

Justice Customers consumer language in New Zealand justice

Abstract

This article examines the use of the term ‘customer’ in the justice system. It recognises that while the use of the term is designed to encourage ministry staff to focus on citizens’ needs, deploying a consumerist concept creates several fundamental problems in the context of the courts: it creates the impression that courts are a private rather than a public good; risks undermining neutrality and independence in the courts; and disguises and misrepresents the true nature of the interaction between the courts and citizens. The article concludes by suggesting a new way to meet the aims of ‘customer service’ while also protecting the independence and neutrality of the courts, by adopting *manaakitanga* and *kaitiakitanga* as guiding principles.

Keywords justice, court users, citizen, customer, *manaakitanga*, *kaitiakitanga*

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Under the leadership of former chief executive Andrew Bridgman, the Ministry of Justice began referring to users of the court system as ‘customers’. This drew the ire of now chief justice of New Zealand Helen Winkelmann in her 2014 Ethel Benjamin address:

There is a new language that is used in connection with courts; people who come before the courts are called customers, judges and lawyers are referred to as stakeholders, District Court centres are referred to as franchises. We are now to understand that we are part of a market for justice services and our product is being ‘marketised’. (Winkelmann, 2014, p.232)

The ministry was not dissuaded. It has defended its use of the term and further integrated the concept, introducing a ‘Customer Charter’ in March 2019. The

language has also been adopted by Associate Minister of Justice and for Courts Aupito William Sio. For example, when commenting on new legislation, he said it would help courts and tribunals to provide 'better customer protection and redress' (Sio, 2018).

This article examines the use of the term 'customer' in the justice system, asking what it seeks to achieve and what is problematic about the idea of justice customers. It concludes by suggesting a new way to meet the aims of 'customer service' while also protecting the independence and neutrality of the courts.

Origins and utility of justice 'customers'

The idea of a customer in the public service is by no means unique to the Ministry of Justice. It is part of a much wider New Public Management trend

having power through the choice of using or not using a product or service. In this light, the public cannot be dismissed as an interruption and inconvenience. Instead, they are the central purpose of the service and customer satisfaction becomes a key performance measure. It is not merely window dressing but a way to change how frontline staff interact with 'customers'.

Andrew Bridgman applied this now familiar rationale to defend the ministry's use of the term. While acknowledging that the ministry had taken some 'flak' for calling people in contact with the ministry 'customers', he said:

It was as if talking about customers somehow took away from what was important about the courts. In fact, the reverse is true – the customer is our reason for being. And reframing our

to 2018 and searched for 'customer' and related terms, and then coded for context. Most frequently, a 'customer' is not a defined member of any group; rather, the term is used generally to talk about making the ministry more individual or public focused:

Providing great service to the public every day. We deliver justice services for New Zealanders every day. ... We'll continue to work on a number of initiatives to improve the customer experience. This includes gaining a better understanding of our customers to enable us to design services that better meet their needs and deliver access to justice. (Ministry of Justice, 2018, p.26)

Making sure New Zealand's justice system is customer focused is critical. (Ministry of Justice, 2017b, p.2)

The precinct will embody much of what we are trying to achieve in our drive to modernise courts and provide customer-focused service. (Ministry of Justice, 2016, p.3)

When 'customer' is used more specifically, it is applied to many different groups of the lay public. For instance, civil parties, bereaved family members where cases are referred to the coroner's service, members of the public watching a case, victims or complainants and their supporters, supporters of a criminal defendant or civil parties, criminal and civil debtors are all described as 'consumers' (see, for example, Ministry of Justice, 2019). Equally, Tenancy Tribunal claimants and respondents become 'tenancy customers': 'Improving the user experience of our tenancy customers ... customers can now keep track of their application via an online portal' (Ministry of Justice, 2018, p.13).

