class justice: Outcomes

Concerns have been raised that informal procedures may result in "second class" justice and that they may not meet legislated standards.[66] Mendes, Rudner and Jourdain suggest that in the American EEOC settlement process there may be a tendency on the part of the employer or respondent to see the process as a "cheap buy-out" or an opportunity to avoid a difficult situation by paying less than what they might otherwise have to pay in a full adjudication process. The EEOC does not concern itself with the merits of settlements other than to prevent the parties

---

[63] Bailey see note 68.

[64] Devereux, see note 81 at 287.

[65] Devereux, see note 81 at 293.

[66] Thornton, see note 78 at 742.

from including unlawful provisions.[67] Mendes, Rudner and Jourdain report that 47% of charging parties expressed dissatisfaction with the settlements they received through EEOC processes.[68]

While user satisfaction (or dissatisfaction) is important, it should not be the only criteria for evaluation. Actual outcomes, and particularly trends in outcomes, should also be considered to ensure compliance with public mandates for protection of human rights. In BC, settlements reached through mediation must be filed with the Human Rights Commission, and the statute provides for enforcement procedures. However, Hodges suggests that guidelines for settlement may be required to ensure that public mandates are met and that parties do not sacrifice their rights.[69] The Ontario Human Rights Commission's 1997 Mediation System Design requires administrative approval of mediated settlements.[70]

c) Lesser forum

Critics have also suggested that non-court options may provide an inferior forum. The "lesser forum" critique is not widely found in the literature compared to other critiques. Devereux,[71] found no evidence in her research with the Australian HREOC that complainants saw the conciliation process as inferior to more formal proceedings. Devereux's work is one of the few evaluative pieces in the literature. However, her research does not evaluate outcomes per se, and her research on disputant perception of conciliation has some acknowledged limitations, since it does not address the perceptions of those who withdrew their complaints (which were not available to the researchers). Devereux's work is also limited in that it does not address the

---

[67] Mendes, Rudner & Jourdain, see note 6 at 26-27.

[68] Mendes, Rudner & Jourdain, see note 6, citing L.D. Clark & B.A. Bush, "Arbitration of Employment Discrimination Claims: A Need for Statutory Reform?" (1985) *Thurgood Marshall Law Review* 47 at 51.

[69] Hodges, see note 64 at 501.

[70] Ontario Human Rights Commission. *Mediation System Design: Excerpt from the Commission's Enforcement Procedures Manual* (Ontario Human Rights Commission) April, 1997, Part III, (j).

[71] Devereux, see note 81 at 287.

perceptions of the conciliation process by those who did not settle but went on to post-conciliation hearings. Devereux's work is also circumscribed by its focus only on the efficacy of conciliation; it does not evaluate its overall cumulative effects or efficacy in the context of the overall functions of HREOC, including conciliation, reporting, and publication education.

d) Privacy and confidentiality of conciliation and mediation conferences

Thornton suggests that privacy and confidentiality of conciliation preclude group empowerment, particularly of stigmatized groups: "The atomism inherent in confidential conciliation underscores the notion that acts of discrimination are of an isolated and individualistic nature and that individualistic solutions alone are appropriate."[72] Thornton points out that education is an important preventive strategy under the Australian legislation, and says the secrecy of specific settlement outcomes frustrates this goal. According to Thornton, confidentiality is a double-edged sword. It encourages victims of discrimination to file complaints and respondents to cooperate, but precludes public scrutiny. Confidentiality of individual cases during conciliation emphasizes a private conception of human rights problems rather than their public nature.

e) "Private ordering"

Conciliation approaches also tend to emphasize a private law view by focusing on a private case-by-case settlement approach[73] rather than a public rights based approach from which precedent can be set both for future cases and for public educational purposes. Thornton points out that private ordering is contrary to feminist aims to transcend the public/private divide so as to expose inequity in women's lives and whose concerns and disputes are usually placed on the private side

[72] Thornton, see note 78 at 741.

[73] Devereux, see note 81.

of the divide.[74] A private process may simply reinforce discriminatory harassment as something that is a private matter between parties.

Thornton and others criticize conciliation, mediation and other individualized processes in comparison to the publicity and precedent value of court adjudication. But courts are also subject to criticism as inadequate to deal with the complexity of human rights issues. Problems with courts and adjudicative tribunal approaches include backlogs, a narrow rights-based focus on past acts, a tendency to exacerbate already tense relationships, and inadequacy and slowness in remedying systemic social issues.

Since critics of conciliation tend not to provide practical suggestions for systemic approaches, ombudsman literature[75] and literature on the design of dispute resolution systems[76] is instructive in some practical methods of integrating individual complaint handling with systemic approaches. Institutions can balance individuals' concerns with approaches that emphasize public policy, for example, research,[77] statistical complaint analysis, systemic investigations,[78] publication of summaries of case abstracts and outcomes, and public reporting of particular systemic issues or social problems that come to the attention of the human rights commission. Owen suggests this kind of systemic approach is

---

[74] Thornton, see note 78.

[75] S. Owen, "The Expanding Role of the Ombudsman in the Administrative State" (1990) 40 *University of Toronto Law Journal* 670,; S. Owen, "The Ombudsman: Essential Elements and Common Challenges" in L. Reif, M. Marshall & C. Ferris, eds., *The Ombudsman: Diversity and Development* (Edmonton, Alberta: International Ombudsman Institute, 1993) 1; Rowe, see note 30.

[76] C.A. Costantino & C.S. Merchant, *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations* (San Francisco: Jossey Bass Publishers, 1996); Rowe, see note 30; W. Ury, J.M. Brett & S.B. Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (San Francisco: Jossey-Bass Publishers, 1988)

[77] Black, see note 7.

[78] Owen, 1990, see note 101 at 675.

not an alternative to individual complaint resolution; rather, it is intimately dependent on the technical expertise and case-work experience acquired through investigating, analyzing, and resolving thousands of individual concerns over many years.[79]

f) Coercion of respondents

The privacy (or "secrecy") of conciliation processes is linked to charges of coercion of respondents. In Australia, HREOC has been disparaged as a "Star Chamber." Bailey defends, saying that privacy is designed for protection of party confidentiality and privilege and "not so that some fell purpose of the Commission and its conciliators can be achieved...."[80]

In the United States, questions about coercion have been raised concerning the work of the EEOC. Mendes, Rudner and Jourdain indicate past evidence that the EEOC has been "overzealousness" in settling claims that have no merit and that up to 25% of cases in 1981 went on to conciliation even though they appeared to have no merit at the preliminary investigation stage.[81]

Bailey,[82] the Deputy Chairman of the Commonwealth Human Rights Commission at the time of his 1986 article, defends the Australian record by pointing out that in the first ten years (until 1986) in over 7500 complaints only 100 compulsory conferences were held. While its successor, HREOC, has considerable power to obtain evidence, in 1996 Devereux, found that in no case were the Commission's compulsory powers for gathering evidence used, and only in one case

---

[79] Owen, see note 101.

