MEDIATION - THE DSS EXPERIENCE

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This paper provides an overview of the Department of Social Security's (DSS) experience of mediation as offered by the Administrative Appeals Tribunal (AAT). The majority of DSS mediations have been conducted in Victoria.

The purpose of the paper is to relate the background and lead-up to the introduction of mediation, its implementation and DSS experiences with its introduction and implementation. Against those experiences, the paper offers some observations and comments against the questions that were raised in the seminar in which the paper was delivered. It is not intended to argue for or against mediation but, as will be seen, the experience with the introduction of mediation has been a positive one for the Department and for others who participated in some early evaluation work.

Prior to any discussion about the concept of mediation it is, in my view, important to clarify what is understood by the concept. Some see mediation as conciliation, some see it as arbitration, some as negotiation and some ascribe other labels and definitions. In practice there may be some negotiation, some attempts at arbitration and some conciliation.

I understand mediation as offered and practised in the AAT as an opportunity for disputant parties to come together in an informal, non-threatening environment and, with the benefit of a skilled facilitator/mediator and an average of one to three hours of time, work towards a mutually agreed outcome.

In 1990 I first heard talk about mediation. In the early part of 1991 I was approached about the prospect of piloting a batch of cases for mediation. I was then the Manager of the External Appeals Section in Victoria, was responsible for between 200-300 AAT cases, and had pressures from the clients behind those files and my superiors in Canberra to ensure that cases were managed and finalised as expeditiously as possible.

Also at that time it was not uncommon for a DSS case in the AAT to take up to 12 months to be finalised from the date of application to the date of decision following a formal hearing. (Earlier stages in the internal and first tier external review process could add up to a further twelve months to this 'waiting period').

At about the same time the public sector generally and the DSS in particular started seriously addressing the government call for a more efficient delivery of quality client service. As Manager, one of the challenges I needed to confront was how to manage cases for which I was

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responsible in a climate of high appeal numbers and no prospect of increased resources. I was expected as well to contribute to the thrust and expectation that clients of government and the DSS receive a quality service.

My view at the time was that a 12 month wait for justice did not equate to a good service, bearing in mind that many clients had already been in a review/appeal process for periods averaging up to 6 months and longer in some cases. If I were a DSS client I would not want to wait for one-and-a-half to two years from lodging a claim to receiving an AAT outcome.

Another important development in Victoria was the significantly reduced availability of legal aid funding that had traditionally been available for DSS clients in AAT appeals.

It was against this background that the AAT convened mediation awareness seminars and included agency representatives as participants, along with DSS client representatives and tribunal members and staff. We were informed that mediation offered an informal mechanism of dispute resolution and aimed to resolve cases as expeditiously and cheaply as possible.

I formed the view that mediation could assist in managing my cases and at the same time provide a better service for DSS clients by offering a quicker but acceptable means of resolution as an *option*. I developed a positive attitude to the possibilities that mediation offered.

And so it was in this context and these circumstances that I readily agreed to a formal pilot program in the latter part of 1991 as:

- I could see possibilities to assist me in my role as Manager;
- Whilst mediation represented change and something quite different to what we were used to, as an organisation DSS was quite used to change and we were in the process of adapting to significant policy and legislative change; and
- I also saw genuine possibilities for *clients*, many of whom, without legal aid, faced the prospect of dealing with a formal hearing many months after an application for review had been lodged.

Mediation was subsequently introduced into the DSS jurisdiction of the AAT. Our experience has been that as at 21 June 1994 over 250 cases have gone to mediation. The majority have been in Victoria and 80% have been resolved at mediation.

In Victoria a detailed analysis of the first 100 mediations was conducted in 1993. Of those 100 cases, representing 89 applications for review some of which were departmental appeals, 75 were resolved (85%) with the balance going on to hearing. Of those that went to hearing, some went with agreed statements of fact which contributed to shorter hearing times.

A broad range of cases were listed for mediation having regard to parties' wishes and presumably the discretion and judgement of the mediation co-ordinator. Typically, many cases involved the disputed exercise of a discretionary power, such as debt recovery, and special circumstances. A number of other cases which on the surface may not have appeared amenable to mediation were resolved anyway. Disability support pension and invalid pension cases tended to resolve during a process of further exchange or elaboration of medical evidence and/or a fuller explanation of the many issues involved in disability support pension qualification.

The view of staff involved in mediation conferences was that resolution was reached in those cases because all parties were thoroughly prepared (the mediator, applicant and respondent), there was sufficient time to go through and explain and explore all issues, and there was a commitment to an outcome or resolution.