It is not clear whether such customers include representatives of organisations: for example, whether Housing New Zealand is a 'tenancy customer'. This is of some importance given that many parties to court proceedings are not people but companies, trusts, and other government departments (Toy-Cronin et al., 2017, p.89). Two groups who are expressly included as 'customers', even though they fall outside the natural meaning of the

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that dates back to the 1980s. Such New Public Management-inspired public sector reform in New Zealand and abroad included 'a more extensive reliance on market mechanisms – contracting out, commercialisation, corporatisation, and privatisation' (Boston et al., 1996, p.16). The use of consumerist language in the public service was thought to redress the imbalance of power between the provider of the service and those to whom the service was provided (Potter, 1988, p.150). This change did not go unnoticed, with many academics critiquing the citizen-consumer concept as it is applied to various areas of the public service (see, for example, Alford, 2002; Clarke et al., 2007). Despite such critiques, its use has taken hold across the public service, defended on the grounds of its utility in refocusing the goals of public sector agencies. Recast as a consumer of a service, the public is conceptualised as

thinking about this has been very helpful in cutting through the complexity and focusing on our priorities. (Ministry of Justice, 2016, p.2)

The term is, therefore, a way to change the nature of the relationship between the ministry and those who are now regarded as 'customers', focusing on the people in contact with the ministry as 'our reason for being'. This, however, begs two questions: who is a customer of the Ministry of Justice?; and why did the use of the term create 'flak' for the ministry?

Who is a justice customer?

The answer to this question can be gleaned by reviewing how the term is used in the ministry's public communications: news updates, brochures and its annual report. I reviewed ministry publications from 2016

term, are jurors and criminal defendants. For example, in a discussion of the 2017 Court User Survey in *Justice Matters*, it was said that the study ‘interviewed 2,044 customers in eight court sites’ (Ministry of Justice, 2017c). Criminal defendants made up 28% of the members of the public surveyed in that study (Ministry of Justice, 2017a). Communications about another survey, this time on juror satisfaction, also cast jurors as customers: ‘2017 Juror Satisfaction Survey shows customer satisfaction remains very high’ (Ministry of Justice, @justicenzgovt, 15 March 2018).

Lay court users (even if their job includes representing a government agency in court, such as some Housing New Zealand employees) are distinguished from judges, the police, lawyers and ministry employees, who are together called ‘stakeholders’:

The effectiveness of courts is affected by many stakeholders with specific and independent roles. They include judges, Police prosecutors, defence counsel, Crown solicitors, victim advisors, court staff, security officers, Corrections officers, and probation officers who all work in the court system. (Ministry of Justice, 2018, p.4)

The usage of ‘customer’, therefore, seems intended to encompass all ‘people who use our services’, regardless of their role or their status as a representative of an entity, as long as they are not in the ‘stakeholder’ group. In this way, the ministry is shifting from the previous situation of ‘too much focus on the stakeholders in the system rather than the people who are relying on the system to resolve their issue’ (Ministry of Justice, 2018, p.4).

What, then, is problematic about this? Is it not simply, as Andrew Bridgman suggested, ‘cutting through complexity’ to focus on ‘our reason for being’?

Why does it matter?

While the desire to cut through complexity is understandable, doing so by deploying a consumerist concept creates several fundamental problems: it suggests that courts are a private rather than public good; it risks undermining neutrality and independence in the courts; and it disguises

and misrepresents the true nature of the interaction between the courts and citizens.

Courts are a public good, not a service to a customer

The use of the term ‘customer’ constructs a very particular type of relationship, one drawn from commercial relationships where a customer is a purchaser of a good or service (Needham, 2009, p.100). The provider–customer relationship is between two entities: the ministry on the one hand and the lay person (in their own capacity or as a representative of an entity) on the other. The focus is placed

requirements against the government itself, while also developing the law as believed necessary as society changes. The value of the courts’ decisions therefore goes well beyond the individuals concerned, due to the fact that courts determine principles of general application. Such general applicability of principle means that the ‘courts play a central role in public governance structures’ (Farrow, 2014, p.23). Even where courts do not perform this particular role in an individual case, their availability to people and businesses is of fundamental importance:

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on the relationship between these two parties, suggesting that the courts are a service provided to the citizenry like any other: the library, the hospital, the mechanic. There is a broader critique of New Public Management that all public services have a collective benefit that is not recognised when they are reduced to a provider–customer relationship: ‘Citizens, as customers, are seen as only having their individual interest in getting the best deal they can, rather than services being seen as rooted in collective citizenship’ (Harris and White, 2018).

