The Pandemic, Climate Change and Mediation Converge in the Mediators' Green Pledge

Ian Macduff*

Abstract

This article briefly examines the impact of the Covid-19 pandemic on mediation practice and the potential benefits of maintaining a commitment to environmentally sound ways of practice as we emerge from the pandemic. It introduces the readers to a recent initiative, The Green Pledge, which is a voluntary commitment to reducing the carbon impact of practice.

Keywords: access to justice, online dispute resolution, impact of pandemic on mediation practice, commitments to "green" practice.

A decade ago, Noam Ebner and Colleen Getz wrote:

> The world is going green, in the sense that green issues are no longer only the concern of activists, lobbyists and politicians – they are finding their way into most households and businesses in the western world. Even if you have not noticed your own map of 'matters to be concerned about' expanding to include environmental issues, indicative measures of this trend are obvious in the way business practices and consumer-focused marketing are changing. (Ebner & Getz 2012)

At the time they wrote about the 'green' potential of online mediation, there was already an emerging, though widely divergent, experience of remote or virtual mediation. Indeed, early iterations of online dispute resolution (ODR) were seen as 'alternative' dispute resolution in digital garb, as practitioners migrated some elements of their work into online spaces, whether through Skype or other forms of audio and video communication. Even a decade ago it was an uneven playing field, as calls dropped out, not everyone had access to even moderately fast broadband (let alone adequate computing hardware), and levels of professional resistance were high.

This article addresses one recent initiative that mirrors the work of the last couple of decades of the digital justice community, and practical responses to

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* Ian Macduff was, until early 2022, Director of the NZ Centre for ICT Law at the University of Auckland Law School, and before that was Associate Professor of Law and Director of the Centre for Dispute Resolution at Singapore Management University. He also taught at Victoria University of Wellington's Law School for a number of years. He has been a practicing mediator for forty years and closely involved in the development of digital access to justice for the past twenty years.

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climate justice imperatives. The Mediators' Green Pledge is one professional community's response to both the potential of digitally mediated practice and the demands of climate justice – wrapped up in the global impact of the ongoing COVID-19 pandemic.

Early reactions to ODR within the mediation community, mirroring developments in the wider field, ranged from scepticism – including a non-mediator colleague who announced that she 'did not believe in ODR' as though it were a matter of faith rather than emerging and empirically grounded practice – to an understandable preference for face-to-face interactions, for a 'warmer' way of disputing (Smith 1978). That 'warmer way' seemed incompatible with screen-based communication, bolstered, probably, by a degree of technological resistance.

The arrival of the COVID-19 pandemic in early 2020 changed that. In addition to the stay-at-home, vaccine and masking mandates gradually implemented across our respective nations, and with varying levels of support and resistance, institutions of law and government themselves had to adapt to the new risks. All of those 'front-facing' organizations, workplaces and institutions that required or offered some level of access to services and outcomes now needed to redefine 'access'. With varying degrees of commitment and success – and comparative studies of this are steadily growing – courts, tribunals and agencies involved in the administration of law turned to digital technologies in order to continue to function, even if in reduced form.

It is beyond the scope of this brief note to comment on the variations in judicial and institutional responses to the shock of the pandemic (and surely there are theses to be written here!) except to note two emerging conclusions: first, perhaps with some surprise, many of those involved in conventional court processes discovered that not only could work continue, and access to justice still be facilitated, but also that it came with significant advantages in terms of efficiencies and enhanced access; and, second, while there have always been gaps in access to justice, the switch to technology-based access revealed a different set of barriers to justice and the need for urgent conversations about digital exclusion. This second insight has also highlighted an irony in government and administrative moves, prior to and during the pandemic, towards so-called 'digitally inclusive' programmes, moving more government services online, thus rendering them less accessible to precisely those sectors of society for whom they are intended.

At the same time as judicial and government agencies needed to shift into online mode, the mediation profession – including those who would have been among the 'resistance' – realized that if they were to continue working, it had to be online. That which had been seen as merely faddish, impossible and incompatible with the very ethos of mediation now became the only way to work. Thus, in the space of weeks, an entire profession and practice have moved ('pivoted', in the *mot du jour* at least here in New Zealand), almost as one, into online or remote mediation.

The almost seamless and overnight shift to mediating online, illustrated through examples posted to online fora such as LinkedIn, of new home offices with double screens, professional microphones, lighting and tales of 'top half' office attire is both encouraging and amusing, in that those who might, weeks earlier,

have been part of the resistance now became experts in and promoters of remote, screen-based mediation.

