Should the New South Wales Bar remain agnostic to mediation?

By Justin Gleeson SC

The premise for this article is a generalisation, which may be controversial, that New South Wales barristers, both individually and through their association, have been largely agnostic towards mediation over the last 15 years. In Part I, I seek to explore why this is so. In Part 2, I argue the case for a fundamental change in attitude by barristers towards mediation. In Part 3, I conclude with some practical suggestions.

Part I: Agnosticism

Mediation took off in New South Wales and elsewhere in Australia in the late 1980s. Initially there were doubts as to whether it was more than a passing fad, but it must now be recognised as a permanent fixture in our legal system. Virtually every court now has a statutory power to refer parties to mediation, even without their consent. Probably more than a quarter of the fully contested cases in the various court lists are the subject of some form of mediation, usually before trial but now also sometimes before appeal.

However, there is evidence that many of the state's barristers, together with their association, have had a largely agnostic or sceptical attitude to mediation. Some aspects of this are as follows:

1. New South Wales has traditionally had the largest Bar in Australia and arguably the most disputatious. The tradition of strong and vigorous cross-examination, particularly in common law matters, but also in commercial disputes heard in equity, has been a feature of the Bar. Mediation seemed to many barristers as not really a true test of the barrister's skill, and indeed a distraction from the real work at hand.
2. By the early 1990s, as mediation assumed real prominence, the New South Wales Bar was facing threats and challenges to its existence. There was considerable pressure from various sources, including competition regulators and some large firms, to move to a fully fused system of legal practice and to discontinue the existence of an independent referral Bar. One of the important responses to this was that the New South Wales Barristers Rules were substantially overhauled in 1994. A much clearer definition was introduced of what constituted barristers' work. The 'sole practitioner rule' was strengthened and enhanced.[1] This review of the Rules focused heavily on the two core aspects of a barrister's practice: arguing cases in court and providing opinions on how cases would be decided if they went to court. While mediation was not excluded from the definition of barristers' work[2], it nevertheless was given a minor place in the Rules.
3. Very few New South Wales barristers sought to offer themselves as mediators or to specialise in that area. Perhaps this was because, in New South Wales, the Law Society took the lead in mediation, establishing an ADR Committee in 1987 and running successful Settlement Weeks in 1991 and 1992. By contrast, in Queensland, senior barristers and their association immediately threw themselves into mediation and in particular offered themselves as mediators. There are some prominent exceptions but, as a general rule, in NSW the mediators in most complex disputes were taken from the ranks of retired judges. In other disputes involving family or other like matters, often the mediator came from solicitors' ranks or indeed from specialists trained in psychology who may not have a legal qualification.
4. The Senior Counsel Protocol was implemented in the early 1990s, when responsibility for the appointment of silks passed from the attorney general to the Bar Association. Again, while work done as a mediator or mediation advocate was not excluded from the protocol, it was given a minor prominence. Few barristers who made mediation a specialty obtained silk during the 1990s. This also meant that there was a lack of role models for new barristers attracted to mediation work.
5. Although the Bar Association introduced a CPD program in 2002, mediation was not identified as a separate strand. It is included in the Advocacy strand and there are some seminars there offered. However, it is fair to say that it is not given a great prominence in the programme or in the readers' courses. Anecdotal evidence suggests most barristers would have attended very few, if any, CPD seminars on mediation. Some may have attended external courses on mediation, but again the number is low.

There is a case for the association to obtain more accurate statistics, but I would venture from anecdotal evidence that about one per cent of New South Wales barristers regularly act as mediators; and less than 10 per cent of New South Wales barristers would appear as an advocate in mediations on more than five occasions per year. I would also venture that perhaps more than 50 per cent of those barristers who do act as advocates in mediations have never studied the art of mediation. Rather, they have learnt from doing and watching: not a bad way to learn, but not necessarily a complete education.

