Why the public sector should mediate more

by Harry Spurr, 1 April 2021

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It's encouraging that mediation is now seen as the preferred route to resolution for many in the commercial litigation world. Less heartening is that the public sector is lagging behind. The reluctance of public organisations to explore mediation is disappointing. As well as the obvious benefits of speed, low cost and high success rates, mediation offers many advantages specific to their sector.

Take a typical planning enforcement case. These are often legally and factually complex cases with neighbours involved, played out in time-consuming and expensive appeals. Mediation has the capacity to cut through the arguments and achieve a practical solution that works for everyone, offering a popular outcome well beyond the limited powers of an inspector. Much the same could be said about appeals and reviews in licensing cases, and statutory nuisance disputes, all situations often involving multiple stakeholders, complex interests and a statutory dispute resolution mechanism that is narrow, inflexible and largely binary.

Saving public resources

Whilst there's nothing to stop private organisations wasting their time and money on expensive litigation, public bodies don't enjoy the same freedom. Obligations governing the use of public money require an efficient and value-driven approach. Funding litigation or regulatory proceedings against private interests can hammer public resources; experience shows that when such disputes are mediated, the savings can be dramatic. Over the coming months, as the pressure on budgets and other public resources builds dramatically post-Covid, mediation will have much to offer in this respect.

Opportunity to manage risk

Mediation also offers risk management benefits. Not just the standard litigation risk, but the additional risk faced by public authorities balancing competing stakeholder interests – such as cost to taxpayer and protection of public interest – under public scrutiny. Mediation provides the opportunity for advance analysis of these factors, allowing clear settlement parameters to be set. As a consequence, decision-makers are protected from the criticism associated with losing at trial (or even winning, where the price of victory is high, as it often is).

Enjoying flexibility

Reservations about using mediation for public sector disputes often relate to concerns about compromising the delivery of statutory functions, the need to protect the public interest and the complexity of decision-making processes. But these are misplaced. The flexibility of mediation means it can adapt to the range of 'non-standard' conflict situations

that public bodies encounter – e.g., involving multiple stakeholders with very different interests – and respect the statutory obligations, procedural requirements and other constraints faced by them, especially where the mediator has experience of working with public organisations. Process design, as well as outcomes, can be tailored to meet a range of disparate needs, with a bespoke responsiveness that goes far beyond what is offered by litigation and most regulatory proceedings.

Defusing tension

Unlike litigation, which promotes antagonism and entrenchment, mediation defuses tension. In the public sector, where authorities, private parties and other stakeholders are often locked into long-term relationships from which there is no escape, the legacy of conflict can be particularly damaging. By contrast, mediation offers an opportunity to improve relations, allowing regulatory and administrative functions to be delivered more smoothly in future.

This is of particular value in cases that concern the regulation of land use, where councils, landowners, neighbours, statutory undertakers and other stakeholders usually have no option but to continue to deal with one another, whatever the outcome of their disputes. Unlike litigation, mediation can ensure that these ongoing relationships reflect mutual understanding of the various interests involved, and can even set a framework for future engagement.

Avoiding bad publicity

No public authority wants any perceived wrongdoing to be publicly aired. A colleague once mediated a case in which a police dog had bitten the homeowner instead of the burglar, prompting a negligence claim for injury and distress. At the mediation, in addition to agreed damages, the homeowner received the recognition and apology they were looking for, as well as an undertaking for a change to training and operating procedures. The police were relieved to avoid the negative publicity of a public trial.

Outcomes like this must surely be encouraging. And with such powerful incentives to explore the use of mediation in the public sector, officers should be encouraged to do so. Unlike litigation, there is little to lose, and much to be gained.