

Evaluating mediation in the Environment Court

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INTRODUCTION

The New Zealand planning model, as set out in the *Resource Management Act* 1991 (the RMA or the Act), is rational-adaptive.¹ Rational-adaptive approaches involve an iterative relationship between research and analysis on one hand, and public consultation and participation on the other. In this model, scientific methods provide data and information that informs policy development while public participation shapes the policy and builds commitment to its implementation. Evaluating the effectiveness and efficiency of plans and processes is an integral part of the model and leads to better policy-making and implementation.

The potential for conflict between parties in this planning model is considerable. This is evident from the adversarial nature of resource consent processing at local government level. There are, however, many alternative dispute resolution (ADR) approaches that may be used to deal with such conflicts, including mediation, negotiation, conciliation, arbitration, and pre-hearing meetings. These environmental conflict resolution techniques are consistent with this rational-adaptive model because they provide for people to be involved in policy-making and administration. Consultation permeates all policy-making processes carried out under the RMA. For consents, the RMA provides for pre-hearings meetings for the purpose of clarifying a matter or issue or facilitating resolution of a matter or issue (s 99). It also provides for the consent authority to refer to mediation applicants for consent and some or all of the submitters (s 99A). At the Environment Court, ADR is provided for in s 268 RMA. Subsection (1) enables the Environment Court,

with the consent of the parties, to “conduct mediation, conciliation, or other procedures designed to facilitate the resolution of any matter before or at any time during the course of a hearing.” In conjunction with s 269, which empowers the Environment Court to regulate its own proceedings, this gives wide latitude in terms of designing a process to suit the issues, parties, and case management requirements of the Court. Finally, arbitration is provided for in s 356 but may not be used for requirements, designations, heritage orders, call-ins and any matter related to a proposed regional policy statement or proposed regional plan. Thus, the RMA provides opportunities for environmental conflict resolution to occur in many situations.

Environmental conflict resolution is one of the many ways in which the RMA promotes achievement of its purpose - sustainable management of natural and physical resources (s 5). Participation, community empowerment and capacity-building are elements underpinning sustainable management.² Mediation empowers the parties to take responsibility for resolving disputes and, in the process, ownership of the outcomes. It therefore assists in promoting sustainable management. Notwithstanding, environmental conflict resolution techniques, including mediation, are not widely used in local government. There is an opportunity to improve planning practice by learning how to make better use of these methods.

Mediation is an increasingly important part of the Environment Court’s workload. In 1995, the Registrar reported to Parliament that 30 appeals had been mediated. That year, 1055 new appeals were filed so the number of cases mediated was a minute proportion of the caseload. In 2007, 449 mediations occurred (involving a greater number of actual appeals) relative to 1142 new cases filed (39%)³. Whilst the Court has always undertaken some mediation, the number increased considerably from 2003/04, when the case management system was initiated.

The Court has gained experience in mediation and several commissioners have expertise in its application to environmental

disputes of all kinds. It is therefore timely to consider undertaking an evaluation of mediation's effectiveness in terms of caseload management and the wider purpose of promoting sustainable management of natural and physical resources. The lessons learned will assist the Court to improve case management, improve the mediation experience for parties and foster greater use of environmental conflict management techniques in central and local government.

In this paper, the focus is on how best to evaluate Environment Court mediation. In doing this, I first explain in more detail why it is important to carry out an evaluation at this time. Next, I explain briefly in Section 2 the theories and methods that are available for carrying out evaluations. This in turn provides the basis for critiquing in Section 3 existing evaluations of court-annexed mediation in Australasia and why it is important to develop an alternative programme of evaluation. The challenges in developing an alternative evaluation research design are canvassed in Section 4 followed by my conclusions.

WHY EVALUATE NOW?

The most important reason why mediation in the Environment Court should be evaluated now is to maintain a high level of confidence in the process. When mediation is annexed to a court there is an apparent paradox because mediation relies on confidentiality whereas the principles of natural justice require openness. In mediation, the parties are bound not to disclose anything that was said or done during the mediation and only the outcome is a matter of public record. I believe that a high level of respect for the Court currently encourages parties to participate in mediation and respect the bounds of confidentiality. However, as mediation increases in frequency, more parties will become involved, more mediations will fail, and it may be more difficult to maintain confidentiality. To minimise risks to the integrity of the Court and mediation, I think it is necessary to actively promote co-operation and respect for the process now that mediation is taking off. Robust evaluation is a timely means of providing information

to assist in both improving mediation practice and maintaining faith in the process. Good information provides transparency and thus helps to reconcile the apparently paradoxical nature of court-annexed mediation with the principles of natural justice. Involving stakeholder representatives in the research is an essential element of evaluation in these circumstances.