[80] Bailey, see note 68 at 129.

[81] Mendes, Rudner & Jourdain, see note 6 at 27, citing B. Lindeman Schlei and P. Grossman, *Employment Discrimination Law*, 2nd edition (Washington, D.C.: Bureau of National Affairs, 1983) at 492.

[82] Bailey, 1986, see note 68.

was the respondent reminded of this. Instead, party cooperation is prevalent. In defending against the idea that the Commission might coerce respondents to cooperate, Bailey misses an important point raised later by Devereux:

> Although encouraging the conciliation of weak complaints might be regarded as the imposition of an unnecessary burden on complainants and respondents, such a practice does allow complainants to further substantiate their claims, seek a consensual settlement and promote the general interests of human rights.[83]

In Australia, from a public policy perspective "...it seems to have been presumed that complainants would be responsive though respondents might need some 'compulsion' to cooperate."[84]

While the interests of balancing power may justify compulsion of respondents to cooperate, this factor must be balanced by the need that human rights processes and outcomes have the moral power to transform individual and societal attitudes. If a system appears to be a "kangaroo court" biased against respondents, it will lose its ethical authority, its public legitimacy and its education value.

g) Coercion of complainants

Considerable and persistent concern has been raised in the literature about coercion of complainants during conciliation. Drawing on Abel,[85] Thornton's view is as follows:

---

[83] Devereux, see note 81 at 293.

[84] Devereux, see note 81.

[85] R. L. Abel, "The Contradictions of Informal Justice" in *The Politics of Informal Justice*, edited by R. L. Abel (New York: Academic Press, 1982) 267.

> Conciliation, as with legal formalism, is utilized by the state to mediate social relations. The state must satisfy the demands for social justice on the one hand and the maintenance of social order and stability on the other. These contradictions inherent within liberalism are mirrored in the conciliation process, for on the one hand, it appears to be a caring process which is supportive of the individual complainant while, on the other hand, it operates in a way to reinforce the interests of the dominant class in society.[86]

In harassment cases specifically, and human rights complaints generally, complainants (often women and minorities) are not members of dominant classes. Therefore, there are powerful public policy arguments against coercion of complainants, which can further exacerbate unfair power imbalances between parties, damage both process and outcome fairness, and thus work against the purposes of the human rights system.

Even without coercion by conciliators, Thornton wonders how free complainants are in conciliation given that human rights complaints are characterized by power imbalances by their very nature. She cites Kressel and Pruitt's 1985 research that indicates disputes with asymmetrical power are the most difficult to mediate.[87]

Thornton also expressed fear that complainants in Australia have indicated they have been threatened with a tribunal hearing if they do not settle in conciliation.[88] Devereux's research[89] found that conciliators did persuade complainants to settle or in some cases to withdraw, and the HREOC guidelines require officers to warn complainants about the evidentiary problems of a

---

[86] Thornton, see note 78 at 758.

[87] K. Kressel & D. G. Pruitt, "Themes in the Mediation of Social Conflict" (1985) 41 *Journal of Social Issues* 179, at 187.

[88] Thornton, see note 78 at 162.

[89] Devereux, see note 81 at 297.

tribunal hearing. This operates as an inducement to settle.

The kind of persuasion Devereux reports may be an appropriate role for conciliators. Devereux's research, while it found that conciliators in the Australian HREOC play an influential role in determining the expectations of parties and the outcome of disputes,

> ...rather than encouraging either party to sacrifice their interests for the sake of bureaucratic efficiency, a possibility foreshadowed by Thornton, the conciliators seem merely to have been advocating the acceptance of what they consider to be the party's best option....The only private agenda conciliators introduce into proceedings was a desire to promote human rights.[90]

Thornton notes examples of intimidating effects of British conciliation officers on complainants.[91] In New Zealand the role of referees in facilitating settlements in tribunals (not human rights tribunals) was scaled back because of evidence of coerced settlements.[92] In Canada, judicial notice has been taken of complainant concerns about coercion in human rights commissions during conciliation.[93] Mendes, Rudner and Jourdain raised concerns about pressure in the early resolution process of the Canadian Human Rights Commission.[94] Cornish noted that in the Ontario Human Rights Commission settlements under the OHRC Early Settlement

---

[90] Devereux, see note 81 at 293.

[91] Citing J. Gregory, *Sex, Race and the Law* (London: Sage Publication, 1987) at 73-74.

[92] P. Spiller, "Dispute Resolution in the New Zealand Disputes Tribunals" (1994) 4 *Australian Dispute Resolution Journal* 280.

[93] For an extreme example, see *Slattery v. Canada (Canadian Human Rights Commission)* [1994] F.C.J. No. 1017 (Federal Court of Canada) in which the complainant unsuccessfully argued that the process of the Canadian Human Rights Commission perpetuated the effects of the employers' discrimination against her and was itself an extension of the harassment. The complainant alleged that the mediator made numerous attempts to coerce her to withdraw her human rights complaints, and the court found that on one occasion the mediator called the complainant a "hog."

[94] Mendes, Rudner & Jourdain, see note 6 at 44.

Initiative (ESI) have been perceived as frequently less than voluntary because if they are not settled in ESI there is a long wait for an investigation. "[M]any claimants way they feel pressured to accepted settlements that they consider unsatisfactory and unfair.[95] This evidence raises serious concerns that require consideration for policy development, program design, training of conciliators and mediators, accountability mechanisms and evaluation.

h) Mandatory settlement processes

Finally, the issue of institutionalized and mandatory mediation for human rights complaints must be raised. The Ontario Human Rights Commission has a mandatory settlement process, however, the Cornish Report recommended that while mediation services should be facilitated by the Commission, the parties should have the right to refuse mediation.[96] While little literature discusses of mandatory mediation of human rights issues, there is a considerable literature (not reviewed here) that raises concerns about mandatory mediation within the court system, particularly with reference to women's concerns. Alarm has been expressed about mandatory mediation that could impact women or children in abusive relationships or where there are other severe power imbalances.[97] Concerns have also been raised with respect to coercion of other vulnerable people and groups. Hodges,[98] in her discussion of disability discrimination cases, points out that mandatory mediation is controversial and may potentially disadvantage people who have disabilities that would interfere with their participation in settlement meetings. There is also concern that mediation on a large scale could become mechanical and the benefits of mediation would be lost. In dispute resolution literature, concerns are raised about screening,

---

[95] Cornish, see note 75 at 17; see also page 22 and 116

[96] Cornish, see note 75 at 117.

[97] For details discussions see the literature suggested in footnote 73; see also Andreas Nelle, "Making Mediation Mandatory: A Proposed Framework" (1992) 7(2) *Journal on Dispute Resolution* 287.