Even if we accept that New Public Management thinking is appropriate for some public services (a matter that continues to be contested), in the context of the courts this conception is ‘demonstrably untenable’ (*R (on the application of UNISON) v Lord Chancellor*, [2017] UKSC 51, pp.20 para [66]–[67]). The existence of courts is, Lord Reed explained, fundamental to the rule of law. Courts are responsible for interpreting and enforcing the laws made by our elected leaders, including upholding the law’s

People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. (*R (on the application of UNISON) v Lord Chancellor*, p.[71])

Courts are, therefore, a different sort of public service to others, in that they are fundamental to our system of government. While the courts’ function includes dispute resolution to enforce private rights between individual parties, it goes well beyond this. Courts create societal rules and promote compliance with them; they scrutinise and limit state power; they provide the ordering for our capitalist economy (Genn, 2010, p.16). The courts are a public good with a constitutional role for everyone’s benefit. To suggest otherwise is dangerous to the stability of our democracy, as Lord Thomas of Cwmgiedd says:

If we conceive of the justice system as no more than a service provider, we

plant the seeds for ... privatisation. ... Its danger lies equally in the fact that it might facilitate the false belief that the justice system is in the same category of public services as education and the health service. It is not. It is in the same category as Parliament and the Executive. It forms part of the institutional framework which safeguards the rule of law and underpins democracy (Thomas, 2017, p.118).

Introducing language that reconceives the justice system as promoting only private benefits chips away at one of the pillars of our system of government. While this may be regarded by some as a matter of high principle, it is on such matters that,

is a song title that resonates with what we're about at the Ministry of Justice' (Ministry of Justice, 2016, p.2). A drive for customer satisfaction, however, creates two pernicious effects in the court system: it creates preferred customers, and it encourages the ministry to see itself as the curator of the 'customer experience'.

Creates preference customers in a system that must be neutral

Our court system is an adversarial one. True, there are some examples where the court staff will interact with people who are not adversaries: for example, an applicant for legal aid or completing a requested police check. But many ministry interactions are with 'customers' who are in an adversarial relationship

the period to do so had not elapsed. The bailiff, however, went ahead with enforcing the order, telling those who expressed misgivings that the plaintiff 'had a right to customer service' (Toy-Cronin, 2015, p.209). When customer satisfaction becomes the metric for performance the pressure is on staff to meet their customers' needs. The best customers – those who use the business most frequently and are the most loyal, such as the plaintiff in this case – then require an extra level of service, undermining neutrality between parties.

This risk of creating preference customers is also identified in international research. In a review of the term 'customer' in the United Kingdom criminal justice system, Needham found that there 'is a hierarchy of users': 'It was clear that "law-abiding citizens", particularly victims and witnesses, would be the priority customers of the service' (Needham, 2009, pp.107, 112). Again, such hierarchies undermine the principle of neutrality.

The customer focus threat to neutrality is also seen in ministry communications. Some people, who would otherwise be 'customers', are reframed as outside the definition. For example, people watching court proceedings are separated into two categories, 'troublemakers' and 'customers': 'Other changes proposed, like extending the powers of court security officers, to remove or deny entry or detain troublemakers, will also improve our customers' experience' (Ministry of Justice, 2017b, p.6). While 'customer' might look like it cuts through complexity, the creation of preferences is quite consistent with running a business but at odds with a core principle in our system of government.

The ministry as the curator of the 'customer experience'

A positive customer experience, as a review of marketing textbooks make clear, relies on all parts of the organisation working together. If one part of the organisation is not 'on message', the efforts of the rest of the organisation are thwarted. For the ministry's staff to be able to provide timely service to the customer, the judiciary (who deliver the judgments that parties seek from the court) are a key component of the organisation. Except, of course, they actually are not part of the organisation

Judicial independence is key as [the Judges] role is to hold everyone – including the government (one of the ministry's best customers) – to the rule of law.

as Lord Thomas suggests, we should stand like a rock (ibid., p.132).