Good governance demands programme evaluation to inform policy development and ensure better delivery of services. In general, mediation is seen as a cheaper alternative to a judicial hearing. Whether or not this is true for the Environment Court is thus a key question in evaluation. Further, mediation is free insofar as the Court does not charge for the time spent by commissioners when assisting the parties. The theory of mediation, however, suggests that parties have a greater commitment to reaching resolution when they have a stake in the process. Therefore whether or not parties should pay for mediation services is another key question of public interest. In terms of service delivery, a better understanding of the costs and benefits of mediation would assist the Court to allocate resources efficiently. The lessons learned from evaluation would also benefit other jurisdictions using alternative dispute resolution e.g., Disputes Tribunal.

In the environmental area, mediation is confined almost entirely to the Environment Court. Mediation is rarely funded privately i.e., by local authorities and other parties to policy and consent-related disputes at appeal. Facilitation is more common, especially for consultation undertaken as part of plan preparation and consenting of major projects. Negotiated rule-making appears suited to plan development but I am not aware of any council where this approach has been used. Despite provision for pre-hearing meetings and mediations to occur as part of consent processing, local authorities make limited use of these opportunities. The reasons for this are not known but it is likely that time constraints on processing are a factor. Another factor may be lack of knowledge and experience which makes it difficult to judge the circumstances in which mediation may be worthwhile.

The Environment Court's experience is therefore the main source of information about mediation's effectiveness and strengths and weaknesses. Evaluation would provide insights about mediation, foster greater use of environmental conflict management techniques in local government and provide useful information to councils seeking ways to improve their consenting and plan preparation processes.

One of the advantages of alternative dispute resolution is the variety of approaches it offers, from negotiation without third party involvement, to mediation and then arbitration. Better matching of cases and dispute resolution processes improves the chances of a successful (and cost-effective) outcome and higher levels of satisfaction among the parties. Professor Frank Sander, Harvard Law, describes this as "fitting the forum to the fuss".⁴ For example, the Middlesex Multi-door Courthouse employs a team of specialist assessors who match incoming cases with the dispute resolution approach most likely to suit the parties and issues. Regular evaluation refines and improves case assessment. If the Environment Court adopted a similar model, we would soon learn why arbitration is not much used, why some cases are settled privately and what characteristics are common to cases settled by mediation. This knowledge would lead to further improvements in case management and better outcomes. In light of the wide latitude under s 268, the Court can design new processes and adapt existing ones and thus can innovate. Again, evaluation provides information about what works, and why.

Some people argue that you can mediate anything and you should try because you'll never find out if you don't. If the parties agree, that's a good start.⁵ However, there are risks involved in using the wrong process including bringing both the Court and environmental conflict resolution into disrepute. Also, a failed process can be financially, emotionally and practically costly to the parties and possibly to the environment as well. I think it is important to learn from past experience in order to manage these risks and protect the integrity of the Court's mediation service.

During the nineties, the number of court-annexed mediations grew slowly but steadily from 30 in 1994/95 to 188 in 1999/2001. In this century, the number has increased from 334 in 2000/01 to 449 in 2006/07, peaking at 544 in 2005/06. There is now a critical mass of activity enabling evaluation using experimental methods to generate reliable data on performance. Given that the Environment Court is central to mediation practice in New Zealand, it is both possible and desirable to carry out an evaluation at this time. Before considering how it might be done, a brief overview of evaluation theory and methods with reference to the Environment Court's activities is provided below.

EVALUATION THEORY AND METHODS

In general, the purpose of evaluation is to gain information that enables valid and reliable statements to be made about the effects of a programme compared to what would have happened without the programme. In the case of the Environment Court, mediation can be compared to judicial hearings in terms of both process and outcomes (immediate and long term). Evaluation also provides information that is good enough to support current and likely future decisions about the programme.⁶ The sort of information collected concerns activities, inputs, outputs and outcomes. This includes both quantitative data and qualitative information such as the participants' satisfaction levels. The Court's case management tracking system is already collecting some of this information.

