MEDIATION IN ADMINISTRATIVE LAW - THE COMMONWEALTH AAT EXPERIENCE

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Mediation commenced in the Commonwealth Administrative Appeals Tribunal (AAT) in September 1991 following a report prepared by Professor Jennifer David, who was commissioned by the former President, Justice Deirdre O'Connor, to investigate the feasibility of developing a mediation stream for the Tribunal. Mediation was ultimately introduced on a graduated basis throughout AAT Registries, after the recommendation of Professor David to introduce mediation was accepted by O'Connor J. From March 1993 it has been available in all jurisdictions and all Registries.

The AAT has not had its own definition of mediation nor has it been defined by recent amendments to the *Administrative Appeals Tribunal Act*. We have, however, practised mediation as being the voluntary participation by all parties, in an atmosphere of confidentiality, of persons in conflict agreeing to be assisted by a neutral third party mediator who will encourage them to find their own solutions to the dispute by focussing on their issues, interests and needs. The solution must necessarily be lawful. Relationships should be restored and the process should be satisfactory to the parties. It must be a credible alternative to litigation and adjudication.

Mediation in effect gives parties before the AAT a choice of the manner in which the dispute may be resolved. The concept of parties being given this choice is, I believe, unique and in the event that a matter does not resolve by mediation, the opportunity to proceed to a hearing is preserved.

I emphasise that mediation has not been introduced to the Tribunal as a case management tool only. Its primary purpose has been to offer disputants a satisfying process of dispute resolution. The right to proceed to a hearing is no longer the only option available to parties if they are incapable of or unable to resolve their dispute.

The Tribunal is familiar with a sufficient number of examples of mediation being implemented as a case management tool to be satisfied that the ethic and philosophy of mediation has been corrupted where courts, tribunals and agencies strive for reduction in delays between commencement of litigation and conclusion or the elimination of court backlogs which exist primarily as the result of a failure to properly administer case loads. We are disappointed by the frequently

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occurring headlines which, unfortunately, continue to be published by courts and tribunals extolling the virtue of mediation because backlogs have been eliminated "overnight" by mediation. To the extent that mediation is primarily focused on resolution of disputes and the creation of peaceful harmonious relationships between parties, the elimination of a court backlog or using mediation as a case management tool satisfies the needs of the courts and the parties' representatives only and fails to focus on the needs of the parties themselves.

Mediation is conducted within the Tribunal by its own members who are accredited as mediators. The decision not to use outside agencies, despite a considerable body of informed opinion that courts and tribunals should not mediate but should use outside agencies, has been taken with regard to the issue of costs, confidentiality, maintenance of files and control over listing.

Results to date

That mediation has been accepted within the Tribunal and by its users is evidenced by the fact that at 30 June 1994, 621 cases had been referred to a mediation conference. Eighty-one percent of cases mediated have been resolved. Broken down into individual jurisdictions, the rate of resolution has been 79% in Social Security, 84% in Veterans and 83% in Compensation.

Some agencies have stated that mediation is now their preferred option of resolution over and above litigation. Some parties in fact request mediation in lieu of a preliminary conference, although our procedures dictate that parties will participate in at least one preliminary conference prior to mediation to ensure that they understand the process and are ready to mediate on the allocated date.

Accredited members also conduct preliminary conferences within the Tribunal so that the ideals of mediation may be practised in those conferences. Wherever possible, if a matter can be resolved in the time permitted for the conference, it ought to be. There is no logical reason to refer an application to a mediation conference if the dispute is capable of being resolved, to the satisfaction of the parties, within a preliminary conference. Mediation does not stand alone nor is it separate as a process outside the mainstream of pre-hearing and case management of the Tribunal. It is a process which the parties may choose to adopt if a matter, for whatever reason, is incapable of being resolved within a preliminary conference or between the parties themselves.

Our experience has been that a mediation conference, on average, has a duration of 99 minutes in Social Security, 87 minutes in Veterans and 132 minutes in Compensation. In most cases, preliminary conferences are convened every half hour. Mediation therefore offers the opportunity for parties to explore thoroughly opportunities to resolve a dispute, without having multiple preliminary conferences or without having their attempts to resolve interrupted by the effluxion of the time permitted for the preliminary conference.

Participation in mediation conferences in the Tribunal is voluntary and is not mandated. This is now ensured as a result of an amendment to the *AAT Act*, which says -

> S 34A.(1) Where an application is made to the Tribunal for a review of a decision, the President may, if he or she thinks it desirable to do so and the parties consent, direct that the proceeding, or any part of the proceeding or any matter arising out of

the proceeding, be referred to a mediator for mediation.