[98] Hodges, see note 64.

coercion, and other abuses that may result from increased pressure on systems to emphasise efficiency goals by mediate larger volumes of cases in shorter sessions.[99] Evaluation of mandatory mediation schemes, such as the Ontario Human Rights Commission, would illuminate the value of mandatory mediation.

f) Multiple roles for human rights commission staff

There are differences among human rights commission in policies concerning the separation or combination of investigation, conciliation and adjudicative roles and staff. Thornton notes that in the Australian process there is no separation between investigation and conciliation, and the same personnel conduct both. While she notes that the connection between conciliation and investigation acknowledges the public character of the harm caused by discrimination, she also points out that the legislation provides no guidelines concerning the process:

> ...the conciliation officers themselves... are the only ones capable of measuring the quality of the conciliation service rendered....We do not know, for example, whether the parties were manipulated by the conciliator to conform to his or her own perception of what was right in the circumstances or to what extent the parties may have been dissatisfied with the outcome.[100]

Bryson, also speaking from the Australian experience, notes that sometimes the investigator conducts conciliation where sufficient trust has been built through a fair and impartial investigation. Otherwise another investigator conciliates.[101]

---

[99] J. Alfini et al., "What Happens When Mediation is Institutionalized?: To the Parties, Practitioners, and Host Institutions" [1994] 9(2) *Ohio State Journal on Dispute Resolution*, 307.

[100] Thornton, see note 78 at 748.

[101] D. Bryson, "Mediator and Advocate: Conciliation Human Rights Complaints" (1990) 1 *Australian Dispute Resolution Journal* 136 at 139.

The Canadian Human Rights Commission provides separate officers to conduct investigation and conciliation, and conciliation proceedings are confidential and privileged.[102] In British Columbia, the new B.C. Human Rights Commission, which commenced in early 1997, conducts both investigation and mediation; the design of mediation components are currently being considered. There is a separate arms-length B.C. Human Rights Tribunal, which also conduct settlement conferences as was recommended by Black.[103]

There are advantages and disadvantages in either combining or separating roles. Combining roles may keep staff requirements down and save time. However, where investigation and conciliation are combined, conciliation cannot be confidential. In the B.C. context, Bill Black recommended that the roles of investigation and mediation not be mandatorily divided in legislation but that the dangers of mixing the functions should be taken into account. According to Black, these dangers require precautions that recognize the need for parties to understand the separate objectives of investigation and mediation, the need to ensure that parties can make informed decisions about settlement, and the need for a separate mediator if investigation has created hostility in one party. Black recommended that it be left up to the Director of Investigation and Mediation to determine whether staff specialization is necessary.[104]

It should be noted that ombudsman offices generally combine the functions of investigation and persuasion and recommendation. The ombudsman literature canvassed for this review does not reflect a concern about role separation for investigation and settlement functions. It is important to remember, however, that ombudsman offices do not conduct binding adjudication, but make non-binding recommendations.[105]

---

[102] Mendes, Rudner & Jourdain, see note 2 at 43.

[103] Black, see note 3.

[104] Black, see note 3 at 115-16.

[105] Owen, 1993, see note 101 at 4.

It is also important to point out that in human rights commissions investigation and mediation are usually separated from binding adjudication. Some research in non-human rights settings indicates that mediation-adjudication processes that use the same mediator and adjudicator can be very effective for settlement.[106] However, combining mediation and binding adjudication renders the overall process more prone to coercion during the mediation phase.

An important principle to emphasize is the prevention of confusion or unfairness, including inappropriate coercion during settlement procedures. Therefore, in a given setting, it is important that clear policies be developed to ensure understanding by staff and the public as to the specific roles of staff conducting each process. More research and comparative evaluation would illuminate this issue further.

IV. Assessment of the literature

The lack of Canadian literature on the use of conciliation in human rights settings is surprising and disturbing in the light of the longstanding statutory mandates for settlement in Canadian human rights commissions, and may limit knowledgeable design of mediation programs as institutionalization of ADR increases.

The strength of Canadian literature that pertains to the general topic of human rights in harassment cases is that it takes a broad systemic approach.[107] For example, Aggarwal's work, while it emphasizes legal aspects, provides an extremely valuable overall survey. But it omits all but a few paragraphs on conciliation or mediation. The one Canadian article exclusively on settlement focuses on its legal aspects and does not discuss the processes of conciliation or

---

[106] D. C. Elliott, "Med/Arb: Fraught With Danger or Ripe with Opportunity?" (1995) XXXIV (1) *Alberta Law Review* 1; D. G. Pruitt et al., "Research on Mediation in a Community Mediation Centre" (Paper presented to a dinner meeting of the Howard University Program on Negotiation, May, 1986).

[107] Black, see note 3; Cornish, see note 75, Aggarwal see note 6.

mediation.[108] The work of Black,[109] Cornish,[110] and particularly Mendes, Rudner and Jourdain[111] are notable exceptions to the almost complete void in the Canadian literature on conciliation of human rights complaints. Black's analysis, which focuses on the overall operation of the B.C. Council of Human Rights, as does Cornish's analysis of conciliation and mediation as part of a critique of the Ontario Human Rights Commission. These reports do not purport to be in depth evaluations of mediation and conciliation. Mendes, Rudner and Jourdain, provide an extremely useful comparative overview and general description of processes as well as some analysis.

In the US literature, where conciliation has been considered more broadly in the literature, there is also little evaluative literature. Hodges[112] provide the most comprehensive consideration of the subject of evaluation.

There is also a lack of critical literature. While most articles tend to rehearse the usual feminist critiques of mediation (private ordering and power imbalance), they tend not to demonstrate an in depth analysis of these critiques as applied to human rights settings. Some literature provides a proponent's perspective with little evaluative evidence available to support it and little awareness of critical literature.[113]

The Australian literature has the most variety, and was of most interest in this review. The work

---

[108] Taylor, see note 12.

[109] Black, see note 3.

[110] Cornish, see note 75.

[111] Mendes, Rudner & Jourdain, see note 6.

[112] Hodges, see note 64.

[113] Barrett & Tanner, see note 81; Costello, see note 22; C. R. Singletary & R. A. Shearer, "Mediation of Employment Discrimination Claims: The Win-Win ADA Option" (1994) *Labor Law Journal* 338.

of Thornton[114] is particularly valuable. Her framing of the critical issues has been considered by many other authors. However, what is not reflected in the literature is attention to evaluation based on Thornton's critiques. An exception is the thoughtful work of Devereux,[115] although the scope of her research was limited.

Of the more general literature on dispute resolution, Ellen Waldman's article[116] is of great value in providing a useful conceptual framework for mediation that has application in mediating human rights complaints. Her article is discussed later in this paper. Other literature that provided considerable background is that of Sara Cobb and Janet Rifkin[117] also referred to later. The work of Gwartney Gibbs and Lach[118] was also valuable in providing sociological insights into the issue of gender and harassment.

Of considerable value was the ombudsman literature considered in this review. Mary Rowe's[119] comprehensive systemic approach takes into account not only the nature and dynamics of harassment, but also the experience of organizational dynamics and dispute resolution. Her approach integrates the needs of individuals with the need for systemic change. This literature is

---

[114] Thornton, see note 78.

[115] Devereux, see note 81.

