INNOVATION AND DISPUTE RESOLUTION: HOW ADAPTABLE ARE WE AS DISPUTE RESOLUTION PRACTITIONERS?

Anne Scragg*

The purpose of my session is to stimulate debate and encourage self-reflection. This accompanying paper is not an academic one. It simply reflects my observations over a period of 25 years working in dispute resolution in New Zealand, largely but not solely in the public sector.

I work for a Crown owned company, Dispute Resolution Services Limited. This company provides a wide range of dispute resolution services to our personal injury insurance provider, the Accident Compensation Corporation. We also provide facilitation or mediation services to the Real Estate Agents Authority, Canterbury Earthquake Recovery Authority and the Health and Disability Commissioner. We operate the telecommunications industry multi-process dispute resolution scheme (TDR) and a similar multi-tiered dispute resolution scheme for financial service providers (FDR). We deal with over 10,000 cases a year. Most of our work is funded by a large organisation rather than individual parties to a dispute. My experience may, therefore, be rather different from yours, if you work solely in the private sector. Nevertheless, I suspect the questions I pose may be relevant to all of us as we are all dealing with human beings who are deciding how they or their organisations should deal with conflict and disputes.

My first question is whether there is alignment between our perception of dispute resolution as dispute resolution practitioners and the perception of those who are not familiar with the theory and practice of dispute resolution?

My experience is that the perceptions are almost always a long way apart. I am forced to the conclusion that, as practitioners, we need to adopt new and clearer

* LLB(Hons), GDipBusiness Studies (Dispute Resolution), AAMINZ. DRSL Practice Director: Professional Excellence and Innovation.

ways of describing the services we provide. Put bluntly, the old descriptions of dispute resolution processes and their benefits "are not cutting the mustard."

A growing number of influential commentators have remarked on the over-zealous promotion of mediation by some mediators. I believe over-promising and under-delivering has been harmful to us as practitioners. Those of you who attended the AMINZ Conference in 2011 may have heard the Hon. Justice Winkelman's critical comments that "claims for mediation should be put more modestly in the interests not only of accuracy but also in the interests of our system of civil justice."[1] Justice Winkelman referred to Dame Hazel Genn's description of the case for mediation as "often an anti-litigation discourse which suggests that litigation is always expensive, unpleasant and unnecessary".[2] It is probably fair to say that in the last couple of years there has been a move away from this type of 'crusading' rhetoric but there remains a deeply rooted belief on the part of some mediators that mediation is superior to any other form of dispute resolution because it offers win-win resolution, preservation of relationships and creative problem solving.

My observation is that the rest of the populace are either unconvinced by this argument or place little value on the benefits claimed for mediation. Whichever the case, it seems we have a task on our hands to describe and promote our services in a more meaningful way.

This is not straightforward. We frequently see reports in the news media of mediators making decisions and terms such as arbitration and mediation used interchangeably. The public see that arbitrators are sometimes retired senior members of the judiciary and the introduction of judge-led mediation within the civil justice system has further "muddied the waters."

There are also some very entrenched views that are difficult to shift. In my experience almost all people I talk to about mediation believe mediation always means compromise and this is a powerful disincentive for them. Organisations somewhat reluctantly introducing mediation as a method of resolving disputes with their customers to show goodwill and/or reduce legal costs frequently insist that they will not be able to change their position and only want to use mediation to "explain" their position to the non- accepting party. This is unfortunate because it further undermines the already rather shaky argument that mediation achieves win-win outcomes, preserves relationships and solves problems creatively.

---

1 Hon Justice Winkelmann "ADR and the Civil Justice System" paper delivered at the AMINZ Conference 2011 – Taking Change of the Future 6 August 2011 p 21.

2 Ibid p 20.

Some practitioners seem reluctant to offer services that differ from those they have been trained in or feel comfortable with. This may be the result of insufficient experience. There seems to be a lack of confidence about adapting "tried and true" processes to better meet the needs of our customers. From what I have heard, this reluctance can extend to refusal to revisit a standard form of agreement to mediate, refusal to assist parties to write up a mediated agreement and refusal to conduct mediation on the telephone, despite the express wishes of the parties. Some mediators see themselves as firmly rooted in one spot on the mediation spectrum, as transformative mediators not evaluative mediators, displaying a woeful lack of flexibility. If this reluctance is founded on a perceived lack of competence, it would be understandable but in some cases I fear it may be the result of inflexibility and a focus on the mediator's personal preference rather than a willingness to respond to the parties' needs.

