Mediation in the Environment Court: Do the Numbers Matter?

When thinking about the number of participants in Environment Court mediation, the old saying "too many cooks spoil the broth" comes to mind. But is there any truth to this preconception? Analysis of group interaction theories, as well as those related to mediation, and plan change documentation for numbers involved and time taken to resolve a dispute, may hold the answer.

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WHY DO THE NUMBERS MATTER?

Local authority resource management plan and policy documents are required to be reviewed every 10 years under s 79 of the Resource Management Act 1991 (RMA). In practice this involves "rolling reviews" with plan change or variation processes addressing discrete plan issues arising during the 10-year "life" of the plan. As part of the RMA Schedule 1 process, interested persons may be consulted by the council at the document pre-notification stage and can continue their involvement through the notification, submissions and hearings parts of the process. In practice, councils facilitate plan development discussions and forums for the community at many junctures of the process, including pre-notification, through the submissions on notified provisions process, the publication of submissions and then the further submissions process, and the hearing of submissions themselves.

As a result, there is a continuous cycle of resource management document redevelopment, review and change, with the processes involving significant public input at different stages and across different authorities. Often the time between policy conception and completion can be measured in years. Clearly, this is an incredibly time-consuming and resource-intensive process in its own right.

Following release of decisions on submissions and completion of the council side of proceedings, persons involved can appeal to the Environment Court. The Court mediation process aims to reduce the scope of or fully resolve appeal matters. By the time mediation is embarked upon, parties to proceedings have often already been through a lengthy and costly council process, possibly locking horns at various junctures with other participants holding opposing views. How do the numbers of people still standing on a matter, and the social dynamics associated with their interactions, affect the time taken for a resolution to be mediated?

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GROUP BEHAVIOUR – WHAT MAKES PEOPLE TICK?

The key driver behind group processes and efficacy is the interactions between individuals in groups and their relationships. An increase in group size leads to an exponential increase in the number of relationships ongoing at any one time, with their various inclusions, exclusions, positions, jealousies, backgrounds, and so on. This is why problems arise in the output productivity of large groups; the number of relationships ongoing are more than the group members are comfortable with (Maggie Kindred and Michael Kindred *Once upon a Group: A Guide to Running and Participating in Successful Groups* (2nd ed, Jessica Kingsley Publishers, London, 2011) at 20).

Group performance has also been found not to be linked to how competent each member is on the subject topic, but by how those members interact with each other (Anita Woolley and others "Evidence for a collective intelligence factor in the performance of human groups" (2010) 330 Science 686 at 688). As such, expertise and depth of knowledge in a particular topic of discussion is not important, but how the individual group members relate to each other is. Applying this concept to an environmental issue for example, an engineer being technically correct about a design element for a dam may not be as important to the ultimate discussion outcome as how that engineer discusses these design elements and approaches other issues with the parties around the table.

In a situation where parties are seeking different outcomes, which is often the case in environmental matters, some participants may see mischief-making as a means to achieve their own goals if the resulting group response is perceived to enable this. Recognising and understanding group interactions creates an opportunity to reroute discussions when behaviours seem to be leading down unproductive tracks not consistent with the overall goals of the group's work.

THE ROLE OF MEDIATION AND MEDIATORS

Resolving conflict related to environmental matters is uniquely difficult, with the involved parties' positions on an issue's risks and priorities, and where costs and benefits should lie, being at times very far apart.

Mediation arose as an alternative to the traditional adversarial model of dispute resolution, and it attempts to prevent an escalation of the dispute and achieve a "win/win" or "all gain" result. As mediation proceedings are confidential and less formal than full court proceedings, participants can feel more comfortable to air grievances and problems, thus moving beyond them and focusing on issues and solutions.

Mediation is not a panacea however. As with getting any job done, negotiation becomes exponentially more difficult as the number of participants, and relationships involved, increases (Christopher Moore *The Mediation Process* (Jossey-Bass, San Francisco, 2014) at 557). Even if agreement is not reached, meeting face to face to discuss issues can improve relationships between parties, which is particularly important on environmental matters where it is often the same parties clashing over different topics over time.