There is one final historical matter. For most barristers, mediation was never a part of the university curriculum, nor was there any teaching within legal history courses (to the extent they were part of law curriculum) of the role which mediation has played in the common law tradition and even earlier in the ancient world. A useful recent article by Derek Roebuck, 'The Myth of Modern Mediation'[3], reveals that, in pre-capitalist societies, people of high as well as low status invested extraordinary amounts of time in mediation, an investment that proportionately far exceeds the resources devoted to the adjudication of disputes in our society. The article continues with a useful review of mediation in the English tradition from the twelfth century onwards. One particular proponent of mediation was Lord Mansfield. He would regularly attempt to have disputes referred for settlement through arbitration following mediation. The view is expressed by Roebuck that mediation continued into the nineteenth century but was largely hidden from view by lawyers hostile to it. The agnosticism, or worse hostility, of some modern barristers to mediation may in part arise from our ignorance of legal history.

Part 2: Belief

Now is the time for New South Wales barristers, individually and collectively, to fundamentally rethink our attitude to mediation. There are a number of reasons for this.

First, it is here to stay. It will not go away. The last 20 years has demonstrated that mediation is now a permanent fixture within the system and this is reflected in court Rules.

Second, while the adversarial system is familiar and serves very valuable purposes, we must accept that mediation may achieve lasting benefits, for the parties and the community, which the adversarial system may not. Mediation settles disputes at a very high rate. Those settlements are important from various perspectives. Save in unusual cases, a mediated dispute will cost the parties less than a fully litigated dispute and fewer community resources are devoted to the legal system. Chief Justice Spigelman has recently reminded us that, as lawyers, we must take seriously the task of reducing the cost of the legal system or else we will end up like the Easter Islanders,[4] who cut down the last trees on the island on which their whole society depended.

However, settlements do more than produce a more efficient outcome. A settlement achieved through mediation can serve to rebuild trust and social capital between the disputants and sometimes within a larger group of the community.

Further, as mediators often point out, many legal disputes involve non-zero sum games. Through co-operation the parties are able to resolve

upon a settlement, which results in a higher joint payoff than either could achieve simply by having the matter decided by the court.

Finally, mediation plays a valuable role in managing the risks inherent in litigating a dispute to judgment. Plaintiffs often settle at mediation for less than they might be awarded by the Court because, by doing this, they avoid the risk of failing completely and paying two sets of costs. Defendants settle for similar reasons.

Accordingly, when one thinks of the benefits of obtaining more and earlier settlements - reduced cost, risk management, rebuilt trust and social capital, as well as additional payoffs through co-operation - we ought to accept readily the fundamental public good that can be achieved by mediation.

This is not to deride the adversarial system. Indeed, often the aversion which barristers have to mediation arises because of the stridency with which some mediators' opening comments point out the deficiencies of the adversarial system. There is much which a fully litigated dispute achieves for the parties and for the larger system of law that mediation does not achieve. A reasoned judgment provides a rational basis upon which legal rights have been ascertained and provides the parties with confidence and understanding in the application of law to their dispute. It also becomes the source material from which other parties can be advised upon their rights. If all cases were mediated or arbitrated and none went to court, that would significantly increase the cost and uncertainty lawyers, including barristers, face in providing advice to their clients on likely legal outcomes. Thus the system gains from a strong mediation component, but it can only be a component of a larger system.

Third, from a trade union perspective, there are many excellent barristers who, possibly with some focused training, would be able to achieve gainful employment through mediation, not only as an advocate but also as mediator, where their diaries may currently have some gaps. We have focused much over the last 5–8 years on the destruction of the personal injury bar affected by government reforms in the name of the cost of justice. Of those barristers affected, many have very finely tuned antenna to practical questions of how a judge would be likely to decide a dispute, what would be a fair settlement, and of how to bring the parties together.

I would like to see a very active effort to 'retrain' barristers in this category who, I am sure, would be very effective as mediation advocates and, at least in some cases, as mediators. In every mediation, there at least two parties needing representation. Often, there are more than two. Barristers who can effectively represent clients at mediation thus have a highly marketable skill. We accept that we have to learn how to represent clients in court. The time has come for barristers to accept that they need to learn how to represent clients at mediation. Elsewhere in this edition of *Bar News* is an article on effective representation at mediation. Much more needs to be done along these lines.