[116] E. A. Waldman, "Identifying the Role of Social Norms in Mediation: A Multiple Model Approach" (1997) 48(4) *Hastings Law Journal* 703.

[117] See S. Cobb, "Einsteinian Practice and Newtonian Discourse: An Ethical Crisis in Mediation" (1991) *Negotiation Journal* 87; S. Cobb & J. Rifkin, "Practice and Paradox: Deconstructing neutrality in mediation" (1991) 16(1) *Law & Social Inquiry* 35; S. Cobb & J. Rifkin, "Neutrality as a Discursive Practice: The Construction and Transformation of Narratives in Community Mediation" in 11 *Studies in Law, Politics and Society*, edited by S. Silbey & A. Sarat (Greenwich, Conn: JAI Press, 1991); Gadlin, see note 30 at 153; K. Gibson, L. Thompson & M. H. Bazerman, "Shortcomings of Neutrality in Mediation: Solutions Based on Rationality" (1996) *Negotiation Journal* 69; J. Rifkin, J. Millen & S. Cobb, "Toward a New Discourse for Mediation: A Critique of Neutrality" (1991) 9 *Mediation Quarterly* 151.

[118] See notes 29 and 34.

[119] Rowe, see note 30.

valuably supplemented by the work of Stephen Owen,[120] whose experience as British Columbia ombudsman and with ombudsman offices in many jurisdictions through his work with the International Ombudsman Institute, as well as his experience investigating human rights abuses in other countries, confirms both the possibility and the necessity of integrating systemic approaches with individual complaint handling in a context that emphasizes non-binding adjudication. Ayeni's article on ombudsman evaluation was also valuable for its discussion of relevant evaluation theory.[121]

Several challenging areas emerge from the literature as requiring further research. Gaps in the literature surveyed for this review suggest further inquiry about power, culture, gender, case screening, coercion, roles of human rights officers and timing of conciliation.

1. Power

Commentators and researchers have consistently noted the need for extensive and in depth research that develops theory of power in conflict including the particular dynamics of power in diverse contexts with particular reference to experiences of vulnerable or disadvantaged people and groups. This is now urgent as ADR, and particularly mediation and conciliation, are becoming more institutionalized. This is particularly important in view of the literature which suggests that coercion of complainants in mediation and conciliation of human rights complaints is more than just a speculative fear.

Even though power is clearly a central construct in matters of human rights including sexual harassment, the literature does not reflect an adequate understanding of the concept of power and

[120] Owen, see note 101.

[121] V. Ayeni, "Evaluating Ombudsman Programmes." (1993) 11 *Ombudsman Journal* 67.

the nature of power dynamics in these contexts.[122] Given the extent to which settlement practices are featured in human rights settings, it is alarming that power as a central theme in human rights conflict is largely glossed over by all but critical authors like Thornton. Even recent literature tends to draw largely on very general literature in mediation, and does not reflect in depth discernment or inquiry about particular issues in mediation as applied in harassment cases in which power, victimization and raw emotion are prominent features.

Little awareness is shown in the literature about issues of conciliator/mediator power. Several authors[123] call for mediators who are "neutral and impartial" but do not consider literature such as that of Cobb and Rifkin that critiques the notion that mediator neutrality can help balance party power.[124] Other authors make brief comments about the need for conciliators to take into account power between the parties.[125] Still others comment briefly that mediation may not be appropriate in discrimination cases where power is imbalanced and the weaker party needs public adjudication to redress the imbalance.[126] But little in-depth reflection or theory development is evident.

Devereux,[127] while she comments on Thornton's concerns about the ability of mediation to redress power imbalance, does not give attention to the issue of party power in her 1996 article evaluating HREOC's use of conciliation although she does discuss conciliator power and coercion. Gadlin and Rowe are exceptions in that their writings demonstrate an in depth practical

---

[122] J. N. Cleveland & M. E. Kerst, "Sexual Harassment and Perceptions of Power: An Under-Articulated Relationship" (1993) 42 *Journal of Vocational Behavior* 49.

[123] For example, Bond, see note 22; Rainone, see note 74.

[124] Bond, see note 22 at 2523-32.

[125] Bryson, see note 122.

[126] G. R. Clarke, "Mediation -- When Is It Not an Appropriate Dispute Resolution Process?" (1992) 3 *Australian Dispute Resolution Journal* 70.

[127] Devereux, see note 81 at 283, 287, 292-93.

awareness of power issues; their extensive experience with harassment issues is reflected in their writing. Gadlin[128] points out that mediation models must be modified in sexual harassment cases through individual sessions with complainants, encouragement of disputants to work with support persons and advocates throughout the mediation, and realistic assessment of settlement options. Gadlin also questions critics of mediation who assume that adjudication is better at addressing inequalities. He quotes Rifkin, who has found that "women felt that the relationship of dominance had been altered and the hierarchy in the relationship had to some extent been altered."[129] Thornton points out that conciliation may have the effect of empowering individual women and members of minority groups. In conciliation of human rights complaints the emphasis is

> on the particular and the experiential, factors which represent empowerment for the individual complainant and which meets a major criticism of feminist legal scholars regarding the abstract nature of formalism....[130] [C]onciliation does create a space where individual women and members of minority groups may achieve small political victories in advancing their substantive 'rights' which would be unlikely, if not impossible, within a formal system of adjudication.[131]

Rowe's systemic approach to resolution of sexual harassment disputes takes into account power imbalance by providing for effective complaint mechanisms that take into account party needs, complainant choice (itself empowering), systemic review and feedback.[132]

---

[128] Gadlin, see note 30 at 148-153.

[129] J. Rifkin, "Mediation From a Feminist Perspective: Promises and Problems" (1984) 2 *Law and Inequality*, at 21-31, cited in Gadlin, see note 30 at 151.

[130] Thornton, see note 78 at 759.

[131] Thornton, see note 78 at 761.

[132] Rowe, see note 30.

However, the dynamics of party power and mediator power have not been plumbed. Both theoretical and practical approaches are lacking.

2. Culture and gender

Further research is also needed on the role of culture and gender in negotiation in the human rights context, including sexual harassment, in the light of the already complex dynamics of power and intense emotions like fear, grief and humiliation which are heightened in human rights cases in comparison with other conflict contexts. The literature is surprisingly silent on issues of both culture and gender in relation to human rights dispute resolution.

Rowe[133] has pointed out that some complainants in sexual harassment complaints have strong feelings about who they can trust with their complaints in terms of gender and culture. LeBaron[134] and others[135] considering community mediation contexts have pointed out that conflict resolution preferences and styles are socially constructed and culturally specific, and that mediation styles commonly taught in Canada and the United States may not suit all parties in all contexts. Of even more concern is research by Hermann and others[136] which indicates that in small claims disputes members of cultural minorities may achieve poorer outcomes than members of the dominant cultural groups in mediation unless the mediators are members of the cultural minority themselves. Poorer outcomes did not, however, affect minority group members'

[133] Rowe, forthcoming 1997, see note 30.