Mediators play a critical role in proceedings. For multi-party issues, mediators facilitate a forum which allows the focus to be on group problem-solving rather than their individual interactions. Mediators play a key role in ensuring clarity of comments and commitments, and de-escalating tense discussions and comments by reframing them in a more neutral manner. Their role is particularly important when dealing with parties with negative attitudes, where the mediator must identify the motivation behind the behavior and deal with it in a manner appropriate to the circumstances (Jean Poitras and Pierre Renaud *Mediation and recognition of interests in public disputes* (Carswell, Ontario, 1997) at 95).

DO MORE PEOPLE EQUAL MORE TIME?

To analyse this issue, I identified the number of parties involved in Court mediation processes for the plan change documents of 30 local authorities.

Plan change documents were selected for analysis as the process followed is generally more discrete and comparable than appeals related to whole plans. Furthermore, cases were only used where the number of s 274 parties was recorded in the Court decision, as without this information clearly stated it is impossible to tell how many parties were actually involved in a dispute resolution without access to notices of the Court.

Although the plan change documents of 30 local authorities were analysed, once policy development processes lacking available appropriate information were excluded, the actual dataset of suitable cases was relatively small (n = 19). Most of the suitable cases involved fewer than 10 parties (n = 16). The number of months between the council notice of decisions on submissions and Court consent order or decision date gives the dispute resolution period.

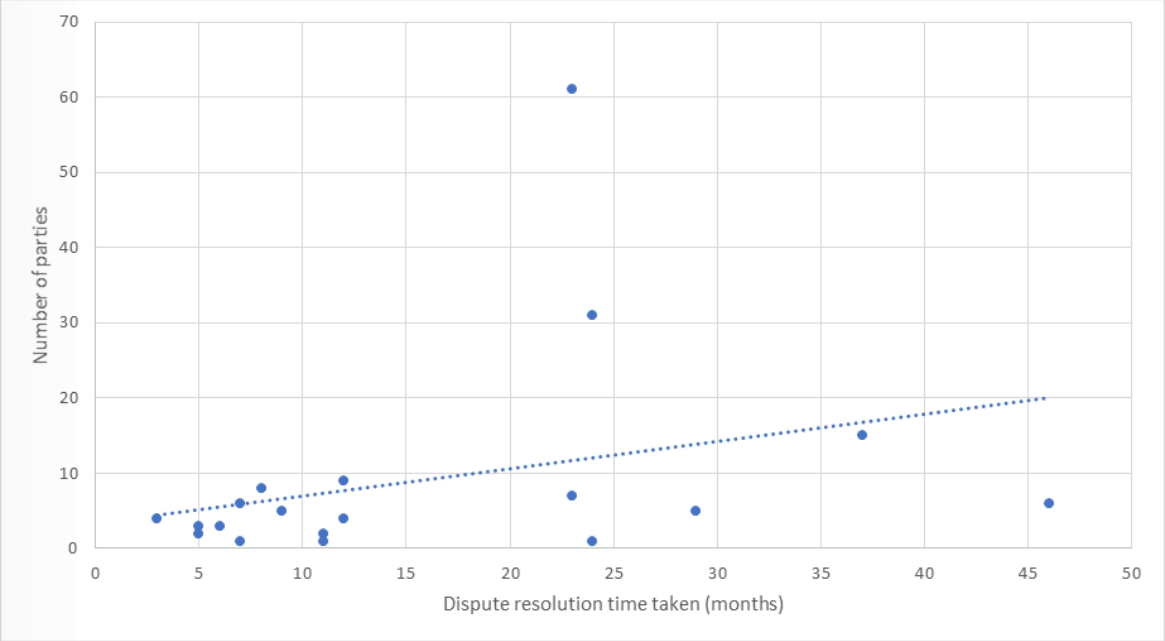

Figure 1 – Dispute resolution time taken vs number of parties involved.