Fourth, and related to the third point, there are probably a significant number of barristers aged 50 or more who, after 25 years in practice, are looking for additional challenges and are conscious of the notion of public service. Some of them will never become judges. Some are not ready to become judges for another 5–10 years. However, the skills which they have honed over 25 years through fighting hard cases day in day out, advising on prospects and engaging in face to face settlement, ought to make a number of them eminent candidates as mediator. This is not to argue against the current model where retired judges dominate complex mediations. However, it is to urge that the retired judges should face stiffer competition from highly experienced barristers to perform the role of mediator.

One objection which may be raised to this is a question of independence. The solicitors arranging for the barrister to act as mediator may, on other occasions, be solicitors considering briefing the barrister as advocate in court, or indeed in a mediation. However, I do not think that this is, or should be, a real problem, given the strong professional standards which underlie the Bar and the fact that mediators do not have the power to impose a result on the parties. If we need to have specific seminars in the CPD programme focussing on these questions of independence, that should be done. But I do not think that we should simply yield to the retired judges the entire field of complex mediation on the ground that they have an independence that we lack. After all, retired judges who frequently are retained as mediators by large law firms themselves are open to the perception that they are expected to "*produce results*" for the clients of those firms.

Part 3: Practice

To make specific the case I have argued for in Part 2, I would suggest the following steps need to be taken fairly urgently by the Bar Association and by individual barristers. Some may be controversial and I accept that further discussion is required before they are adopted:

1. The CPD program should be restructured so that there is a separate mediation strand and every barrister must acquire at least one point in that strand each year.
2. This will require organising many more seminars, lectures and workshops in mediation so that barristers can obtain the necessary points. To the extent this requires assistance from professionals, academics or experts in mediation beyond the voluntary resources of members of the association, a budget should be set for this task. Elsewhere in this edition of *Bar News* is a description of an enhanced CPD curriculum on mediation for 2007-2008 developed by the Bar Association's Mediation Committee. I welcome this development and would like to see it taken much further.
3. A specific matter to be studied through the seminars is the role to be played by the barrister as mediation advocate within the context of mediation. Much work is now being done in England[5] to identify the particular techniques, approaches and professional obligations to the client which the mediation advocate should adopt. We need to study and think about this more carefully than we currently do. For example, Craig Pollack has pointed out[6] that the mediator's fundamental goal is to create a framework in which the reality gap between the parties is narrowed sufficiently so that settlement can take place on a realistic basis. It is the aim of the mediator to get the parties to a point, through aggressive reality testing, where they conclude that settlement is the only viable option and it has to take place there and then. This is described as the 'settlement frenzy'. Pollack points out that the mediation advocate has a very different duty from that of the mediator, namely a duty to ensure the client is advised that settlement on the day is not the only option available. This may mean standing up in forceful terms to the mediator. We need to discuss in seminars exactly what our role is in this situation.
4. Another matter to carefully consider through seminars is the role of the opening. Usually the reason the solicitor wants the barrister involved in the mediation is to give a concise but strong 15–20 minute opening which, without the full technicalities of the court opening, nevertheless shows that a powerful case has been assembled and is ready to go to trial. Sometimes there is a process of questioning between barristers as a result of the openings, partly to obtain information from the other and partly to probe weaknesses in the other party's case. We need to think far more closely about the utility of such openings. Often

they seem highly counter-productive. Indeed, what really is at stake here is a rhetorical question. In the court room we know instinctively that the audience we are addressing is primarily the judge or jury. In a mediation, the audience is much more multifaceted. For some purposes it is the mediator; or it could be the ultimate decision maker on the other side; or it could be the key witnesses on the other side who are being tested for the likely cross-examination ahead; or again it could be the solicitors or barristers on the other side who, if persuaded, might advise their clients to moderate their expectations. We need to think much more about who the audience is, which in turn will inform the style of address.