The most important task in designing evaluation research is to ask the right questions. There are two main kinds of evaluation guiding the questions we ask: summative and formative. Summative evaluation judges the merit or worth of a programme or service. A summative evaluation would seek to answer the question "is Environment Court-sponsored mediation resulting in similar environmental short and long term outcomes to hearings?" This research goes to the heart of the programme and its purpose, i.e., it seeks to find out whether or not mediated settlements are achieving sustainable management of natural and physical resources. Formative evaluation supports programme

improvement i.e., case management, by addressing questions such as “what changes would make mediation cheaper, better and/or faster than going to a hearing?”

There are two main aspects of programme evaluation: programme theory and programme logic. There should be a clear ‘programme theory’ underpinning the evaluation. That is, the conceptual strength of its aims should be explicit. Disentangling the assumptions and implicit theories on which the Environment Court’s mediation service has evolved is a key task of the evaluation. This has to be done to ensure that the evaluation is fair and focuses on assessing what the Court intended mediation to achieve and not some ideal. The evaluation should also include a ‘programme logic’ or means of describing the programme or service – activities, inputs, outputs, and outcomes or impacts. Measurements should relate to those things it is important to know because they inform us about the effectiveness of mediation. For example, in the Environment Court, inputs include the cost of commissioners’ time, travel, venues, dealing with any consent orders and overheads. Outcome measures are the number of cases settled, partially settled, withdrawn or referred for a hearing. The level of satisfaction expressed by the parties is another outcome measure.

The methods employed in evaluation are: experimental or quasi-experimental, case studies, surveys of participants, interviews and document reviews. Researchers in programme evaluation recommend that several methods are used in combination and the value of this advice is confirmed by research conducted in New Zealand. The *Planning Under Cooperative Mandates* research team has developed and tested methods for evaluating the quality of plans under the RMA, their implementation through resource consents and the effectiveness of plan outcomes.⁷ The research design for each of these studies necessitated multiple methods because of the often qualitative nature of the subject matter. Using several methods enables results to be compared (triangulation) thereby enhancing confidence in the findings.

RESULTS OF PRIOR EVALUATIONS

Each year, the Registrar reports to the House of Representatives as required by s 264 RMA. This report states “such information relating to the administration, workload, and resources of the Court” as the responsible Minister may require. In recent years, this report has covered the Environment Court’s performance in terms of cases filed, managed and disposed of, the time it is taking to deal with cases and alternative dispute resolution. The data set, while limited in scope, tracks the number of cases over some years and could be extended to provide a greater array of data suitable for evaluation. I am not aware of any other evaluation of the Court’s workload at this stage, e.g., any programme assessment by, say, the Ministry of Justice or the Ministry for the Environment.

A helpful review of mediation was carried out in 2006 by Stephen Higgs, a Fulbright Research Fellow based in the Centre for Conflict Resolution at Victoria University. Higgs conducted 25 interviews with judges, commissioners and dispute resolution practitioners throughout the country. The results identified some key issues warranting further study. For example, the first report focuses considerable attention on how the public interest is protected in confidential court-annexed mediations.⁸ Higgs describes the Court’s mediation process and responds to

...scepticism about whether the public interest can be protected in a process that assists private parties to negotiate settlements to their disputes outside the limelight of a public trial.⁹

He explores how commissioners are well-positioned (because of their unique role as both mediators and adjudicators) to protect the public interest by utilising various interventions to ensure mediated agreements are legal and fostering a dispute resolution climate that helps parties explore and elect more sustainable agreements. This report is an example of summative evaluation, i.e., it focuses on the merits of mediated settlements. It highlights a key question and the result contributes to our understanding of the mediation model used by the Court.

In his second report, Higgs provides an overview of the mediation programme, identifies issues arising with pre-mediation processes, explores some of the benefits of mediation, and addresses some of the challenges.¹⁰ This is primarily an example of formative evaluation because it examines ways in which mediation can be improved. The challenges, such as maintaining mediator neutrality, identify opportunities for more comprehensive evaluation research. However, because these reports rely on interviews with a limited number of respondents, ideally the findings would be tested by a rigorously designed evaluation using more methods and involving a wider array of stakeholders.

Evaluation is carried out in other countries, particularly the United States. The US Environmental Protection Agency instituted an ADR Program Evaluation in 2000 in recognition of the importance of feedback on the performance of existing programmes when designing alternative dispute resolution approaches.¹¹ The US Institute of Environmental Conflict Resolution uses a case evaluation system which has been developed in conjunction with several state and federal agencies.¹² Both evaluation models have been used in a wide variety of circumstances.