(2) A mediator is to be a member or officer of the Tribunal directed by the President to mediate in the particular case.

(3) A direction may be given under subsection (1) whether or not a conference under section 34 has also been held in relation to the proceeding.

(4) If, in the course of a mediation:

(a) agreement is reached between the parties or their representatives as to the terms of a decision of the Tribunal in the proceeding or in relation to the part of the proceeding or the matter arising out of the proceeding that would be acceptable to the parties; and

(b) the terms of the agreement are reduced to writing, signed by or on behalf of the parties and lodged with the Tribunal; and

(c) the Tribunal is satisfied that a decision in those terms or consistent with those terms would be within the powers of the Tribunal;

the Tribunal may, if it appears to it to be appropriate to do so, act in accordance with whichever of subsection (5) or (6) is relevant in the particular case.

(5) if the agreement reached is to the terms of a decision of the Tribunal in the proceeding, the Tribunal may, without holding a hearing of the proceeding, make a decision in accordance with those terms.

(6) If the agreement relates to a part of the proceeding or a matter arising out of the proceeding, the Tribunal may, in its decision in the proceeding, give effect to the terms of the agreement without dealing at the hearing of the proceeding with the part of the proceeding or the matter arising out of the proceeding, as the case may be, to which the agreement relates.

(7) Except at the hearing of a proceeding before the Tribunal where the parties otherwise agree, evidence of anything said or act done at a mediation is not admissible in any court or in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory, or by the consent of the parties, to hear evidence.

(8) A person who mediates in respect of a proceeding may not be a member of the Tribunal as constituted for the purposes of the proceeding other than for the purpose of the Tribunal making a decision in accordance with subsection (5) or (6) or dismissing under subsection 42(A)(1) or (2) the application giving rise to the proceeding.

It is our belief that both parties will not enter mediation in good faith nor will they be willing to work towards resolving conflict if they enter the process by an order or a direction of the Tribunal. Voluntary participation further ensures that mediation will not be used as a case management tool or used by the Tribunal to ensure the speedy resolution of applications for the sake of case management only.

Does mediation complement or offend administrative review?

In my view, one of the failings of administrative review in Australia is the absence of face-to-face communication between decision makers and citizens prior to participation in either a preliminary conference or a mediation conference before the AAT. This is despite perhaps 12 to 18 months elapsing between the initial claim being made upon an agency and a preliminary conference or mediation conference being convened at the Tribunal. Within this period of time, there will also have been a number of internal and external reviews conducted by both the agency and by other tribunals.

The "claim" made by the citizen upon the agency or department is usually done at a counter in some office but thereafter any face-to-face contact ceases to exist until presence at the

Tribunal. The investigation of the claim and the calling for any additional information is usually done by letter or telephone and the external review by other tribunals is often convened in the absence of the decision maker or the decision maker's representative.

Arguably, the conflict between the parties is the consequence of absent or poor communication between them. Mediation has therefore lent itself as an ideal vehicle to resolve disputes because it necessarily brings the parties together and thereby, with the assistance of the mediator, more effective communication and the opportunity to be heard occurs.

The Tribunal readily acknowledge that cases can "settle" between parties when communication occurs either by correspondence or between legal or other representatives on behalf of parties. The Tribunal however has created an opportunity for the parties to "eye ball" each other and verbally communicate by virtue of a mediation conference. Whilst the opportunity exists for parties to come together in preliminary conferences in the Tribunal, more often than not only the parties' legal representatives attend.

It has been our experience that communication between parties is much more effective when the parties attend personally. With the assistance of a mediator and the use of audio-visual equipment made available to mediators by the Tribunal, both parties, even if they withdraw or concede, are at least given the opportunity to present their case and be heard.

It is acknowledged that some of the cases that are resolved in mediation may well have resolved in any event. The fact remains however that they had not resolved prior to the convening of a mediation conference despite many of the parties being represented by senior competent legal representatives.

Some persons argue that mediation offends the concept of public and open review of administrative decisions because the process is confidential. Some have commented that it is "secret". The notion that administrative review should be open and publicly adjudicated is sound to the extent that other citizens might benefit or be aware of the decisions of government. Likewise, the decision making process itself should be accountable and be open to the scrutiny that adjudication provides.