In my view, we as practitioners need to take a long hard look at the way we describe and promote dispute resolution. The old descriptions are either being challenged or they do not resonate with the public at large. We need to find a way through this if dispute resolution is to perform the valuable function that we all know it can provide.

My second question is 'what is it that our prospective customers really want?'

Here, I can really only speak for large organisations in the public and private sectors. Through my work I have been involved in the design of a number of dispute resolution schemes. In all cases, the organisations have wanted the following:

- Flexibility including multiple options for parties
- Cost effective and timely services
- Effective use of technology
- Quality assurance mechanisms
- Exclusion of cases more suited to other dispute resolution methods eg litigation.

I shall deal with each of these aspects in turn.

In terms of flexibility, I have found that each prospective customer wants a process that meets their needs and the needs of their clients. They are not interested in the general benefits of mediation; they generally believe that their needs are unique and require a custom built solution. They have little or no understanding of process labels but are very much drawn to processes which will

resolve conflict early and with minimum formality. They like the notions of problem solving and settlement based outcomes but they are more drawn to what we might describe as facilitation than mediation which they distrust as requiring them to compromise. They generally regard it as preferable for practitioners to have relevant subject matter knowledge. Building on this, they are often comfortable with the practitioner utilising their subject matter knowledge through an evaluative approach or the process of early neutral evaluation and they are quite often keen on an approach which we might describe as med/arb. Importantly, they want any process to be regarded as fair, constructive and credible by their clients as well as themselves.

How should we as practitioners respond? I suggest we need to abandon any inclination to personal preference in terms of labels and we look very carefully at whether we can offer a solution which meets the customers' needs **and** also meets our ethical obligations as practitioners. This immediately raises the notion of accreditation and potentially of regulation. We will come back to this.

In terms of cost-effectiveness and timeliness, I imagine we would all agree that these are important features of any professional service. Fees must of course reflect the skills and expertise of the practitioner and provide a reasonable return for the work involved. However, it is also reasonable to expect flexibility and cost-consciousness on the part of the practitioner especially if cost can be reduced through appropriate use of technology.

Not surprisingly, most dispute resolution practitioners are not in the first flush of youth. This is probably how it should be, given the value of wisdom, experience and maturity of outlook on the part of a practitioner in any dispute resolution process. However, there is also a risk that some of us may not be keeping up with the latest advances in technology. Large organisations are increasingly adopting new technology across all areas of their work and they have an expectation that as service providers we will be doing the same in order to achieve significant cost savings and greater efficiency. We need to be much more open to resolving disputes on line, or even utilising telephone or video conferencing, despite a natural preference to bring everyone together round a table. It's a question of "horses for courses." Not all cases will be suitable but I suspect may of us are overly risk averse when it comes to trying out new technology.

Quality is of course something we all recognise is critical. We all like to think we deliver a high quality service to our clients. The question is whether the general populace think we do. Commentators such as Dame Hazel Genn have noted in relation to mediation that "the role of mediators is currently unregulated and they are unaccountable. The nature and extent of their responsibilities is not clearly

articulated and ethical codes vary. These issues matter since mediators have considerable opportunity for the exercise of covert power during the course of mediations and in influencing settlement agreements."[3] The confidentiality of our processes makes checking a mediator's competency a major challenge.

How can we demonstrate the quality and worth of our services? How can we reassure prospective customers that we can provide a fair and credible mechanism for resolving disputes? I believe we can do this in a number of ways. First, we must have the ability and will to seek feedback from our clients on the process in which they have participated. We might share this feedback in a suitably anonymised form with prospective clients. We must engage in honest self-reflection and utilise professional supervision to further refine the way we do things. However, this may not provide sufficient reassurance to prospective customers.

