'A storm in a teacup' or 'damage from friendly fire'? Uniform Rule 11, 'barristers' work' and barristers conducting ADR processes

In May 2015 the Bar Association's Alternative Dispute Resolution (ADR) Committee unanimously resolved (not for the first time and consistently with the views of many other NSW and Victorian barristers) that the Uniform Rules should specifically include barristers *conducting* (rather than just representing a client in) a mediation or arbitration or other method of alternative dispute resolution as 'barristers' work'. Ian Davidson SC, since 1 July 2015 chair of the ADR Committee, suggests this reflection of reality and return to the true historical position would enhance, rather than damage, the essence of an independent referral bar.

The current controversy

Readers of *Bar News* will be aware of controversy before the *Legal Profession Uniform Conduct (Barristers Rules) 2015* (Uniform Rules) came into force on 1 July 2015 about the exclusion from clause 11(d) of conducting a mediation or arbitration or other method of alternative dispute resolution as 'barristers' work'.

Clause 11 of the Uniform Rules (only currently applicable to NSW and Victorian barristers) provides:

> Barristers' work consists of:
>
> (a) appearing as an advocate;
>
> (b) preparing to appear as an advocate;
>
> (c) negotiating for a client with an opponent to compromise a case;
>
> (d) representing a client in a mediation or arbitration or other method of alternative dispute resolution;
>
> (e) giving legal advice;
>
> (f) preparing or advising on documents to be used by a client or by others in relation to the client's case or other affairs;
>
> (g) carrying out work properly incidental to the kinds of work referred to in (a)–(f); and
>
> (h) such other work as is from time to time commonly carried out by barristers.

For present purposes, the critical paragraphs of this definition are (d) and (h).

On 12 May 2015, five senior counsel[1] in NSW circulated a detailed memorandum suggesting that the proposed 'barristers' work' definition (then numbered rule 15, also the number in the immediately prior NSW Rules) ought to be amended at least to provide in paragraph (d):

(d) representing a client in *or conducting* a mediation or arbitration or other method of alternative dispute resolution;

because, both historically and practically, it was inaccurate to omit all reference to a major part of many barristers' work, as recognised by all bars and the Australian Bar Association, from the definition.

To date, more than 70 other NSW silks have expressly indicated their specific support for conducting ADR to be specifically included as 'barristers' work', in addition to support from juniors. Many members of the Victorian Bar also responded in support of that proposition.

On 13 May 2015, *InBrief* contained a message from President Jane Needham SC in response to the numerous communications she had received on this issue. This message included:

> The conduct rules for barristers have been the focus of efforts to achieve national uniformity since around 2007. Since then, the Australian Bar Association has been developing rules which reflect the specialised nature of 'barristers' work'. The New South Wales Barristers' Rule in question has been in place since 2011. Since then it has always been the Council's view – and that view has been publicised in *In Brief* from time to time – that bar rule 15(h) recognises that barristers do work, such as conducting mediations or arbitrations, which is not specifically included in the definition of 'barristers' work'. The reason for the wording of the current rule is to assist in ensuring that the bar remain as an independent branch of the profession and maintaining a focus on the work which sets barristers apart from other legal professionals.
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> ….
>
> The current rules are in the same, or substantially similar, form as our current rules have been since 2011.
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> I make these points only to note that even if the Council takes the view that a new rule is necessary, no change is guaranteed, because we are now subject (from 1 July 2015) to uniform rules. However, the question of whether the amendment proposed should be sought is the subject of discussion at an upcoming Council meeting. The views already expressed to me will of course be taken into account. Additionally, the Council will have input from the ADR Committee of the Association on this topic.

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Later on 13 May 2015, the ADR Committee (which coincidentally already had a regular meeting scheduled that evening) unanimously passed the following resolution:

> The Alternative Dispute Resolution Committee continues to endorse its Memorandum to Bar Council dated 1 December 2011 attached to the email sent by the Chair of the ADR Committee to Philip Selth and Alastair McConnachie at 2.30pm on 12 May 2015.
>
> The ADR Committee's unanimous recommendation is that Rule 15(d) or the equivalent rule in the *Legal Profession Uniform Conduct (Barristers) Rules 2015* be amended to include the underlined words:
>
>> representing a client in or conducting a mediation or arbitration or other method of alternative dispute resolution.