Closer to home, the Planning and Environment Court in Queensland has provided a 'free' environmental conflict resolution service since May 2007. A Registrar who specialises in dispute resolution has been appointed to carry out mediations. Preliminary evaluation indicates that environmental conflict resolution is faster, better and cheaper than going to a hearing. The number of cases going to court has reduced, the Judges' time is better used and the cost to the parties is less than it would be if they had to prepare for a hearing.¹³ These are measurements used in formative evaluation and would be equally applicable in New Zealand. There is an opportunity for the Environment Court to work with its counterparts in Australia to develop an evaluation programme capable of being applied in both countries. This in turn would enable a convergence in practice.

CHALLENGES IN RESEARCH DESIGN

The heterogeneity and complexity of environmental disputes mitigates the use of experimental methods. For example, one of the concerns identified by Higgs is that mediation is a private process and therefore parties may reach agreements that do not promote sustainable management. To research this question, it is necessary to compare the outcomes of settlements and judgements to find out if there are differences between them in terms of promoting sustainable management. This is methodologically demanding. To attempt this sort of summative evaluation, it is necessary to establish a benchmark interpretation of what sustainable management means in Environment Court decisions. This is easier said than done. The Environment Court makes an overall judgement based on weighing of relevant factors when deciding whether a proposal would promote sustainable management. For resource consents, this will vary due to local environmental conditions and due to the provisions of the relevant regional policy statement, and regional and district plans. These set out what sustainable management means for a particular region or district.¹⁴ Having considered both the intention of the plans and Part 2 RMA, the Court forms an overall judgement as to whether the proposal promotes sustainable management. Summative evaluation, i.e., comparing the outcomes of settlements and hearings in terms of the purpose of the RMA, would be difficult in the circumstances because sustainable management means different things in different places. However, it is not impossible provided there are sufficient cases occurring in an area from which a common understanding of the meaning of sustainable management can be derived. Once this common understanding is defined, it is possible to 'score' the text of decisions by reference to key features of sustainable management for comparative purposes. Consent orders are limited in scope compared to judgements and therefore characterising sustainable management would require recourse to the file. Notwithstanding, I think that methodological challenges can be overcome and summative evaluation is therefore feasible. Whether it is the right time to attempt this evaluation is another matter.

The research design must deal with maturation problems. Cases can take several years to be resolved, particularly those concerning proposed plans. Therefore tracking selected cases from the date of filing to closure makes it hard to complete the research in a timely manner. This approach is also uncertain because there is no guarantee that the selected cases will be mediated. An alternative is to select completed cases. This would be a satisfactory method when comparing outcomes but has limitations if the research seeks to probe the parties' satisfaction with the process. The latter requires surveys of the parties immediately after the mediation process has concluded. An additional survey would then be needed after settlement to find out if the outcome was durable and satisfactory but this introduces the problem of the counter-factual, i.e., how would the respondents compare the outcome in their case to what would have happened if the appeal had been resolved by an alternative process? The research design needs to take into account maturation problems and this can be done by using several different methods in combination. For example, case studies provide qualitative information to complement quantitative analysis enabling conclusions to be drawn about the intangible benefits of the mediation service as well as its timeliness, cost and resourcing needs.

Another methodological challenge arises from the nature and confidentiality of the process. Ideally, an evaluation of mediation would include appraisal of the actual mediation session. The research would seek to understand the mediation model being used and the way in which individual mediators adapt the basic model to suit the issues, parties and their own style. Identifying interventions that are effective would be a useful aim. However, it is difficult to place an evaluator in the room with the parties because this changes the dynamics and behaviours of those present. There is a challenge to find reliable 'out of room' methods of evaluation to complement surveys of participants whilst protecting confidentiality. In the absence of such methods, researchers should include survey questions designed to test the extent to which the parties agree about what happened, and why.

These challenges in design are common to many research projects and can be overcome by using a mix of methods and applying sufficient resources to the task. Including stakeholders in formulating the questions, critiquing the design, testing methods and reviewing tentative conclusions is helpful because they bring expertise, experience and ideas to the table. Whilst summative evaluation is more difficult to carry out, formative evaluation of the Environment Court's mediation service is relatively straightforward. Both are important because sustainability is about both outcomes and process.

