Still measuring value

The final instalment of a two-part article about expanding the use of mediation in public law and policy making

BY AMANDA BUCKLOW

Mediation is still viewed as useful in a limited number of case types. Many areas are considered unsuitable, including public law and regulated matters. However, these are the areas where the greatest potential for added value can be found for the benefit of both the public interest (better laws and regulation) and the public purse (lower costs).

I frequently work with the Treasury Solicitor's Office (TSol) and at the beginning of training we ask participants in which practice areas mediation could be used. The lists are initially short. By the end of the training, when we ask the question again, it is a different and much expanded list.

David Pearson, director general at TSol, has been a long-time supporter of mediation and the necessary culture change required to support its use. He advocates a simple shift in emphasis from why use mediation to why not use mediation, on the basis that this provides a better assessment, even if the result is sound reasons for not using it. I would go one step further and ask where we can effectively use mediation in order to manage the case and develop policy around the issues identified. The principle might not be suitable for mediation, but there may be attendant issues that should be mediated to benefit the overall case management and, therefore, for the individual and public good.

Regulators should also consider mediation as a valuable process for delivering objectives of improved accountability and standards. Mediation is a process that frequently reveals underlying causes. It holds the potential to identify what works, what hinders and to promote a culture of shared responsibility – a most compelling intangible benefit of mediation. Mediation does not exclude or undermine the enforcement of sanctions; it offers unique opportunities for encouragement, sanction, responsibility and learning. It is learning that is key to creating a context in which it is easier for those regulated to comply.

WHEN MEDIATION FAILS

It is not all good news when it comes to the evidence. There are discouraging examples and ambiguous outcomes when mediation has played a role in policy making. I think there are some reasons for this: the level of authority and capacity to influence and the conflict between cost (including who pays) and quality.

Turn to a chapter in Beyond neutrality: confronting the crisis in conflict resolution entitled "The use (and misuse) of mediation" (Jossey-Bass, 2004) and the author makes a few key points about using mediation in the design of public policy, including:

- decisions arrived through consensus at a local level can be overturned by decisions at national level or even ignored;
- the processes for arriving at those decisions are time-consuming and expensive;
- they often intensify the power imbalance (unpaid enthusiasts versus well-paid professionals);
- structurally, the process supports the status quo; and
- a question over the neutrality of the mediators/facilitators arises because they "are in some way accountable for our time and for the outcome to the agency in a way that was different from how we were accountable to the stakeholders".

The chapter concludes by stating: "Our challenge is to work with the entire dimension of the policy making process if we really want to have an impact on how conflict is conducted in crucial areas".

The policy to use mediation is different from using mediation to develop policy but they can support each other, even if only by accident! For example, the use of mediation in employment matters has increased over the past two years thanks to the introduction of the Dispute Resolution Regulations 2004. There was evidence in the government's March 2007 review of employment dispute resolution (www.berr.gov.uk) that regulations have actually created disputes, providing many more opportunities for mediation. Happily that fact may very well be instrumental in informing a change in legislation. However, the cost of mediation in this area has adjusted to the cost base of the users. When the choice of mediation is cost-driven, the demand is likely to be met by those happy and able to accept more modest fees to gain experience. This has a profound effect on the quality of tangible results and, therefore, on the evidence that subsequently supports the overall use of mediation in areas where it could bring the most benefit: the public sector and policy-making. It also has implications for a sustainable service especially with an increasing focus on shorter and

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shorter mediations. Until the profession of mediator becomes more highly valued, people will continue to choose the lowest cost if they feel they are getting the same for less. Do we have to wait for the evidence?

WHEN MEDIATION SUCCEEDS

Even the most complex commercial cases mediated in the UK rarely take longer than two days to complete; most are completed in one. However, changing culture takes time and we need to be open to the idea that much longer mediations will be necessary to give proper attention to important issues. Until financial resources are committed to such an approach, it will rest with the enthusiast to maintain momentum with inherent risks to quality. Yet, we depend on enthusiasts; mediation in the UK became a reality precisely because there were enough of them to make it happen. The pioneers had different motivations.

Culture change frequently comes down to the personal qualities, attributes and commitment of the sponsor. Patience, persistence, optimism, creativity, tenacity, courage, personal risk taking, trust – *they are all very difficult to measure*, but also essential attributes of an effective mediator. Mediation has huge potential for success in matters of public law and policy making, and a number of real benefits exist in broadening the use of mediation: narrowing the issues; focusing on how; creating a culture of responsibility; managing ambiguous disputes in a better way; and informing authorities about areas consistently generating disputes and never seeming to be resolved satisfactorily through established processes. Falling towards the intangible end of the scale, these are not part of the normal suite of pros and cons and need wider sponsorship.

HOW CAN WE SPEED UP THE PROCESS OF DEVELOPMENT?

Culture change requires a change in mindset to nurture success. At the same time, culture change also succeeds in nurturing a new mindset. Though mutual processes, they may not happen at the same pace. Those with responsibility and influence in areas that could benefit from a wider use of mediation, especially from the intangible benefits, need a new perspective on the possibilities that is less spotlight and more floodlight.

We need a new way of thinking that builds capacity to include both spotlight and floodlight at the same time: a mindfulness that observes without judging. Our cultural obsession with simple often leads us to focus too soon. In mediation, focusing too soon frequently means no agreement.

This is not a proposal for abandoning reason, argument or decisiveness or being results orientated. It is an invitation to be more inclusive and to value qualities and benefits even though we cannot measure them – yet.

Some benefits will always remain intangible because they relate to how people feel about the matter, whether mediation process or policy. Behaviour is based on the way people feel about things. People do not obey, they chose to comply and mediation can identify the context in which people are more likely to comply than not.

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