Some may wonder what percentage of cases were wins or losses. I do not think it is appropriate to categorise mediation outcomes - or any other AAT outcome for that matter - as wins or losses. The result, in my view, should be seen as the correct or preferable decision so if anything, a resolution at mediation is a win/win situation.

I indicated above that most of the mediation activity in the DSS jurisdiction has occurred in Victoria. I think there are several possible explanations for this, which include that the Mediation Co-ordinator is located in Melbourne, a majority of other accredited mediators are based in Melbourne, and there is a willingness to give it a try and to experiment with change. There may be other reasons and explanations too.

Of DSS cases finalised by the AAT this financial year 20% have been finalised by a hearing in Victoria. The figures for other states are 26% in New South Wales, 35% in South Australia, and 46% in Queensland. The same figure for the AAT across all jurisdictions and all states in the veterans/general division was 25% for the financial year ending 30 June 1992 (and I understand that this figure is similar for the financial year ended 30 June 1993).

Questions raised by this seminar

How successful is mediation in administrative law matters?

From the perspective of DSS in Victoria, mediation has been quite successful, in that (i) 80% of cases are resolved at mediation and (ii) along with NSW, Victoria has the lowest average finalisation times. Average finalisation times are a useful indicator of a tribunal's performance and a guide to how users of the tribunal are serviced. More objective indicators are discussed below.

Is mediation cost effective?

It would seem that, from a purely common sense perspective, fewer substantive hearings result in cost savings and earlier resolution, and thereby contribute to client and community satisfaction.

Is mediation an appropriate method of resolving disputes?

I consider it is an appropriate *option* and should be seen and accepted as complementary to and not a replacement for other options of dispute resolution offered by the AAT - preliminary conference, directions hearing, consent agreement and substantive hearing. From my personal and fairly substantial experience in the review and appeals process in DSS, a significant number of DSS clients look to and express a preference for early resolution of the dispute. Many express concern about the court-like structure of the AAT.

At what stage of the review hierarchy should it be employed?

At the earliest possible level. In the DSS context and in an ideal world this would be at the primary decision stage. As the review and appeal

process is currently structured and resourced this is impractical.

Does mediation need safeguards?

Safeguards already in place include that the process is voluntary, parties do not lose their place in the hearings queue, confidentiality is agreed and guaranteed, and parties own the outcome.

My office and staff's experience with mediation is very positive, but that is only one indicator. Other more objective indicators appear to be that mediation assists in containing finalisation times and cuts down on the number of hearings that would otherwise be necessary.

My view is that many if not most DSS clients are comfortable with and positive about mediation, because so many in Victoria explore it as an option, so few criticise or complain about it, and people who I talk to - legal practitioners, mediators and Departmental clients - say so.

At the conclusion of the seminar in which this paper was given there was an open forum which gave participants and speakers an opportunity to raise questions and discuss issues relating to the introduction and practice of mediation in the AAT. I think it is fair to say that of the range of views expressed there was a good deal of suspicion, doubt and, in some cases, outright rejection of and opposition to the concept of mediation. I am not sure whether the participants expressing those doubts, suspicion, rejection and opposition have had any experience with mediation or have a similar understanding of the definition of mediation as mine.

As I indicated at the outset, for the purposes of this paper, I do not intend to argue for or against mediation but rather to put the DSS experience. The most accurate assessment must surely only be possible after thorough and independent evaluation including the reactions and feelings of not only tribunal and agency participants but also members of the community and their representatives.

In this regard I note that an early and independent progress evaluation of the pilot phase of mediation was reported in the *Law Society Journal* published in November 1992 and reveals that applicants (clients) "...report satisfaction with the conduct of proceedings and express satisfaction at being able to have their say... were also satisfied with the clarification of issues, compromise and an expeditious outcome. Applicants reported high levels of satisfaction with mediation outcomes in the sense that they were pleased with the final decision and would use mediation again".

In a paper delivered to the First International Conference in Australia on Alternative Dispute Resolution in Sydney on 29 August 1992, the then President of the AAT advised that feedback (on the process of mediation) to date indicated a high level of satisfaction. Her Honour expressed confidence that "high quality mediation provided on a voluntary basis has enormous potential". The President also advised that "The Tribunal's experience with mediation to date has been a positive one and there is every indication that mediation will become an increasingly significant additional dispute resolution process available in appropriate cases".