The wide spread of the dots around the trend line is indicative of a weak relationship between the two variables. The scatterplot shows no correlation – the time taken to resolve a matter does not increase or decrease with an addition to the number of parties involved. This held true even when the minority datapoints of 15 or more parties were excluded and the more numerous 10 or fewer parties dataset was analysed:

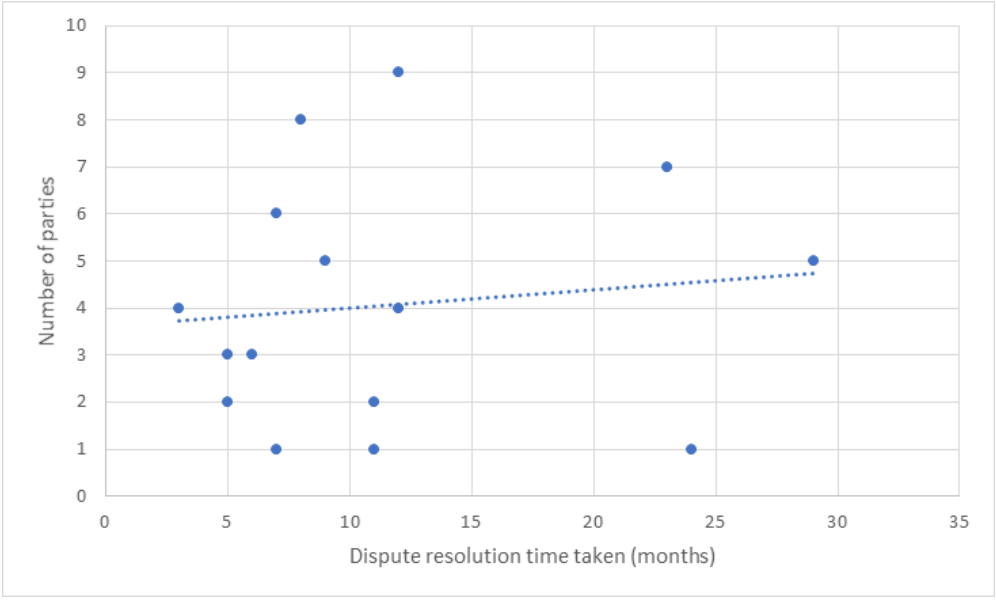

Figure 2 – Dispute resolution time taken vs number of parties involved for processes involving fewer than 10 parties.

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WHAT DOES IT ALL MEAN?

It may be that the small dataset is the reason that there is no correlation between time taken to mediate an appeal to resolution and the number of parties involved. However, a 1986 American study of mediation groups (n = 95, sized two to 40 parties, averaging four parties) found that there was no evidence that the number of parties involved in mediation affected the success in reaching agreement (Gail Bingham *Resolving environmental disputes: a decade of experience* (The Conservative Foundation, Washington, 1986) at 99). This finding would seem consistent with the fewer than 10 parties dataset showing no correlation between party numbers and time taken to resolve an appeal (Figure 2). Although many plan change processes investigated had to be discarded ultimately for the purpose of this study (for lack of information availability), it was observed that the vast majority of processes were resolved through mediation, and only a small number proceeded to a Court hearing. It may be that there is no correlation because mediation is working effectively to resolve disputes, regardless of the number of people involved.

If there is indeed no correlation between mediation numbers and time taken to achieve resolution, why is that? Certainly, group dynamics and interaction theories as described above back up the original assumption of increases in the number of participants increasing the difficulty in achieving resolution.

One possible explanation is that the New Zealand Environment Court mediation process, and the mediators themselves, are very successful in achieving the goal of reaching resolution. Although there is no set process or timeframes for mediation, the Court provides excellent guidance in suggested flexible methodologies as well as its skilled and trained Environment Commissioners to facilitate. The theoretical importance and influence of the mediator's role, as set out in the literature, certainly seems to be borne out in practice in the Court's mediation of appeals.

In the almost 30 years since the RMA came into force, it is likely the public has become generally familiar with the idea of resolving disputes prior to and outside of a full court process, particularly parties that have wide-ranging resource management interests and engage regularly with planning processes. This increased awareness of and engagement in alternative disputes resolution processes by parties involved may also be contributing to their success. In 2017 participation in mediation went from voluntary to mandatory, and this change seems to underline the value placed on mediation by the Ministry for the Environment as a successful way to resolve disputes.

Mediation directed by the Environment Court of New Zealand appears to defy the group dynamics theories around increases in group size making it more difficult to get a job done. As such, mediation should continue to be the primary vehicle for resolving appeal disputes for the Environment Court. Thought could be given to the place in the process where mediation occurs, and whether it could be utilised earlier, perhaps as part of the council process, to bring disputes to a resolution sooner.