As suggested by the reference to its 1 December 2011 Memorandum, the views of the ADR Committee (despite changes in individual members over the years) have remained consistent on the current controversy.

The question of whether the amendments proposed should be sought was not able to be dealt with at the next Bar Council meeting after the *InBrief* article, due to time pressures with other agenda items that day. However, this issue was discussed by Bar Council on 16 July (after the deadline for submission of this article but before page proofs were finalised) and, very encouragingly, that evening Bar Council resolved to approach the ABA to seek the amendment of Rule 11(d) by including 'or conducting' as recommended by the ADR Committee.[2]

The May 2015 *Australian Alternative Dispute Resolution Bulletin* article by Nigel Cotman SC 'Proposed uniform r 15 – definition of barristers' work'[3], among other things, responded to the 13 May 2015 *InBrief* commentary and suggested what is now clause 11 of the Uniform Rules was inconsistent with what the Australian Bar Association's own website described as the role of barristers in being ADR providers. Concerns expressed in that article, consistent with the 12 May 2015 Memorandum, included: uncertainty as to whether the omission in paragraph (d) was sufficiently picked up by the reference in paragraph (h) to 'other work as is from time to time commonly carried out by barristers' (given previously permitted local variations which had clarified the position in NSW and Victoria are no longer permitted under the Uniform Rules); whether barrister arbitrators and mediators might be in breach of the prohibition (in what is now clause 10) of the Uniform Rules of using or permitting 'the use of the professional qualification as a barrister for the advancement of any other occupation or activity'; and issues of professional indemnity insurance coverage for barrister arbitrators and mediators; and concluded that clause 11 will inhibit one part of the aspiration of a modern bar that it be expert, and recognised as expert, at ADR delivery.

The Updates section on the Bar Association's web page on the Uniform Rules as accessed on 6 July 2015[4] states '11 June 2015: The president of the Australian Bar Association, Fiona McLeod SC, has made a statement concerning the *Legal Profession Uniform Conduct (Barristers) Rules 2015* and the wording of clause 11 'the work of a barrister'.'

That five page statement, headed '28 May 2015 *Legal Profession Uniform Conduct (Barristers Rules) 2015* and mediators' (the statement), examined briefly below, tried to assuage concerns previously expressed and encouragingly concluded:

> Were a problem to arise in practice, rather than being raised as a mere possibility, the Australian Bar Council would immediately take up the matter with the Legal Services Council.

Is this worth worrying about now that the Uniform Rules are in force?

That was this commentator's initial reaction, when requested by the editor to address this controversy. Is the ABA statement correct to suggest the concerns of so many NSW and Victorian barristers about the omission is a mere 'storm in a teacup' of purely theoretical issues that really will not cause problems in practice for the many barristers who conduct forms of ADR, or is there a more fundamental issue? Should those concerned about the omission of conducting a mediation or arbitration or other method of alternative dispute resolution as being specifically stated to be 'barristers' work' just get over it, in light of the comforting words emanating from both the ABA and NSW Bar presidents to the effect that paragraph (h) of clause 11 of the Uniform Rules will continue to 'permit' barristers to conduct arbitrations, mediations and other forms of ADR, just as they have for very many years?

Or, have the crafters of clause 11 of the Uniform Rules, while no doubt they have always acted with the best of motives, changed the historic position in a way that, if not remedied by at least clause 11(d) being expanded, will damage the long term interests of the bar as the independent referral branch of the legal profession with relevance to an expanding area of legal practice in dispute resolution?

Some matters of history that require correction

It is appropriate to correct any suggestions that might be made that the current definition simply maintains the 'status quo'

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and that no one has really complained about it since August 2011. Neither proposition would be correct.

