Kluwer Mediation Blog

"Justice" Report for England and Wales: A Missed Opportunity for Radical Change

Charlie Irvine (University of Strathclyde) · Tuesday, May 12th, 2015

'Justice', an *"all-party law reform and human rights organisation working to strengthen the justice system"* launched a new report on April 23rd entitled 'DELIVERING JUSTICE IN AN AGE OF AUSTERITY'. The report could be described as a plan to deliver justice despite the cuts. It proposes a transformation of the court system in England and Wales, supplementing its venerable adversarial system with a more inquisitorial approach. Unfortunately the proposal, while altering both personnel and process, leaves untouched the mindset and philosophy of the justice system.

The report opens with a critique that it is *"increasingly difficult for ordinary people to navigate an adversarial justice system developed on the assumption that people will be legally represented"* (p.1). Legal aid cuts and increasing fees mean that *"Many individuals are simply unable to bring good claims and enforce their rights, or adequately defend claims brought against them"* (p.1). This has led to an increase in the numbers of people representing themselves. The report cites an Australian judge: *"there are three things that can be done in relation to self- representation by litigants: one is to **get them lawyers**, the second is to **make them lawyers** and the third is to **change the system**"* (p.4, citing Deputy Chief Justice Faulks, Family Court of Australia, "Self-Represented Litigants: Tackling the Challenge").

The first two are problematic. No matter the quality and quantity of information available to lay people, *"a disconnect between having access to some information and being able to effectively navigate the justice system will always remain"* (p.6). The first time the parties might receive some

guidance from a *"suitably qualified person"* is at a hearing: *"a wasteful use of highly qualified and expensive judicial time"* (p.10).

In this regard I have thought for some time that we have neglected a valuable aspect of mediation. Although mediators don't necessarily give legal advice, they often provide useful and previously unavailable legal and process information. People with little experience of the justice system receive guidance about matters like the length of time proceedings are likely to take, their cost, the range of possible outcomes and, often, the meaning of arcane legal terminology. If the legal system fails to recognise this substantive contribution to informational justice, mediators are partly to blame for persistently using language that implies passivity. (For more on this see Mediation and Social Norms: A Response to Dame Hazel Genn.)

The New Model of Dispute Resolution

The report introduces a new character: the Registrar. Registrars will be legally qualified and trained in mediation. The process itself starts with an investigation by the Registrar. This is based on online forms, reflecting considerable enthusiasm for the digital domain. The approach seems inquisitorial, not least the fact that the person conducting the investigation will go on to act in a quasi-judicial role.

The Registrar has 4 options:

• **Strike out** – where the case has no reasonable prospect of success. This can be appealed.

• **Early neutral evaluation** (ENE) – again this is based on the papers and is *"essentially an authoritative view on the likely outcome should the case proceed to resolution by a judge, based on the facts and law"* (p.21). This needs to be given in writing, not least in case the parties want to take the case further. ENE is not binding but there will be a time limit after which the evaluation is deemed to be accepted.

• **Mediation** – this is usually an alternative to ENE. The report asserts: *"Extensive research shows that mediation is rarely successful if it is made compulsory and imposed on unwilling parties"* (p.22). The single study cited (a particularly excoriating study of two previous in-court mediation schemes showing them to be feeble and unpopular) leads the report's authors to conclude that ENE should be the default and mediation a rather gentle suggestion.

The Registrar provides the mediation: *"The registrar will have gained a detailed knowledge of the case following the initial investigation phase, and parties will not need to repeat their grievances to a third party mediator"* (p.22). This seems sensible. Mediation will mostly be by telephone or online. If both ENE and mediation are used they should be provided by different registrars.

• **Refer to a judge** – this can be direct from the Registrar or the next step if none of the above produces a resolution.

The proposal is essentially a multi-door courthouse with a high level of reliance on online and telephone interaction: a "virtual multi-door courthouse". Guidance is provided on the criteria for choosing one process over another:
– relative levels of power – with ENE more suitable the greater the disparity
– technical difficulty – with judicial disposal where things are complex
– question of fact or process – disputes over facts more suitable for mediation; those over a process

more suitable for ENE
– interests v rights – rights more suitable for ENE
– rules v discretion – *"Disputes concerning the application or interpretation of rules or policy are less suitable for mediation"* (p.25) Where the decision maker is exercising discretion there is said to be more scope for mediation
– test cases – *"Matters likely to have significant precedent effect should be referred to a judge"* (p.25).

In all of this we see the old chestnut that ADR is tolerable where things are relatively uncontroversial but not deemeed suitable when it comes to matters with significant policy or precedential implications. In other words people are to be trusted to resolve their own disputes justly or fairly but not to be just or fair enough to provide guidance for others. Only professional judges can do that.

Juridification

This is one aspect of the unnecessary juridification that mars an otherwise radical proposal. For some time I and others have been calling for the justice system to use mediation as a default (see "Mediation in Scotland: Some Practical Questions and a Nudge in the Right Direction"). While this would bring a number of benefits, most relevant here is that signficant numbers of cases may resolve without reference to the law. If parties choose to settle because a proposal is convenient, or pragmatic, or quick, or because their solicitor's costs are escalating, or because they are exhausted and can't face another moment of dispute, why shouldn't they? As Carrie Menkel-Meadow wisely put it, *"Whose Dispute Is It Anyway?"* (83 Geo L.J. 2663 1994-1995)

By making early neutral evaluation the default in preference to mediation this well-intentioned and carefully researched report extends the "shadow of the law" more widely than it needs to. Registrars will be legally qualified; their remit is to predict what the courts would do; doubtless they will carry out this function in a conscientious manner. And so the vision of empowering citizens to resolve their own disputes gives way to the reality of providing litigants of modest means with an earlier and cheaper prediction of what a judge might do. The scheme falls victim to what Lon Fuller described as *"the tendency of modern thought to assume that all social order must be imposed by some kind of 'authority'"* (Fuller, 'Mediation: Its Forms and Functions' 44 S Cal L Rev 305 (1970-71) p.315).

This is a particular shame because the Justice report goes on to highlight a move in the opposite direction, in the shape of recent Dutch developments in creating an online dispute advice and resolution forum (Rechtwijzer 2.0). Parties are taken through advice, negotiation and resolution without outside intervention. There are parallels with Money Advice's impressive 'Resolver' platform – http://www.resolver.co.uk – already providing a user-friendly complaints system in the UK. It is 'multi-door' in that it enables people to pursue complaints in a number of different ways; and 'multi-step' in that it provides guidance about various stages in the process, including opening a file, sending emails and keeping records. Here is radical empowerment, having sufficient respect for citizens to provide as little or as much information (on process and substance) as they need to resolve their problems to their satisfaction.

This reflects the problem for the report. While its diagnosis seems accurate, its prescription leaves untouched the current way of doing things. At the heart of the system is a legally qualified person who investigates people's disputes, provides a prediction of their likely outcome and decides which

route, if any, they should take. Justice remains a matter for professionals. Ordinary people are not to be trusted to resolve their own disputes. A more radical approach would have seen mediation as default and normative guidance from a legally qualified person the special case when matters go awry, perhaps bolstered by rendering mediation outcomes enforceable.

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