Mediation – an HDC perspective

When Parliament created the Office of Health and Disability Commissioner in 1994, only three statutory tools were provided for HDC to resolve complaints - advocacy, investigation and (once an investigation has been commenced) mediation.

Under the first Commissioner, Robyn Stent, hundreds of investigations were conducted, but relatively few mediations - rising to a peak of 14 in 1999. However, I was intrigued to discover (from Marie Bismark's research) that Robyn personally undertook two mediations as Commissioner! When I was interviewed for the job of Commissioner in February 2000, I recall that I told the Minister of Health that mediation was an under-utilised tool and I wanted to see it used more often. Well, to date I have failed! I can report that last year HDC resolved only seven cases at mediation. Mediation under HDC has got some bad press. In my first six months on the job, I was approached by Barbara Robson on behalf of six women (complaining about their experience of their local public hospital maternity service) who felt rail-roaded into an HDC mediation. They recalled the process as follows:

> "[We] were not made sufficiently aware of the procedures in mediation until several requests for information were answered. The health provider arrived at the mediation without any notes or files and the mediation was conducted with six patients in one mediation hearing. No opportunity was given to separately meet with the mediator throughout the process to negotiate remedies. Half signed a settlement agreement reluctantly and now regret it, and the others refused to sign and remain disgruntled."

Barbara later convened a meeting of the women in her lounge in Feilding, and I heard their unhappiness firsthand. In her 'Review of Processes Concerning Adverse Medical Events' in March 2001, Helen Cull QC reported their experience. She noted:

> "This example should not be used to deflect from the efficacy of the mediation process for other complaints, which appear to have been dealt with satisfactorily. The example does serve to highlight however, the importance of adequate guidelines and procedures being in place and known prior to the commencement of the mediation. The ability of [an] Advocate to be present to support or assist patients is another factor which might assist in the successful resolution of complaints."

Helen Cull made two important recommendations about HDC mediation:

1. That there should be greater flexibility to enable the Commissioner to refer a complaint to mediation without the necessity of commencing an investigation.

2. That guidelines be developed to ensure consistency of the mediation process, noting that "knowledge of the procedures for consumers is important for an effective process and should be available and easily accessible".

HDC's mediation guidelines were developed with input from consumers and mediators, and were launched in 2003. And as a result of the HDC Amendment Act 2003, since 18 September 2004 the Commissioner has had the power to refer complaints to mediation without commencing an investigation.

What is HDC's experience of mediation?

1. It's hard to get parties around the table for mediation -

Since 1 July 2004, HDC has offered mediation in 28 cases, and it has been declined in 9 of those cases (32%).

2. The success rate in mediations is relatively high - 17/19 (89%) since 1 July 2004.

3. HDC refers relatively few complaints to mediation - in the past 6 years the number of cases resolved at mediation has been:

14 (2000), 27 (2001), 28 (2002), 23 (2003), 10 (2004), 7 (2005).

Even with the relatively new power to refer complaints to mediation before commencing a formal investigation, the total number of successful mediations since 1 July 2005 has been only 9 (4 non-investigations, 5 investigations).

4. When mediation doesn't work, the fallout is awful and results in anguish for the parties, occasionally litigation (see Perfect v Human Rights Review Tribunal, 4 March 2004), and a great deal of work for HDC.

HDC's mission is Resolution, Protection and Learning

We know that for real resolution, face-to-face meetings that are safe for the complainant and facilitated are best.

We are well aware of our 'public watchdog' responsibility - we do not want serious failures to be 'covered up' in a process behind closed doors. So we are selective in what matters we choose to send to mediation.

We are also trying to use the resolution of complaints as a means of improving the safety and quality of health care and disability services. This means we need to capture the lessons from mediation agreements and disseminate them in the sector. Patient safety agreements may be one way to do this.

Why is mediation under-utilised?