Drive for satisfaction undermines neutrality and independence

The use of the language of consumerism also has an effect within the operation of the courts. Courts must, as a fundamental principle, be both neutral and independent; these are core principles of natural justice. Reconceiving 'the people who use our services' as 'customers' constructs a particular relationship which threatens both these principles. This is because the emphasis in a customer relationship is on customer satisfaction. The service provider needs to meet the needs of the customer and interact with them in such a way that they will go away with a positive view of the experience. As Andrew Bridgman said in one communication, 'Our customers are key to every step we take. Simon and Garfunkel's "Keep the customer satisfied"

with another 'customer'. When the two customers' interests conflict, as they often will in an adversarial setting, whose will be preferred? The Customer Charter perhaps anticipates this problem by saying 'we are fair and impartial'. However, examples of how the customer satisfaction mindset plays out on the ground suggest that this may be harder to achieve in practice.

An example comes from research conducted about litigants in person. The case involved a bailiff (a court staff member who is responsible for executing orders: for example, forcibly taking possession of property) and two adversarial parties. An order had been made by the court in favour of a plaintiff – a large organisation which often brought proceedings. The order allowed the plaintiff to take possession of the property of an individual defendant – a person who was inexperienced with the system and from a low socio-economic background. The defendant still had a right to apply to stop the order taking effect as

at all. The separation of judges from the ministry is of fundamental importance. Judicial independence is key as their role is to hold everyone – including the government (one of the ministry’s best customers) – to the rule of law. This fact puts the ministry staff in the conflicted situation of being both responsible for delivering a timely and satisfactory service to ‘our’ customers and unable to control all the elements that enable that to occur (according to their own metrics).

This tension was recognised in research on the pace of litigation in the High Court (Toy-Cronin et al., 2017). Court staff expressed concern about the pace of cases being too slow and creating difficulties for a party to a case: ‘we don’t want it to take over and be drawn out over a long period of time because it’s not fair on a person who is either owed this money or owes this money’. Judges will, however, commonly adjourn a case for a variety of reasons: for example, so a party can seek advice, gather more evidence or negotiate a settlement. Some of the court staff interviewed for the study revealed that they were unhappy about such adjournments as it meant the conclusion of the case was delayed. Court staff comments included that when ‘judges granted adjournments they felt “let down”, “disheartened” and “unsupported”, or more simply: “we don’t really like adjournments”’ (Toy-Cronin et al., 2017, p.100). While the court staff were very aware of and careful about the separation of powers, this push to create ‘customer’ satisfaction creates pressure for staff to try and manage the customer experience. This in turn risks pressure on the independence of the judiciary.

Disguises the nature of the interaction between citizens and the courts

The concept of a customer, at its heart, imports the idea of choice. The purpose of good customer service is to attract and keep customers to secure a competitive advantage. Consumerist language recasts everyone as ‘enterprising, active, choice-making consumers’ who are ‘in control of their own lives through a series of rational transactions’ (Harris and White, 2018). This is a depiction at odds with the experience of most people in contact with the ministry. Certainly for

criminal defendants, the idea is devoid of meaning. As Patricia Williams observed when discussing sentencing ‘choices’: ‘The vocabulary of allowance and option seems meaningless in the context of an imprisoned defendant dealing with a judge whose power is absolute’ (Williams, 1991, p.33). Even for those under less direct coercion, the idea that they have chosen to be in contact with the ministry is a wholly inaccurate depiction, particularly for those who are most vulnerable, such as criminal defendants, legal aid applicants, victims of crime, and family court litigants. In using the language of choice, of selecting to become a ‘customer’ of the ministry, the discourse is transformed from ‘one of public obligation and consensus into one of privatized economy. The positioning

consumerist language in the ministry are not mere ‘flak’; they are in aid of protecting our system of government. That is not to suggest, however, that there is no place for trying to improve the public’s interaction with the ministry. Citizens come into contact with the ministry for a wide range of reasons, often without any choice in the matter and often at times of great stress. The ministry’s ethos of trying to improve the quality of these interactions is an admirable one. However, rather than borrowing from capitalism to solve the problem, let us instead look to te ao Māori. The values of manaakitanga and kaitiakitanga could provide an equally powerful framework to encourage focus on the citizen, but with fewer risks to our democratic structures.

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renders invisible the force of the state’ (ibid., pp.33–4).