The insight that came with this transition to remote mediation was that not only was it still possible to function as a mediator, but also that this mode brought tangible advantages for everyone. These advantages will be familiar to readers of this journal, so there is little need for a full accounting of them other than to note the unexpected benefits of *not* being in the same room at the same time; the related advantages of asynchronous 'meetings'; the clear advantages of reducing travel, of electronic file sharing and collaborative editing; and – perhaps least expected – the surprising intimacy of the digitally mediated meeting space. This 'conversion experience' was largely in a mediation community that had not been part of the last two decades of conversation about design, ethics, communication and access that we have seen (see Ebner 2022).

While our attention was taken by the spread and contagion of the COVID-19 pandemic, and indeed while mediators and others became aware of the changes the pandemic wrought to normal patterns of life, such as the ease of travel and consumption, the other unavoidable conversation was, of course, about the growing urgency of the climate crisis. Part of the conversation about and science of the climate crisis also forged epidemiological links between viral risks (not just COVID-19) and human impacts on the planet, biodiversity and consequences of human interactions with other species at the margins of our global expansion. Again, this is not the place for any further exploration of the climate crisis: the scientific consensus is clear enough, and the evidence of climate destabilization is only too clear in the fires, floods, typhoons, droughts, glacial retreat, biodiversity loss and other grim headlines. Even as I draft these paragraphs, Working Group 3 of the Intergovernmental Panel on Climate Change is finalizing the key language of its latest report, which will contain significant policy recommendations, particularly on the imperative of phasing out our dependence on fossil fuels.

It is where these two currents meet – the normalization of remote and online communication and work, and the urgency of responding to the climate crisis at both personal and systemic levels – that the conversation develops on turning a pandemic-driven shift in modes of work into a principled and evidence-driven commitment to continuing this mode. It is at this point that necessity becomes a virtue. Setting aside for present purposes the imperatives of system-level changes and increased climate accountability of the carbon corporates, a core part of the growing conversation on climate change is on what we, as individuals, families and communities can do to reduce our impact. There is a necessary caution here in that a focus on individual carbon footprints is, for the fossil fuel industry, a useful distraction from the real imperative: decarbonizing our lives at a systemic level.

This is where the Mediators' Green Pledge comes in. The pandemic-induced shift in modes of working as mediators was not only a way of continuing to work and to facilitate access to dispute resolution, and was perhaps unexpectedly effective and even preferable in some settings; it was also a way of reducing the carbon impact of usual modes of working – especially for those mediators whose work often involved at least domestic and often international air travel. Here, then, is the weaving together of unexpected advantages: on the one hand, the shift to

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remote, digitally mediated dispute resolution reinforced in practice the conclusion that most readers of this journal will take for granted – that digital technologies have a key role in enhancing access to justice and resolution; and on the other, there can be at least a small step towards climate justice and the imperatives of a 'just transition' to a post-carbon world and towards the essential conversations that we must have in confronting the existential crisis of climate change.

In blogs for the Kluwer Mediation blog website, both before and after the pandemic hit the world and an article on the mediate.com website, my Edinburgh-based colleague, John Sturrock, outlined the early thinking that led to conversations among a small steering group, and to the now established Mediators' Green Pledge. There is, as John noted, an easy fit between the founding ethos of seeking sustainable, accessible forms of dispute resolution through mediation and an incorporation of sustainable ways of conducting one's mediation practice. This, of course, had been anticipated in the article by Noam Ebner and Colleen Getz cited earlier.

The mediation world also had a fine precedent in the work of Lucy Greenwood and her colleagues in the Campaign for Greener Arbitrations, established in 2019, acknowledging that "the arbitration community was keen to get behind a broader campaign to address the waste and unnecessary travel that often occurred in international arbitrations." While this initiative preceded the challenge created by the pandemic, it is illustrative of the meeting and melding of the twin imperatives of climate change and sustainable access to justice.

The Mediators' Green Pledge has now attracted over 580 signatories worldwide; it has been translated into 14 languages, with more translations in the pipeline; it has a number of institutional supporters from the mediation world; and we are moving towards a 'corporate' pledge, which will engage some of the larger players beyond the immediate world of dispute resolution practitioners. As will be seen on the Pledge website, a commitment to reducing air travel is only one part of the conversation: once the 'awareness' switch has been flipped, we can begin to identify a number of ways in which our ways of doing things can be more environmentally sound. They may be small steps, but the impact can be cumulative. The Pledge, of course, is just that: it is an undertaking to do what is within the power of the individual to act in more sustainable ways; but there is also an understanding, for example, that there will be times when air travel is essential. This is aspirational rather than mandatory. And it is the least we can do.

> If we came out of this pandemic a little stronger in that sense of solidarity with each other, that would be a good thing.
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> (Bill McKibben: 'How to Fix Unemployment While Fighting the Climate Crisis', https://lithub.com/bill-mckibben-how-to-fix-unemployment-while-fighting-the-climate-crisis/)