So, why is mediation skill an under-utilised tool in the health sector, at least at HDC? One reason may be that mediation has received some bad press. In 2001, the Chair of the Medical Practitioners Disciplinary Tribunal, Wendy Brandon publicly criticised the use

of mediation to resolve patient complaints. She asked ([2001] NZLM 249) "whether the mediation model is appropriate for resolving disputes which arise in the context of a doctor-patient relationship. It is not a relationship between parties of roughly equal bargaining power."

Brandon suggested that the mediation option should be used "sparingly" in the context of relationships which, by their very nature, are not equal. She also criticised the secrecy of the mediation process:

> "[T]he mediation option and the resolution of complaints outside of a formal, public, process, such as a professional disciplinary hearing, is inconsistent with the principal purposes of the Medical Practitioners Act and the Health and Disability Commissioner Act: to protect the health and safety of members of the public, and to promote and protect the rights of health consumers and disability service consumers. … Confidential settlements and private mediations inhibit both professional education and the dissemination of information to the public generally. … Mediation and the low level resolution of complaints, unless used judiciously and sparingly, has the potential to perpetuate the public perception of 'secret deals' and non-disclosure."

Another reason for under-use may be that complainants remain wary about mediation. Unlike advocacy, which consumers understand is a consumer-centred process, mediation is recognised as an impartial legal process that may not be consumer-friendly. Certainly, our data indicates that nearly one-third of complaints to whom mediation is offered, decline it. Mediations have an important role to play in persuading parties to get around the table - but that cannot happen if the initial offer is declined. HDC recognises the need to do more to publicise the benefits of mediation.

On the provider side, DHBs (especially complaints and quality managers) need to persuade nervous clinical staff and managers that mediation can save them time (and therefore money) and can help bring emotional resolution - for providers are also often scarred by adverse events and complaints. Ian Brown has been a great exponent of benefits for mediation in his role as Medical Officer at Counties Manukau.

Cheque books at mediation?

I also want to raise for discussion the question whether DHBs and other providers should be willing to bring their cheque books to mediations. As Marie Bismark's research shows, a significant proportion of complainants to HDC (22%) are looking for compensation. Patients and their families are often left out-of-pocket when something goes wrong in their care, and a willingness to cover expenses (eg, petrol vouchers or motel expenses, for a longer-than-expected stay in hospital) can go a long way to satisfy unhappy complainants. We know that complaints that never reach HDC are sometimes resolved by a financial settlement. There is a further consideration from HDC's perspective if a complaint reaches our Office. If there have clearly been shortcomings in care (eg, ACC has accepted a treatment injury claim, and the DHB's internal investigation has found

care failures), we consider mediation rather than a formal investigation - but complainants may be unwilling to mediate because in the absence of a breach finding (which requires an investigation) they will lose the opportunity to bring a claim before the Human Rights Review Tribunal. Although very few claimants ultimately recover damages in HRRT claims (in part because of the ACC bar), the fact is that complainants who settle at mediation are deprived of the opportunity (see s 53 Health and Disability Commissioner Act 1994). This needs to be factored into the equation. Responding to a protracted HDC investigation, and defending HRRT proceedings (and possibly other civil proceedings), is a time-consuming and costly business, and providers may need to be willing to loosen the purse strings a little at mediation. Legal advisors may also need to rethink what is really in their client's interests if mediation is on the horizon.

Conclusion

To conclude, from HDC's perspective mediation has yet to "change the face of healthcare dispute resolution in New Zealand". But we are excited by Professor Dauer's report on the emerging US experience, and by Marie Bismark's research, and I am hopeful that one outcome will be greater knowledge amongst consumer and provider groups of the valuable opportunity offered by mediation.

I offer my own commitment to increase our Office's use of mediation, with the support of our skilled mediators, and to ensure that the lessons of cases resolved at mediation are captured and shared throughout the sector and the community.

Ron Paterson
Health and Disability Commissioner

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