5. We also need to think about what is ultimately persuasive to the audience, however identified. Much research into game theory has identified that when people are being asked to agree to an outcome, fundamental questions of fairness intrude heavily in the decision.[7] However strong the legal position taken into the mediation, the bargain ultimately being offered has to be one within a range of what the other side considers to be fair. How the range of fairness is identified, probed and tested is a critical skill for the mediation advocate.

6. Although most mediations are about money, very few mediations are solely about money. Even in the most hard fought, complex commercial dispute with many millions of dollars hanging on it, it is sometimes the case that what matters to the other side is not just the money – it may be an apology, it may be a recognition of fault, it may be a rebuilding of other commercial relationships. One of the most critical aspects of a mediation is to identify what the non-money aspects of the co-operative situation are and how to exploit them. This requires particular skills of the mediator but also of the barrister as mediation advocate.

7. Next, we need to think more closely about the different styles of mediation – is it to be an evaluative mediation; is it what is described in England as a med-arb, i.e., where the parties in the mediation at a certain point jointly appoint the mediator as an arbitrator to enter a final and binding decision in lieu of agreement by the court; or some other model. Should the parties determine this, or it be left to the technique of the individual mediator?

8. Also we need to think about timing: when is the best time to refer a dispute to mediation; should it be a fixed time for all matters ahead of the trial or determined according to the exigencies of the case?

Part 4: Conclusion

Now is the time to move from agnosticism to belief and implement it by practice. One way forward would be for a general meeting of the Bar to be called to discuss mediation, and related reform of the CPD programme. This could be assisted by the circulation of some papers in advance prepared by the Bar's Mediation Committee, together with the presence of some experienced mediators both from the Bar and retired judge circuit. We should not let this opportunity go by.

1 *New South Wales Barristers Rules*, Rule 81.

2 Rule 74(d) and (g).

3 (2007) 73 Arbitration 1 at 105-116.

4 'Access to Justice and Access to Lawyers' 24 March 2007.

5 see the collection of articles in (2007) 73 Arbitration 1.

6 (2007) 73 Arbitration 1 at 21.

7 Beinhocker, *The Origin of Wealth*, 2006 at 119-120.

Mediation Committee offers curriculum of CPD seminars on aspects of mediation

For 2007 – 2008, the Mediation Committee of the Bar Association has created a mini-curriculum of CPD seminars dealing with aspects of mediation. The seminars as a whole are designed to cover most aspects of mediation but each seminar is self-contained.

Seminar 1: Introduction to mediation; how to get the most out of the pre-mediation conference; and preparing yourself, your client and your solicitor for mediation
This seminar will be co-ordinated by Graham Barter with the assistance of Peter Callaghan SC and is scheduled for July 2007.

Seminar 2: Mediation in specialised areas – Part 1
This seminar will deal with mediation in family law, de facto law, family provision and discrimination. It will be co-ordinated by Richard Bell and presented in August 2007.

Seminar 3: Native title
This seminar will be co-ordinated by Susan Phillips, and Professor Laurence Boulle of Bond University's School of Law is a speaker. It is planned to present the seminar in September 2007.

Seminar 4 Mediation in specialised areas – Part 2
The second specialised seminar will deal with mediation of retail lease disputes and mediation made mandatory by statute in other areas. It will be co-ordinated by Robert Angyal SC and presented in March 2008 at the Bar Association and also at the Sydney and/or Parramatta mini-conferences. Ms Candace Barron, deputy registrar of the Retail Tenancy Unit, has been invited to speak.

Seminar 5: Enforceability of agreements to mediate, confidentiality in mediation and the obligation to mediate in good faith
This seminar will be co-ordinated by Andrew Colefax SC and will be presented early in 2008 and also at several of the regional conferences organised by the Bar Association.

Seminar 6: Mediation in personal injury cases (including multi-party disputes) and dust diseases claims
This seminar will be presented by Michael McGrowdie at the Orange mini-conference on 29-30 March 2008.

Repeat sessions at mini-conferences

Most of the seminars will be repeated at the regional mini-conferences in 2008:

Seminar 1: Newcastle
Seminar 2: Canberra
Seminar 4: Sydney and/or Parramatta
Seminar 5: Lismore
Seminar 6: Orange (not a repeat)