The real position in NSW is as follows:

From 20 June 1997 to August 2011, a barrister's work was defined in NSW in the following terms:

> 74. A barrister must confine the barrister's professional work to:
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> a. appearing as an advocate;
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> b. preparing to appear as an advocate;
>
> c. negotiating for the client with the opponent to compromise the case;
>
> d. representing the client in a mediation;
>
> e. giving legal advice;
>
> f. preparing or advising on documents to be used by the clients or by others in the client's affairs;
>
> g. *acting as a referee, arbitrator or mediator*; and
>
> h. carrying out work properly incidental to the kinds of work referred to in (a)–(g).
>
> (Emphasis added)

Thus, there was for well over a decade before 2011 an express recognition in paragraph (g) that acting as a referee, arbitrator or mediator *was* a part of barristers' work. That rule reflected reality, although other emerging forms of ADR were not specifically mentioned.

The ABA Model Rules from 2002 were to the same effect and reproduced the NSW Rule 74(g).

The ADR Committee by memorandum dated 11 March 2008 recommended an expansion to Rule 74(g) to cover barristers conducting additional ADR processes to the three specifically dealt with in Rule 74(g).

However, in 2011 the ABA proposed new national Conduct Rules. Proposed Rule 15 (in the same terms as clause 11 of the Uniform Rules) did not include an acknowledgement of barristers' work as an ADR provider as previously provided in Rule 74(g). No explanation was given for this change.

On 24 March 2011 Bar Council discussed the proposed new national Conduct Rules. Bar Council asked that the Australian Bar Association Rules Committee give further consideration to amending clause 15(d) so that work of mediators, referees or others conducting ADR proceedings was specifically included within the term barristers' work. However, clause 15(d) was not so amended when it became a part of the New South Wales Barristers' Rules in August 2011. Instead, clause 15(h) was introduced.

That omission of an express acknowledgement of barristers' work as an ADR provider, was first not generally accepted by NSW barristers and, second, was ameliorated to some extent by a specific (and at that time permitted) local ruling by the NSW Bar Council.

The ADR Committee by a memorandum to Bar Council dated 1 December 2011 proposed the same amendment to Rule 15(d), of adding 'or conducting' before 'a mediation'.

At its meeting on 8 December 2011, Bar Council considered the ADR Committee Memorandum of 1 December 2011 and RESOLVED that:

- the Alternative Dispute Resolution Committee's suggested amendments to rule 15(d) and Rule 116 of the NSW Barristers rules be forwarded to the Australian Bar Association's Rules Committee for consideration.
- this issue be reconsidered if no decision has been made in this regard by the Rules Committee by 1 April 2012.
- it accepts that *conducting alternative dispute resolution proceedings such as mediations does constitute 'barristers work' for the purposes of the New South Wales Barristers' Rules of 8 August 2011*, (emphasis added) and that a note be circulated to the bar via *InBrief* advising them of Bar Council's resolution. A note containing this last resolution was duly circulated to the bar via *InBrief* on 13 December 2011.

That acceptance resolution on 8 December 2011, while less satisfactory than a formal amendment to the recently changed Barristers' Rules, at least ameliorated some of the immediate concerns from the changed Rule 15.

The recent statement records that the ABA Council was requested by the New South Wales Bar Council to consider the issue of amending the rules concerning barristers' work and ADR 'on four occasions' (since 2011), but does not explain how that consideration proceeded or why there was no amendment to Rule 15. This might suggest the 2011 ABA Rules changed the position in NSW and did so over the objection and continued objection of the New South Wales Bar, which had resolved to the contrary of the ABA Rules. Or it might have been considered that the reference in Rule 15(h) to other work 'commonly carried out by barristers' adequately dealt with barristers who conduct any ADR procedures - not just the three listed in the prior Rule 74(g).