CONCLUSIONS

Our planning system is rational-adaptive and evaluation is an integral element of this system because it provides feedback on achievements. Similarly, modern public management requires programme evaluation to justify policy and improve service delivery. For these reasons, it is desirable to evaluate the mediation service offered by the Environment Court. As mediation is an increasing part of the Court's workload, it is timely to learn about its effectiveness and apply any lessons learned to improving the service. Evaluation will help to maintain public confidence in mediation by providing information about what is an otherwise confidential process.

Community empowerment underpins sustainable management and mediation is one of the means of empowerment. However, there is a low uptake of mediation in local government despite the opportunities provided by the RMA. Lessons from the Environment Court's experience may encourage greater use of mediation by providing information about what works, and why.

Now that mediation is well-established, it is feasible to carry out formative evaluation designed to improve case management and, with some careful attention to research design, summative evaluation as well. Formative evaluation can and should proceed soon, beginning by adding key indicators of timeliness, cost and

benefits to the case management tracking system. Analysis of these indicators will provide more information upon which to develop the formative research programme in conjunction with the stakeholders. Summative evaluation may have to wait some time but is nevertheless important because it focuses on outcomes and, most importantly, involves serious thinking about the meaning of sustainable management. The lessons learned are transferable to local government plan-making and implementation. They would also be of international interest.

There are benefits for the whole planning system from evaluating mediation in the Environment Court and one of the more important benefits is to demonstrate a commitment to evaluation as an integral element of planning and good governance.

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In memory of David Hollands, an engineer and surveyor who became an arbitrator of international repute and then moved into mediation of multi-party, multi-issue environmental disputes in the public sector. David prepared thoroughly and was recognised for his flair, sense of humour and cool-headedness under pressure. Self-evaluation and self-improvement was second nature to David.

NOTES

¹ Ericksen, N., P. Berke, J. Crawford and J. Dixon, *Planning for Sustainability; NZ under the RMA*, NZ Edition published by International Global Change Institute, The University of Waikato, 2003, pp31-2.

² Oliver, M., *Implementing Sustainability – New Zealand’s Environment Court-Annexed Mediation*, paper presented to the Indian Society of International Law, 8-9 December, 2007, New Delhi, India, pp4-6.

³ *Reports of the Registrar to the Environment Court*, presented to the House of Representatives 1995-2007. Changes in the way data is recorded require caution in interpretation. Reports for 2002-2007 at www.justice.govt.nz/environment.

⁴ Sander, Frank E. A. and S. Goldberg. "Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure," 10 *Negotiation Journal* 49 (1994).

⁵ John Haydon, personal comment, 27 September 2008.

⁶ Lunt, N., Davidson, C., and McKegg, K., Eds. *Evaluating Policy and Practice: A New Zealand Reader*, Pearson Education NZ Limited, 2003.

⁷ See www.waikato.ac.nz/igici/pucm for extensive resources on plan evaluation.

⁸ Higgs, S. *Mediating Sustainability: The Public Interest Mediator in the New Zealand Environment Court*, Research Reports for Fulbright Grant: Lessons from Environmental Mediation in New Zealand, Victoria University, October 2006. This report appears as a paper in the *Environmental Law* journal at:

http://www.lclark.edu/org/envtl/objects/37-1_Higgs.pdf

⁹ *Ibid*, p2.

¹⁰ Higgs, S., *Conversations on Environmental Mediation in the New Zealand Environment Court*, Research Reports for Fulbright Grant: Lessons from Environmental Mediation in New Zealand, Victoria University, October 2006. To see this report:

<http://www.google.co.nz/search?hl=en&q=stephen+higgs+%2Bmediation+%2BfulbrightandbtnG=Searchandme>

¹¹ USEPA, ADR Program Evaluation Recommendations, 65 Federal Register 59200, 59208-14 (October 4, 2000). See <http://www.epa.gov/adr/evalu.pdf>

¹² Orr, P., ECR Performance Evaluation, a presentation dated October 12, 2006. See www.ecr.gov/pdf/ECR_policy_memo20061012

¹³ Haydon, J., *Environmental Conflict Resolution, Mediation, Negotiation and Negotiated Rulemaking as well as Other Third Party Facilitation Methods*, paper presented to Resource Management Law Association conference, Dunedin, New Zealand, 27 September, 2008.

¹⁴ Local interpretations of what sustainable management means are consistent with plan-making in a devolved co-operative mandate.