[134] Duryea, 1992, see note 13; M. LeBaron Duryea & J. B. Grundison, *Conflict and Culture: Research in Five Communities in Vancouver, British Columbia* (Victoria, B.C.: UVic Institute for Dispute Resolution, 1993).

[135] For example, John Paul Lederach, *Preparing for Peace: Conflict Transformation Across Cultures* (Syracuse, NY: Syracuse University Press, 1995).

[136] Hermann et al, see note 77.

higher satisfaction with mediation than with adjudication.[137] The literature is extraordinarily and alarmingly mute on the importance that complaint handling programs for human rights issues ensure that they have multicultural and gender balanced staff.[138]

3. Screening of cases for appropriateness

The literature lacks attention to issues of screening and triage. Relevant guidance concerning the problem of coercion may be found in the practice of victim-offender reconciliation and in family mediation in cases where there has been woman or child abuse. Great concern has been raised by feminist critiques about the possibility of coercion and power imbalance in family disputes, especially in cases where there have been patterns of coercion or violence. Family violence cases and victim-offender cases typically feature power imbalance and victimization. The work of Hilary Astor, Linda Girdner and Barbara Landau[139] in the area of family mediation as well as the

---

[137] Interestingly, in the same project Hermann et al's research, see note 77, found that white women achieved better outcomes in mediation than in adjudication but were less satisfied with the results. This mirrors other research on gender and negotiation that indicates that outcomes are determined more by situational power rather than they are by gender in itself, although there are gender differences related to confidence and satisfaction with negotiation, and perception of others concerning female competence compared to male competence. D.M. Kolb & G.G. Goolidge, "Her Place at the Table: A Consideration of Gender Issues in Negotiation" in *Negotiation Theory and Practice*, edited by J.W. Breslin & J.Z. Rubin (Cambridge, Mass: PON Books, 1991); L. Stamato, "Voice, Place, and Process: Research on Gender, Negotiation, and Conflict Resolution" (1992) 9(4) *Mediation Quarterly* 375; C. Watson, "An Examination of the Impact of Gender and Power on Managers' Negotiation Behaviour and Outcomes: Implications for ADR Practitioners" in *Beyond Borders: 19th Annual International Conference, San Diego, CA, October 17-20, 1991* (Washington, D.C.: Society of Professionals in Dispute Resolution, 1992); C. Watson, "Gender versus Power as a Predictor of Negotiation Behaviour and Outcomes" (1994) *Negotiation Journal* 117. It could be queried whether confidence factors might be particularly prominent in mediation of human rights and sexual harassment cases.

[138] Cornish does recommend in her 1992 report on the Ontario Human Rights Commission that mediators "should be representative of the regional and cultural diversity of the province." Cornish, see note 121 at 118; See also B. Lund, C. Morris & M. LeBaron Duryea, *Conflict and Culture: Report of the Multiculturalism and Dispute Resolution Project* (Victoria, B.C.: UVic Institute for Dispute Resolution, 1994) 36.

[139] H. Astor, "Domestic Violence and Mediation" [1990] *Australian Dispute Resolution Journal* 143; L. K. Girdner, "Mediation Triage: Screening for Spouse Abuse in Divorce Mediation" (1990) 7 *Mediation Quarterly* 365. B. Landau, "Qualifications of Family Mediators: Listening to the Feminist Critique" in C. Morris and A. Pirie, eds., *Qualifications for Dispute Resolution: Perspectives on the Debate* (Victoria, B.C.: UVic Institute for Dispute Resolution, 1994) 27; Barbara Landau's work in Fund for Dispute Resolution, *Report from the Toronto Forum on Woman Abuse and Mediation* (Waterloo, Ontario: Fund for Dispute Resolution, 1993).

experience of victim-offender mediators[140] point to the need for separate screening meetings with parties and triage to determine suitable candidates for mediation, as well as ongoing screening during the process of mediation to ensure voluntariness and absence of coercion. It is particularly important to ensure that parties who have experienced victimization are not subject to further victimization during the process of resolution.

The need for screening for human rights conciliation programs has also been suggested to eliminate those who might abuse mediation as a cheap discovery process.[141] Apart from this, the literature reflects no attention to screening methodology and tools which should be developed for use in human rights conflict. Assessment of actual screening currently practice should be recorded and evaluated. Also, the work done in these other areas should be considered for application in human rights conciliation. Increased attention to screening methods are particularly important in the light of increased institutionalization of mediation and conciliation methods. Methods of screening out inappropriate cases or clients are particularly important for any human rights program that might attempt to mandate mediation or conciliation.

4. Coercion and Voluntariness

Research should pay attention to particular processes and policies that foster the development of as much voluntariness as possible in getting people to the negotiation table. While some coercion of respondents may be appropriate to encourage cooperation, coercion of complainants may not be. More importantly, research should consider processes and practices that ensure that actual settlements arrived at through mediation and conciliation are informed and voluntary.

The literature relevant to mediation and conciliation of human rights complaints pays little

[140] For example, see M. Umbreit, "Victim-Offender Mediation" in *Mediating Interpersonal Conflict: A Pathway to Peace* (West Concord, Minn: CPI Publishing) 135.

[141] Baar and Zody, see note 60.

attention to the issue of mediator neutrality. Other literature in the field of dispute resolution has raised questions concerning the appropriateness or even the possibility of neutrality in mediation, especially where power disparities or party vulnerability are in question.

Some literature distinguishes between "interest-based" mediation and "rights-based" mediation. It is suggested that in interest-based mediation, the interests of the parties are what govern the result, and the mediators takes a facilitative role in assisting the parties to maximize the achievement of both parties' interests. By contrast, Stitt suggests that rights-based mediation involves recommendations by the mediator, and he equates "rights-based" mediation with "muscle mediation" or non-binding arbitration.[142] This distinction between rights-based and interest-based mediation may tend to blurr two features of mediation, its degree of coerciveness, and the degree to which it considers the rights of the parties.[143] Recommendatory or "muscle" mediation can be conducted without reference to parties' rights and in exclusive consideration of their interests.

Waldman,[144] in a recent and valuable article, places mediation into three categories relating to social norms. She categorizes mediation as "norm-generating," "norm-educating," and "norm-advocating." Norm-generating models are used in contexts where the parties need to create their own norms, for example neighbourhood conflicts. Norm-educating models include divorce mediation where lawyers are involved to explain legal rights to the parties. Norm-advocating models promote and reinforce particular social norms. She notes that norm-advocating models, while essentially non-neutral, are practised by many mediators in several fields, including

---

[142] A.J. Stitt, "Mediation," in *Alternative Dispute Resolution Practice Manual*, York, ON: CCH Canadian Limited, 1451 at 1452-55.

[143] The arbitrary distinction between "rights" and "interests" is also subject to challenge. The "interests" of parties (often described as their needs, concerns, fears, and desires) surely must also include the parties' sense of entitlements or rights in respect of these needs, concerns, etc.