Calling jurors ‘customers’ not only disguises the fact that jurors have no choice but to attend court; it also fundamentally mislabels the role that jurors perform. Jurors are not recipients of a service but are in fact providers of a service, that of fact finder in a trial. The state has to provide the infrastructure for this to be achieved in a way that is as equitable and pleasant as possible, but to consider them ‘customers’ is to fundamentally misunderstand their role in the court system. Jurors are not there to be served by the state but are independent from the state; their purpose is a limit on state power. To suggest they are customers of the state undermines one of their key reasons for being.

A different way to cut through the complexity – manaakitanga and kaitiakitanga

The arguments against the use of

Manaakitanga is what Hirini Moko Mead refers to as a ‘guiding principle for everyone’ (Mead, 2016, p.32). It refers to the obligations of ‘nurturing relationships, looking after people, and being very careful about how others are treated. ... It cannot be stressed enough that manaakitanga is always important no matter what the circumstances might be’ (ibid., p.33). This could be a more, or at least equally, powerful guiding value to ‘cut through the complexity’ and ensure that frontline staff treat people coming into contact with the ministry with dignity and respect. It achieves the same orientation towards thinking about the needs and perspectives of the lay public, but without the attendant risks.

Similarly, kaitiakitanga, a distinct but related concept (Jones, 2016, pp.71–3), could guide interactions. Kaitiakitanga is most commonly understood in terms of human obligations of guardianship to the

environment, but it has broader meaning as well. Spiller and colleagues argue that organisations can be strengthened through practising kaitiakitanga:

humans are stewards endowed with a mandate to use the agency of their mana (spiritual power, authority, and sovereignty) to create mauri ora (conscious well-being) for humans and ecosystems – and this commitment extends to organizations. (Spiller et al., 2011, p.223)

They argue that adopting this value can help organisations be more ‘relevant, responsive and relational’ (ibid., p.224). If Ministry of Justice staff are recast as kaitiaki, they are tasked with using their mana to create mauri ora for all those they come into contact with in the system. Furthermore, they could be guided by obligations of stewardship for the system they are entrusted with. This requires deep understanding of that system and the value it offers; knowledge of the importance of judicial independence, of equal treatment before the law, of fair process. Adopting these values as guiding principles, rather than a consumer focus, would therefore not only encourage positive relationships with the citizens who come into contact with the ministry, but also protect the importance of the courts in our democratic system. These principles can be adopted

into statements of organisational values and into citizen – rather than ‘customer’ – charters.

A possible critique of borrowing from te ao Māori would be Moana Jackson’s concern that adopting Māori principles into a Pākehā justice system (and one that evidence overwhelmingly shows is systemically discriminatory towards Māori) only serves to maintain a paradigm that exercises control over the colonised, making it harder to fundamentally decolonise the country (Jackson, 1995, p.34). That is a possible risk and one that needs consideration. The benefits, however, are significant. It will not be enough to tell the ministry to stop using consumerist ideas; an alternative that achieves their legitimate aims of being responsive and respectful must be found. Manaakitanga and kaitiakitanga seem to answer many of the problems that the consumerist language creates while doing the work of encouraging staff to relate respectfully to the citizens who are in contact with the system. The citizens who come into contact with the system are not cast as rational utility maximisers but are instead recognised as people who are connected to others. An approach based on manaakitanga and kaitiakitanga does not hide the coercive nature of the system but rather makes no comment on it. It directs the frontline staff to treat everyone with care and respect but it does not create incentives for the ministry

to try and control or influence the separate judiciary, who are separate for reasons that are fundamental to the rule of law. It creates no hierarchy between people as it requires acknowledgement of each person’s mauri, regardless of their particular role.

Conclusion

Lawyers and judges crying foul over an innovation to deliver a better service to the public can be all too readily dismissed as petty or protectionist. Their discontent might even be read as evidence of success. In this case, however, there are persuasive, principled reasons why using consumerist language in our justice system may cause profound harm to its strength and independence and therefore the strength of our system of government. The focus on respectful, helpful interactions with the citizens who come into contact with the ministry is an admirable one and should be pursued. However, looking to Māori values will provide a better way to ‘cut through the complexity’ than risking turning one of the pillars of the rule of law into just another service.

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