However, the opportunity to resolve conflict, interpersonally, is the essence of mediation. The process is distinct totally from adjudication. Mediation of an application may publicly deny review of the decision in that particular application and will necessarily prevent publication or creation of any precedent from which others may benefit. However, the conflict and its consequent tension is interpersonal and is likely to be resolved by mediation, as opposed to adjudication which will rule or decide on the legal or factual events only.

Likewise, citizens who challenge decisions of government hold no duty or obligation to the community at large to have their applications adjudicated, and thereby ensure public scrutiny of decision making. In my view, it was never the intention of those responsible for administrative review that every case must be heard, adjudicated and reported. The *Administrative Appeals Tribunal Act* itself has a number of sections which deal with the procedure to be followed when parties do resolve their dispute, such as the recognition that applicants are permitted to "settle" without Tribunal intervention.

In our experience, mediation is a process that many applicants and agencies now prefer. Few applicants want to have their cases adjudicated, and welcome the opportunity to discuss their applications informally. Agencies sometimes welcome confidentiality and the opportunity, by mediation, to reduce the costs associated with a hearing.

The future

As more and more legal representatives and agency advocates participate in mediation conferences, they became aware of the value and ideal of identifying as early as possible clients' needs and interests.

With the Tribunal practice of requiring parties to file a statement of issues prior to the first preliminary conference and a statement of facts and contentions prior to a matter being set down for a hearing, the legal representatives in turn have started to obtain instructions of a quality and type different to what they did previously. It follows that the negotiations which have occurred within preliminary conferences have shifted from a positional demand for a payment in dollar terms by way of settlement, in a compensation case, to an offer of return to work and/or rehabilitation by way of settlement. These latter offers are in recognition that many workers, particularly having regard to the state of the Australian economy and its labour market, have preferred to return to work or be retrained for a job within their capacity rather than settle for or accept a lump sum settlement of compensation.

In veterans' applications, mediation offers the opportunity to clarify, explain and sometimes demonstrate matters referred to in a lifestyle questionnaire which partially provides a basis for assessment of some types of pension. Veterans frequently, particularly because of their age and frailty, are motivated to secure a pension of a type which ensures a pension qualification to their wives upon their demise. This would not have been apparent from the file and is not raised as an issue in the earlier stages of review.

In social security appeals, it is not unusual for a person who receives a pension as the spouse of a pensioner to claim a pension in their own right. Whilst this will not result in any greater monetary sum payable, it is frequently sought to achieve income security and independence.

The above examples represent a small cross section of the myriad of parties' needs which emerge by the mediation process. In the context of dispute resolution generally it is unfortunate that relations between citizens and government fall victim to a system of administrative review which does not have an effective earlier stage of intervention dedicated to identifying needs and thereby eliminating, or at least reducing, the conflict which inevitably occurs.

Conclusion

As reform initiates change, so also does mediation and the experience of it.

In the relatively short time that mediation has been available in the AAT, signs are emerging of changes in work practices and disciplines amongst our own members and our clients.

Mediation would not have been as successfully practised, as it has been, in the absence of overall reform of the Tribunal's procedures. In the absence of reform of our case management policies, mediation would have been at risk of institutional influences.

Whilst a more realistic evaluation will be made at a future time, we can do no more, now, than ensure, wherever possible, that mediation continues to be practised competently, remains available and free of the risk of institutional influence. The reform of the Tribunal's pre-hearing practices and compliance by parties with a number of practice directions should ensure that mediation will not only, or principally, be a case management tool.

That stated, mediation has significantly reduced the duration of applications. Consequently, there has been considerable saving to clients - and the Tribunal - by not having to convene hearings.

Signs are emerging of a broader acceptance of mediation as a credible and legitimate process of resolving disputes. One of my colleagues has mediated a dispute concerning access to documents under the *Freedom of Information Act* and another mediated an environmental dispute concerning the Great Barrier Reef Marine Park Authority.

Practitioners and agencies who were initially dismissive of or reluctant to enter into mediation are now recommending it to their clients. It would appear also that practitioners are comfortable with early resolution by mediation and do not interpret "settlement" as a sign of weakness.

The Tribunal has made a significant investment in dispute resolution and has chosen mediation as the appropriate process. I have every confidence that mediation will increase its acceptance amongst our clients. Should the opportunity occur on some future occasion to report on the implementation of mediation into the AAT, I am sure, with the foundation now well and truly set, that I can report mediation continued to provide a credible dispute resolution technique and the decision to implement it was more than justified.