While this article does not purport to deal in detail with the position of our Victorian Bar colleagues, in 2012, after the publication of the original ABA Uniform Rules, the Victorian

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Bar published 'Vic Bar Draft Practice Rules Part A & Part B - 26 July 2012', which, in Part B (the Victoria specific rules), addressed the ABA Rule 15 issue. It provided as a 'local variation' (then permitted by the proposed national rules) to Rule 15:

> Barristers' Work
>
> 151.Without limiting the generality of Rule 15(h), work commonly carried out by barristers shall be taken to include *acting as an arbitrator, adjudicator, expert determiner, mediator, conciliator or otherwise in a role independent of a party, in any determinative or nondeterminative alternate dispute resolution process.'* (Emphasis added)

As is well known, clause 11(d) remained unchanged in the Uniform Rules now in force. However, the Local Variations, reflected in Victoria and the benefit immediately available in NSW from the Bar Council 8 December 2011 resolutions, no longer have any force.

The fundamental flaw in the ABA statement

These comments accept without hesitation that all those responsible for the current form of the Uniform Rules, when not specifically including conducting ADR proceedings as barristers' work', were motivated by the worthwhile aim of enhancing and preserving the special features of an independent referral bar that are from time to time the subject of attack. This critic shares that aim.

That said, it is difficult to see a logical reason how that can work when there was express recognition from as long ago as 1997 that conducting mediations or arbitrations or acting as a referee was barrister's work and all that has occurred is that reference to that obvious fact has been removed in the Uniform Rules.That is, there is no apparent connection between the independence of the bar and the bar acknowledging what it in fact asserts now and has done for a long time, which is, that barristers are expert at arbitration, expert in determination, mediation and so forth, and do that work.

There is also an issue of principle at stake. Are we prepared to state clearly what we do as barristers?

At the practical level, no barrister would like to be the test case if there was ever an argument whether conducting perhaps an innovative form of alternative dispute resolution was 'barrister's work' under clause 11(h) of the Uniform Rules. Would conducting a novel form of ADR be work sufficiently 'commonly carried out by barristers' to be included? Since it is understood that providers of compulsory indemnity insurance have accepted that conducting ADR is protected by current insurance policies, it may indeed be correct that there are no immediate practical problems.

So, let it be assumed that none of those previously expressed practical concerns will ultimately eventuate.

Looking at the issue of principle, if there is a sound justification for the rule it arguably ought to be found in the reasoning in the ABA statement.

Unfortunately, one struggles to find it. For example, the statement reasons:

> To assert now in statutory Rules [i.e. Rule 11] that this particular work is "barristers work' – as distinct from work barristers (and others) undertake – is ahistorical and not useful. …
>
> and
>
> The Australian Bar Association has accordingly taken the view that it is inappropriate to claim that conducting an ADR process should be described as being 'barrister's work'; rather, it is work that many barristers do because they are barristers. Many others do that work.

However, it is plainly not 'ahistorical' to say that conducting arbitrations and mediations, which barristers have been doing for decades, with express recognition in NSW of that work since 1997, is barristers' work. The ABA itself did say just that in its Model Rules from 2002 to 2010.

Further, the distinction between 'barristers' work' and 'work that many barristers do because they *are* barristers' is not obvious. Appearing or preparing to appear 'as an advocate' is the work that very many barristers do because they *are* barristers. More particularly, that others also do advocacy work cannot be an objection to calling it 'barristers' work'. Advocacy work is both done by solicitors and, given the volume of self-represented litigants, by others outside the legal profession, as is advising, preparing matters for trial, drafting documents, and so forth. Everything in clause 11 has this character.

If, as the statement also suggests, 'The rule as drafted in no way prevents a barrister from undertaking any type of ADR work …', then why not make that explicitly clear in clause 11 of the Uniform Rules that it is work that barristers do? Moreover, that statement cannot be right, in that, ADR (or, indeed, any) work not expressly mentioned in clause 11 is only within the rule if it is work 'commonly carried out by barristers'. How, a new form of ADR can develop with the involvement of barristers is not clear since, by definition, it could not at first be 'commonly' carried out by barristers or carried out by barristers practising as such at all.