[144] Waldman, see note 144.

environmental mediation. This style of mediation may not necessarily include formal "recommendations" of the mediator as in Stitt's definition of "rights based" mediation. A separation of the concepts of rights (or norms) and the degree of coercion in a mediation is enhanced in Waldman's analysis, and allows for more flexibility in the mediation process. A mediator could adopt a norm-advocating style without necessarily making formal recommendations. Norm-advocating methods could also include urging consideration of policy, making suggestions for consideration, and persuasion.

It is suggested that both norm-educating and norm-advocating models of mediation and conciliation should be considered and developed for use in human rights cases to ensure that legislative mandates are maintained in settlement proceedings. Bryson[145] also advocates this approach when he states that the conciliator should be an advocate for the statute and cannot be party to any agreement which is discriminatory in itself. However, it is not necessarily suggested that rights be protected in mediation exclusively through recommendatory mediation which Stitt describes as "rights based."

Waldman's article outlines a framework by which different degrees of neutrality are called for depending on the context. This framework provides an ethically cohesive way for mediators to balance mediation decisions in relation to often competing mediator directives to maintaining both party autonomy and legislative mandates. Much mediation training proposes a very facilitative approach that shies away from party persuasion. This teaching in part reflects the "myth" of neutrality[146] promoted in much mediation education in North America.[147] It has been noted by Kolb that far from being non-coercive and "neutral," many successful mediators "are

---

[145] Bryson, see note 127.

[146] Note that here the term "neutrality" is not completely synonymous with "impartiality." Neutrality in this discussion refers to a low degree of mediator activism and intervention regarding outcome.

[147] Cobb; Cobb & Rifkin; Rifkin, Millen & Cobb: see note 145.

inclined to make extensive use of pressure tactics and arm twisting" as well as non-neutral framing and reframing of party conversation.[148] These practices fly in the face of many existing Western myths about mediation which tend to support the idea that a mediator should never be coercive and should always support individual party autonomy.[149] Quite apart from the practical issue of the possibility of neutrality, the problem with the myth is that individual party autonomy may not be appropriate in human rights disputes where power is being skewed and abused by individuals and employers, and in which public mandates are as important as individual settlement wishes.

While Waldman's concept of norm-educating and norm-advocating models of mediation provides a useful construct for consideration in human rights settings, it also provides challenges for existing codes of ethics of Canadian and American mediation organizations, and challenges for training of mediators for this specific context. Also, while human rights officers and others, such as Bryson, report the use norm-advocating styles, it is not known whether current approaches to training consider or teach these models. The specific features of norm-educating and norm-advocating features of mediation and conciliation are not described in the literature, so without observation or experience it is difficult to see what they look like or how they work in human rights settings. Waldman's article provides a very useful conceptual framework. What remains to be considered is the issue of what might be appropriate and inappropriate levels of advocacy (or coercion) as it applies in a norm-advocating model of mediation.

5. Roles of human rights officers

Related to issues of coercion, more attention should be paid to the issue of role limitation or role combinations for human rights officers. For example, comparative study and evaluation could be

---

[148] D. M. Kolb, "The Realities of Making Talk Work" in *When Talk Works: Profiles of Mediators* (San Francisco: Jossey-Bass Publishers, 1994) 459 at 461.

[149] For discussion, see Morris, see note 16.

done in offices that combine investigation and conciliation and in offices that separate these functions. Evaluation of programs that combine investigation and recommendation or adjudication would also be useful in comparison with offices that separate these roles. Particular attention should be paid to the any differences that appear in comparing offices that ultimately recommend outcomes and those that provide binding adjudication.

The issue of confidentiality and privilege of conciliation proceedings and its association with increased potential for reporting and increased levels of cooperation from respondents should be a key factor in consideration of policy and program design. The issue of confidentiality is also important in considering the timing of conciliation, considered in the next paragraph.

6. Timing of conciliation

Should conciliation be offered before investigation, during investigation, after investigation, or as part of adjudication? A good deal depends on the values and goals sought to be served in settlement processes. Efficiency goals have led to fast tracks and early conciliation, such as the early resolution process of the Canadian Human Rights Commission which was instituted in 1989. This allows for immediate conciliation before full investigation. As previously noted, Mendes, Rudner and Jourdain wonder whether this process, designed for speed, may place undue pressure on complainants to settle.[150] There are also risks to respondents of being inappropriately coerced into settlement if conciliation takes place before an investigation has produced a clear finding that a violation has taken place. More evaluative research is needed to shed light on this issue.

[150] Mendes, Rudner & Jourdain, see note 6 at 44.

V. Recommendations for an effective system for dealing with human rights conflict

The nature of human rights disputes, including the example of sexual harassment, demands the integration of approaches to address both the systemic and structural nature of human rights issues and the needs of individuals who are suffering abuse (not only complainants, but those who are currently silent). Based on the literature, this section proposes a list of essential features for effective policies and programs to address human rights problems at the individual and systemic levels.

1. An integrated systemic approach to human rights problems

This section proposes that human rights problems, which have both public and private dimensions must be addressed in ways that integrate individual and public interests[151] and that are clearly linked to policy and legislation. Cornish and Lopez[152] and Owen[153] emphasize the need for fair and effective complaint handling as well as systemic approaches. Rowe points out the need to design and build dispute resolution systems rather than just one dispute resolution mechanism.[154] The literature suggests that the characteristics of an effective dispute system for human rights issues include:

- an integrated multi-process complaint handling system;
- methods to identify system problems;
- problem prevention and systems change mechanisms;
- accountability and quality assurance;

---

[151] Owen, 1990, 1993, see note 101; Rowe, 1991, 1993, 1997, see note 30.

[152] Cornish & Lopez, see note 3 at 101.

[153] Owen, 1990, see note 101.

[154] See also Costantino & Merchant, see note 102; Ury, Brett & Goldberg, see note 102.

• impartiality and independence.

a) Integrated multi-process complaint handling system.

One of the key findings in the literature on sexual harassment is that complainants need options and choices for addressing their problems, with emphasis on maximizing control over processes and outcomes as well as protection from retaliation and further humiliation. Otherwise, low levels of reporting will continue. Therefore, I recommend Mary Rowe's[155] criteria for an effective system that has the following choices and options for complainants, including:

- confidential one-to-one consultation to acknowledge feelings (eg. rage, fear of retaliation, grief and humiliation), to exchange information exchange, and to help people help themselves wherever possible;
- shuttle diplomacy by a third party;
- face to face mediation;
- fact finding and investigation;
- decision making, arbitration or adjudication.

Rowe also emphasizes that in an institutional setting there should be multiple entry points for complaints in the system to maximize complainant choices concerning the person they wish to confide in about their problems. Consensual options need to be combined with the availability of binding options in order that the system is not without teeth to achieve its public or institutional mandates.