If we work in a team as practitioners, we need to make the most of this. We can learn a huge amount from our colleagues and I believe we should work together to improve all aspects of our work from the way we conduct meetings or hearings to agreement and decision writing. Where possible, we should make the most of opportunities to observe and be observed and we should welcome collegial feedback.

More controversially, I believe we should be more open to the need for regulation. While most of us are accredited members of professional organisations and therefore subject to their Codes of Ethics, not all dispute resolution practitioners are. And, as Dame Hazel Genn noted, ethical codes vary, which can be confusing for potential clients. Dispute resolution agencies which employ or regularly contract with practitioners will also have their own Codes of Conduct possibly adding to the confusion.

In a paper delivered at a recent seminar in Auckland on Best Practice in Dispute Resolution, Kim Lovegrove, Partner of Trans-Tasman law firm Lovegrove Solicitors and Conjoint Professor at the University of Newcastle argues that mediation is not a profession because there is no uniform requirement that there be a prolonged course of training or a formal qualification. In his words, "to hold out as being a mediator one need not be qualified nor need one have any experience."[4] In Lovegrove's view, "mediation will only become a profession

---

3 Dame Hael Genn *Judging Civil Justice* (The Hamlyn Lectures 2008, Cambridge University Press, New York, 2010) p 124.

4 Kim Lovegrove "Making Mediation a Profession" – A paper delivered at the Lexis Nexis Seminar "Best Practice in Dispute Resolution" Auckland 2013, p 1.

when legislation is brought to bear to regulate and professionalize mediation."[5] He argues that "it is naïve to think that the fraternity of mediators will of its own volition self-regulate".[6]

I am aware that many mediators are resistant to the concept of regulation. It may seem ironic that I am disposed toward regulation when there is a risk that this could stifle innovation. Nevertheless, I believe the case for regulation is becoming compelling especially for mediators who are not working concurrently in a profession which is already regulated. I agree with Lovegrove's view that the best mechanism to generate accountability is legislation because black letter law dictates what one can do, what one cannot do and what the codified consequences of breach are.[7] Regulation would provide significant reassurance to the larger organisations I work with and my expectation is that this would lead to an increase in work for competent mediators who are interested in undertaking work for such organisations.

In terms of the exclusion of cases more suited to other forms of dispute resolution, I believe it is incumbent on all practitioners to think carefully about the best way to resolve a given dispute. This may not be the process requested by the parties, who may have very little information on which to base their request. Clearly the more competent and the experienced the practitioner, the more likely they are to make the right decision here. Some practitioners might argue that they must respect the parties' wishes but I believe as "professionals" we have an obligation to advise parties if our expertise and experience suggest litigation or another method of resolving their dispute would be more appropriate. I believe we owe it to parties to do this to save them cost, time and unnecessary stress.

In conclusion, we need to reflect on whether there should be any limits to our adopting an innovative approach? There can be little doubt that modern dispute management requires modern techniques of dispute resolution but are there any "no go" areas? In the absence of regulation we must look to professional bodies for guidance. In New Zealand both AMINZ and LEADR NZ require their members to adhere to prescribed ethical standards and both organisations have complaint and disciplinary procedures. These provide some guidance to practitioners wishing to test new ground. Most of the comments and suggestions I have made, however, are not revolutionary. My aim has simply been to communicate what I see is a widespread lack of understanding of dispute resolution

5 Ibid p 5.

6 Ibid p 8.

7 Ibid p 7.

processes on the part of potential users and scepticism about their appropriateness and worth. My experience tells me that we need to find new and better ways to share our knowledge and understanding of dispute resolution and that we need to be more responsive to the evolving needs of our clients.

I will end by quoting former Australian High Court Justice Michael Kirby, who writes: "What is needed is not a starry-eyed embrace of a new fad that will replace the courts, but the best utilisation of new techniques that will assist our society and those with disputes to lawful, just and economical solutions to the conflicts that inevitably arise."[8] These words were penned in 2009 but the message remains just as relevant in 2013.

8 Michael Kirby "Alternative Dispute Resolution: A Hard-Nosed view of its Strengths and Limitations" (2009) 28 (1) The Arbitrator and Mediator 1, 1.