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The real concern underlying the statement may well be the concern expressed that:

> Characterising as 'barristers' work' an ADR process carried out by a wide range of people could promote a blurring of the hard-fought distinction between the Bar and the solicitors' arm of the legal profession – and the pressure from some quarters for there to be a single fused profession may again be raised (as it *was* a few years ago in the COAG process.)

How this concern squares the history, referred to above, and the present position where the ABA and the local bars are actively and loudly promoting barristers as ADR providers, is not adequately explained by the statement. It simply cannot be that the absence of an express reference to ADR in the definition is the bulwark against fusion, particularly when the definition is factually incorrect and the statement claims ADR is picked up in 11(h), so that conducting ADR processes is in the definition. Conducting ADR cannot both be in and not in the definition and if it is in implicitly, why not make it explicit?

A primarily referral profession like the bar will only obtain work, whether in-court advocacy and ADR advocacy (both expressly stated to be part of barristers' work in clause 11) or conducting ADR processes, to the extent that the solicitors' branch considers referring that work to barristers to be in their clients' best interests. The statement correctly notes 'it is usually solicitors who nominate barristers to be involved in an ADR process'. The same applies to advocacy: it is usually solicitors who nominate barristers to be involved as advocates, whether in a court or ADR process.

Expressly recognising that part of the skill set of many barristers includes them conducting arbitrations, mediations and other ADR processes will not cause us to be confused with solicitors. That did not happen in NSW between 1997 and 2011. There is no evidence of even a risk of that happening if clause 11 of the Conduct Rules was more explicit about what barristers do.

Admittedly, not expressly recognising this fact may well not immediately, or even ever, cause those solicitors who already nominate barristers to conduct ADR processes to stop recommending barristers or to only recommend former judges who are not barristers or other solicitors to conduct ADR processes. However, the omission raises the question: why are we as barristers embarrassed to state what is manifestly true and stake a claim to do the work we do and do well?

The current form of clause 11 cannot help persuade those solicitors who may be tempted only to recommend former judges who are not barristers or who cling to the idea that barristers are not capable of conducting innovative ADR proceedings to consider recommending barristers. It also could appear disrespectful of the large number of barristers who do practise as ADR providers and is ahistorical, having regard to the long involvement of the bar in arbitration and mediation.

The current form of clause 11 is unlikely to assist the NSW or Victorian bars (or any other bars contemplating adopting the Uniform Rules) to participate fully in the development of an actually growing area of legal work for which the qualities of independence, intellectual rigour and the sole practitioner rule (reducing the prospect of conflicts of interest) particularly suit barristers to conduct this work.

The rule as stated makes the bar look either churlish or carelessly blind, to not recognise the present and future fact, that in-court advocacy is not the only form of dispute resolution that lawyers generally, and the bar in particular, are participating in. That apparent position cannot help the bars' constructive participation in ADR development in the legal and wider community. It incorrectly suggests we are solely wedded to the adversarial model while the world changes under our feet.

In short, why continue to damage ourselves by our own 'friendly fire' in response to a threat that is unrelated, assuming it exists?

Conclusion

The ABA statement does not provide sufficient compelling or coherent reasons for the omission of an express reference to conducting ADR processes from the description of barristers' work. Clause 11 should be amended to restore the true historical position of expressly recognising that barristers subject to the Uniform Rules may conduct ADR proceedings like (but not limited to) arbitrations and mediations. The Australian Bar Council should, consistent with the New South Wales Bar Council 16 July 2015 resolutions, take up the matter with the Legal Services Council to ensure that occurs.

Endnotes

1. West QC, Jacobson QC, Bridge SC (then also a member of the ADR Committee), Cotman SC and Inatey SC.
2. The full text of the 16 July 2015 resolutions was advised to members the very next day in the 17 July 2015 *InBrief*.
3. General Editor Richard Weinstein SC, vol 2 No 2 at pp 38-42.
4. http://www.nswbar.asn.au/for-members/uniform-law.