[155] Cornish & Lopez, see note 3 at 101.

b) Identification of systemic problems

Complaint handling should not be seen in isolation. It is only one component in an effective systemic approach to human rights problems. If complaint handling is overemphasized, the system may well be justifiably accused of privatizing issues that are clearly matters of public interest. A systemic approach should also provide mechanisms for identifying systemic problems and alerting those with appropriate authority[156] (in some cases the public) including remedial recommendations. The Australian HREOC appears to have had some success with this approach.[157] Important to this ombudsman-type approach are statistics gathering,[158] a mandate to conduct research,[159] and a mandate to conduct independent institutional or systems review.[160] The ability to intervene in court proceedings in important precedent cases is also important.[161]

c) Problem prevention and systems change

Mediation programs have been cited as useful for providing non-adversarial climates for the purpose of educating parties and employers in particular cases about the law and how to avoid discrimination claims.[162] However, human rights programs should also include broader public education goals beyond what may take place in individual mediation and conciliation sessions.[163]

---

[156] Rowe, 1997, see note 30.

[157] Charlesworth, see note 66 at 216.

[158] V. Ayeni, "Collecting Statistics" in *The Ombudsman: Diversity and Development*, edited by L. Reif, M. Marshall & C. Ferris (Edmonton, Alberta: International Ombudsman Institute, 1993) 265.

[159] Black, see note 3.

[160] Owen, 1990, see note 101.

[161] Charlesworth, see note 66 at 216.

[162] Baar and Zody, see note 60 at 32.

[163] Rowe, see note 30; Black, see note 3.

Education and training should be directed at potential complainants, employers and other groups to train them about general diversity and discrimination issues, including what constitutes harassment and sexual harassment. Training should also be targeted at managers and supervisor to increase awareness of and competency in early identification and intervention.

Given that harassment constitutes a large proportion of discrimination complaints, education and technical support is also needed for employers for the development of effective in-house policies and processes for prevention, intervention[164] and remedies for employment related complaints. Harassment policies and institutional complaint mechanisms are not enough. Managers and supervisors also need to be trained in the handling of employee disputes in an effective manner to prevent them from developing into harassment or other discrimination complaints.[165] In particular, managers need effective strategies to prevent retaliation and escalation of conflict or abuse once an issue has been raised.

d) Accountability and Assurance of quality

Finally, a system should ensure accountability and quality. Staff must be appropriately selected and trained. Training is discussed at more length later in this paper. Accountability and evaluation should be built into program design at the outset.

Evaluation should assess not just settlement rates or cost-efficiency, but fairness and user satisfaction. In addition, it is important to reiterate that evaluation should measure quality against all the goals of the program, including both private complaint resolution and overall public effectiveness in improving and maintaining human rights.[166] There is very little evaluative

[164] Singletary & Shearer, see note 141.

[165] Conversation with Phil Reusing, Human Resources, University of Victoria, November 19, 1997.

[166] Ayeni, see note 149; Owen, 1990, see note 101.

literature that considers conciliation and mediation in human rights settings, and what does exist, tends to rehearse the well-known benefits for mediation, such as faster case processing and participant satisfaction. Only Eve Landau[167] has looked at the societal outcomes in the Australian context showing the impact of human rights conciliation, including examples of cases that are considered to have made an impact on women's progress in the workforce. Evaluation should attempt to address societal outcomes, and not just complaint handling outcomes.

The most comprehensive treatment of evaluation criteria is done by Hodges[168] who points out that continued evaluation and monitoring are essential. She provides detailed suggestions concerning evaluation process, stressing that it is important not to overemphasize settlement rates. She suggests that evaluation processes should include parties, mediators, and agency personnel. Data collection and analysis should be designed to address:

- consistency with statutory goals
- changes in case processing time and backlogs;
- changes in costs for parties and government;
- most effective point for conciliation in the investigation process;
- comparison of effectiveness of mediation for various case types;
- advantages or disadvantages of mediation for historically disadvantaged groups.
- comparability for represented and unrepresented parties;
- results in conciliated cases compared to outcomes of adjudication or other processes;
- whether there is need for agency approval of settlements;
- compliance rates;
- mediator quality, including sources of best mediators.

[167] Landau, see note 68.

[168] Hodges, see note 64 at 503.

e) Independence

Impartiality and independence from political or administrative pressure is also essential for conciliation officers, investigators and tribunal members. This issue is not discussed much in the literature, except for a few statements about the need for impartiality. While perhaps the need for impartiality and independence goes without saying in the Canadian, Australian, and American contexts discussed, it is an important point to emphasize. Appointments of human rights officers for sufficient periods of time, as well as legislative protection, are important to ensure that the system remains free of subtle pressures toward corruption.

2. Specific suggestions concerning conciliation and mediation aspects of a human rights program

a) Intake and screening

Intake and screening procedures should be in place to assess cases suitable for mediation, including attention to power dynamics and party ability to negotiate effectively. Cases where important legal points are at stake may not be appropriate for private settlement.

b) Clear policy concerning roles and role limitation

Policy should clearly establish roles and role limitation concerning the combination or separation of investigation, conciliation and adjudication.

c) Clear policy guidelines concerning confidentiality

Policy should establish clear guidelines as to what and how information is to be used in particular stages of the process of complaint handling and resolution. In particular, policy and legislation

should set out limits of confidentiality and privilege in settlement discussions. This becomes complex in programs where investigation, conciliation or adjudicative roles are combined.

d) Clear rationale and policy for timing of conciliation procedures

Bryson states that "it is obviously a critical feature of human rights conciliation that investigation precedes conciliation."[169] This is not so obvious everywhere. In some jurisdictions, conciliation precedes in depth investigation, such as in the early resolution processes of the Canadian Human Rights Commission. However, it is difficult to justify conciliation in the absence of some preliminary finding that the complainant at least has a *prima facie* case. This is an area identified as needing more research and comparative evaluation.

e) Clear policy concerning appropriate and inappropriate coercion during mediation and conciliation phases

Policy should delimit what is appropriate and inappropriate coercion in settlement discussions. Parties, particularly vulnerable parties such as victims of harassment, should be protected from coercion by other parties. Regarding mediator coercion, it is suggested that norm-educating and norm-advocating models be used, with cautions concerning appropriate and inappropriate uses of mediator coercion. Research is needed to describe and evaluate current approaches in human rights commissions that fit this model. Also, policy should require that sufficient time and staff be allowed to ensure that fairness goals do not have to compete unduly with efficiency goals that create pressure for higher caseloads and faster complaint handling.

[169] Bryson, see note 127 at 138.

f) Guidelines concerning outcomes

It is recommended that guidelines and procedures be developed to ensure that settlements meet the standards of human rights legislation.[170] In the light of the literature, it is questionable whether the practice of the B.C. Human Rights Commission of simply registering settlements with the Commission is a sufficient safeguard against settlements that violate the public mandate of the human rights statute.

g) Staff and tribunal selection and training

Current ADR training in Canada tends to stress facilitative styles of mediation. Given that norm-advocating models of mediation seem more appropriate for human rights settings, current approaches to training of mediators may need to be reassessed and redesigned to develop training modules in norm-advocating approaches. Research is needed to support educational design based on comparative evaluation of methods currently being used effectively in human rights settings. Training should also focus particular attention on the features and dynamics of human rights disputes, including issues of power, culture, gender, intense emotion such as fear and anger, as well as the public mandates of the human rights body in question.[171] Training should ensure sufficient substantive knowledge about the standards of the human rights legislation. The Cornish report emphasized that mediators should be able to recognize power imbalances. Recognition is not enough; screeners, conciliators and investigators all need to know what to do about unfair or abusive power dynamics. Often conciliation and investigation roles are mixed, so officers must also be trained in impartiality with reference to their role as investigators, mediators and also as officers who make recommendations concerning claims.[172]

---

[170] Hodges, see note 64 at 501.

[171] See also Lund, Morris & LeBaron Duryea, see note 166 at 36.

[172] Cornish, see note 75 at 17, 118-119, cited in Mendes, Rudner & Jourdain, see note 2 at 52.

With regard to conciliator selection, it must be underscored that in a multicultural and pluralistic society human rights staff including conciliators and mediators should be representative of the diversity within the particular context of disputing.

3. Overall policy and program issues

Public human rights complaint systems have various and multiple mandates as well as various legal, political, social, cultural and fiscal potentials and constraints, depending on the contexts in which they have arisen and operate. Multiple mandates can provide tensions. The tensions outlined in public/private debates are a problem not just for theorist but also at the functional level in every day practice in a given setting. Mediators who practice in human rights settings (and other administrative justice settings) are continually aware of their duty to ensure that settlements are within the framework of their statutory and policy mandates.

In a pluralistic society, the challenge is to develop policies and practices that integrate or strike a balance between opposing individuals' requirements for protection of fundamental rights and autonomy, as well as a balance between the power of governments to determine law and public policy and the power of non-dominant ideological, cultural or interest groups in society. The dichotomous public/private paradigm may be an insufficient theoretical paradigm to account for the complexities of balancing public and individual rights and interests in the context of pluralistic societies. Some theorists have suggested instead that in the area of public law and policy we should guided by "the twin lights of *accountability* and *participation*."[173] Using this paradigm, it is suggested that an effective system for resolving human rights issues in a given context would include policy development that balances public mandates and private interests, includes appropriate public participation including those with a stake in the issues, is based on clear understanding of the context, integrates policies with practices, and had adequate resources

[173] See A. Cockrell, "'Can you Paradigm'-- Another Perspective on the Public Law/Private Law Divide" in T.W. Bennett et al, *Administrative Law Reform* (Cape Town, S.A.: Juta & Co., 1993) 227.

to fulfil mandates.

a) Balance of public mandates and individual rights and needs

Policy and program development should balance and integrate public, group and individual interests by involving those with a stake in the process.[174]

b) Understanding of context and public participation

Policies and programs should not be developed without a clear understanding of the context including the legal, political, social, cultural, historical and institutional context as well as the nature of the problems to be address and the people to be served.[175] Of particular importance in the context of sexual harassment is the need to understand complainant needs for safety, privacy, protection from retaliation, career preservation and enhancement, and to balance these not only with respondents' and employer interests, but also with the public interest. The interests of those most directly affected are diverse in this intensely conflictual area of law and public policy. In a pluralistic society establishing the "public interest" is challenging. This process can be assisted through public consultation and inclusion of those with a stake in processes or outcomes in policy development exercises to ensure that the system meets the needs of parties and to ensure

---

[174] Owen, 1990, see note 101 at 682; Society of Professionals in Dispute Resolution (SPIDR), *Ensuring Competence and Quality in Dispute Resolution Practice: Report No. 2 of the SPIDR Commission on Qualifications, April 1995* (Washington, D.C.: Society of Professionals in Dispute Resolution, 1995) 3, 9, 14, 19; Thornton, see note 78 at 747-48.

[175] SPIDR, see note 202 at 2, 9, 14; C. Edwards and C. Morris, "Competence and the Role of Standards for Neutrals" in *Alternative Dispute Resolution Practice Manual* (North York, ON: CCH Canadian Limited, 1995) 8591; M. LeBaron Duryea, "The Quest for Qualifications: A Quick Trip Without a Good Map" in *Qualifications for Dispute Resolution: Perspectives on the Debate*, edited by C. Morris & A. Pirie (Victoria, B.C.: UVic Institute for Dispute Resolution, 1994) 109; C. Morris, "Where Peace and Justice Meet: Will Standards for Dispute Resolution Get Us There?" in C. Morris & A. Pirie, eds., *Qualifications for Dispute Resolution: Perspectives on the Debate.* (Victoria, B.C.: UVic Institute for Dispute Resolution, 1994) 3 at 7-10.

user support.[176] Dispute resolution practitioners have done considerable work to develop processes for policy development that include appropriate participation by those affected and by the public.[177]

c) Practices clearly linked with legislative mandates and policies

Practices, including evaluation, should all relate clearly and transparently to the goals articulated in legislation and policy.[178]

d) Adequate resources

It is also essential to ensure that budgets and staffing are sufficient to fulfil legislative mandates and policies including evaluation. Too often, ambitious new mandates are announced without adequate wherewithal to advance them, with predictably poor results and decreased public confidence. At the same time, sufficient time must be allowed to develop experience and good results, and to avoid untimely "death by pilot project."

VI. Conclusion

For all its gaps and inadequacies, the literature makes it clear that experiments with mediation

---

[176] Costantino & Merchant, see note 102; Owen, 1990, see note 101; Hodges, see note 64 at 465.

[177] See, for example: British Columbia Commission on Resources and Environment, *The Provincial Land Use Strategy: Public participation, Volume 3* (Victoria, BC.: Commission on Resources and Environment, 1995); British Columbia Commission on Resources and Environment, *The Provincial Land Use Strategy: Dispute resolution, Volume 4* (Victoria, BC.: Commission on Resources and Environment, 1995); Round Tables on Environment and Economy in Canada, *Building Consensus for a Sustainable Future: Guiding principles* (Ottawa: National Round Table on Environment and Economy, 1993); Society of Professionals in Dispute Resolution (SPIDR), *Best Practices for Government Agencies: Guidelines for Using Collaborative Agreement-Seeking Processes. Report and Recommendations of the SPIDR Environmental/Public Disputes Sector Critical Issues Committee* (Washington, D.C.: SPIDR, 1997).

[178] Owen, 1990, see note 101, at 675-76.

and conciliation of human rights conflict, including sexual harassment, are meeting with sufficient success to warrant continuation and expansion. While many fears of critics have not materialized, the literature suggests that mediation and conciliation should not be considered a panacea or a replacement for adjudication and systemic approaches. This is particularly so given the concerns raised in the literature about the privatization effect that could occur with overemphasis on individual case-by-case settlement. While fair, effective and efficient complaint resolution should be strongly featured, it is essential that these mandates be integrated with practical and effect methods of ensure that public mandates are carried out. The issues outlined in this paper all speak to the need for development of interdisciplinary approaches to reveal multiple dimensions and factors that must be considered for the development or strengthening of policy and practice in the resolution of human rights issues. Human rights problems are multi-faceted. So must be the approaches to address them.