

ADR and the NSW Bar in the 21st Century?

Specialist Advocacy In and Outside the Courtroom

By Arthur Moses SC

Over the last 35 years or so, we have witnessed what the NSW Law Reform Commission has described as an “ADR Revolution”.¹ There is no doubt that governments and policy makers now consider ADR to be a critical part of the administration of justice and the legal landscape in this country.

In 2006, the National Alternative Dispute Resolution Advisory Council identified fifteen Commonwealth laws that referred to ADR in a substantive way,² and another 109 pieces of legislation that made passing minor references to ADR.

In 2014, approximately 50 statutes in NSW provided for ADR in some form.³ This legislation covered a wide range of subject matter, from local governance to mining, electricity supply, criminal law, Indigenous land rights, conveyancing, health and workplace injury.⁴

The courts and community continue to share concerns about the staggering costs of litigation. This has contributed to an increasing interest in ADR, both court-directed and consensual.

There should no longer be any doubt that ADR is an integral part of barristers’ work in New South Wales.

Barrister ADR practitioners and providers are not only welcome at the Bar, you are a crucial part of our future as a profession.

When we talk about the future of ADR at the Bar, there are three critical questions.

First, what does a 21st century barrister look like?

Second, how can the Association best support members to advance and develop your ADR practice?

And third, to succeed in this endeavour, and in this current climate, what do we need from ADR barristers in return?

There is a growing trend in the number of barristers performing ADR, and the volume of ADR work undertaken.

There was a time not so long ago when it was difficult – unpopular, even – to be an



ADR barrister practitioner. The rise of ADR in Australia has certainly not been without controversy. There has been a lot of ‘fake news’ about ADR.

ADR has been misunderstood, and misconstrued as a threat to traditional courtroom advocacy and to barristers’ livelihoods. There have been debates as to whether acting in or conducting ADR should even be considered barristers’ work.

Members have told me quite frankly that there was a time not so long ago when they felt that as ADR barristers, they had effectively been disowned by the Bar because their work and their skillset was not valued.

As part of the ‘ADR revolution’, ADR barrister practitioners have worked tirelessly to systematically dismantle and disprove those views. Sir Laurence Street was a fearless champion for ADR. He argued from the first against the misconception that ADR was a threat ‘in competition with the established judicial system’.⁵ In fact, Sir Laurence AC KCMG QC suggested that ADR should be more aptly described as ‘additional’ dispute resolution rather than ‘alternate’ – because it provided an ‘additional range of mechanisms within the overall aggregated mechanisms for the resolution of disputes’.⁶

Chief Justice Bathurst AC, has gone further, describing ADR as not merely ‘additional or supplementary but

complementary and integrative’.⁷ As his Honour rightly noted in his seminal ‘Off with the Wig’ speech in 2017, ‘ADR now has the capacity to intrude at almost every stage of the litigious process’.⁸

The NSW Bar is a broad church made up of diverse practitioners working across a varied range of areas of law. But the Association is not in the business of defining barristers by categories or a box ticked on ‘find a barrister’.

As barristers, wherever and whatever we practise, there is much we have in common.

Whether we work inside or outside of the courtroom, whether we represent clients in litigation or conduct mediations, barristers are specialist advocates, expert dispute resolvers, and critical problem solvers. We are fiercely independent. Our strengths lie in our training of meticulous reasoning, forensic logic, and persuasion. These skills lend themselves as readily to advocacy in ADR as in the courtroom.

ADR is now an inherent part of our professional and ethical obligations as barristers – it is not some other lawyer’s problem.

Under the *Legal Profession Uniform Conduct (Barristers) Rules 2015*, every barrister has obligations to consider and advise their clients of alternatives to litigation.

Rule 36 provides that barristers must inform our clients or instructing solicitors about the alternatives to fully contested adjudication of each case which are reasonably available.

Actively considering and advising on ADR is an integral ethical responsibility that we all bear – it cannot be outsourced to somebody else.

Further, ADR is explicitly recognised and included in the definition of ‘Barristers’ work’ under the Barristers’ Conduct Rules.

Rule 11(c) provides that barristers’ work includes ‘negotiating for a client with an opponent to compromise a case’ while rule (d) provides that barristers’ work includes ‘representing a client in or conducting a mediation or arbitration or other method of alternative dispute resolution’.

As barristers, whatever our area of practice, our paramount duty as servants of the Court is to the administration of justice. This includes an obligation to facilitate the resolution of matters as justly, quickly and cheaply as possible – whether that obligation comes from common law or statute.

In other words, barristers in the 21st century are specialist advocates both in and outside of the courtroom. As specialist advocates with unique training and expertise in dispute resolution, and professional obligations to engage in ADR, there is a real opportunity for the Bar to own the ADR space.

Yet while ADR continues to create new work streams for the Bar, there remain underutilised opportunities.

To be clear, these opportunities are not limited simply to advocacy in ADR – they include acting as conductors of ADR, for example as mediators.

ADR now forms a core part of the Association's strategy for the future of the NSW Bar. The Association is working collaboratively with ADR Barrister Practitioners, with the Bench and with other Bars to advance barristers' skills and standing.

The Association's Strategic Plan explicitly recognises that we practise during a time of disruption and rapid change in the provision of legal services in Australia. Technology and innovation create new opportunities but also new challenges for the way we work, and who we work to represent.

The law has become increasingly internationalised, and we continue to witness changing dynamics and relationships with those briefing counsel, including a decline in solicitors' briefing and the rise of corporate counsel. It is estimated that the in-house sector comprises as much as 30 per cent of the broader legal sector.

The Plan recognises that there has been an increasing use of ADR and bodies other than courts to resolve disputes, including tribunals and administrative bodies. There is also an increasing interest in hybrid ADR models.

The Plan includes specific objectives relating to 'dispute resolution outside courts' and to support our members' practice more generally.

Effective dispute resolution involves identifying the most appropriate and effective process to resolve a dispute between parties.

Members must be equipped with the skills, knowledge and practical experience to offer a full suite of services to clients, and empowering our barristers to realise opportunities as and when they present.

This can be assisted by:

- (1) developing closer collaboration directly with corporate counsel;
- (2) providing accreditation for arbitrators, mediators and expert determiners; and

- (3) promoting the Bar as a highly cost efficient part of the litigation process.

To achieve these objectives requires us to rethink how we can best teach the skills, exposure and versatility that junior barristers need to thrive in a changing legal environment and move effectively between ADR forums and traditional courts.

It includes rethinking how we best promote robust, ethical standards in consensual ADR that is inherently confidential.

It includes rethinking how we recognise success and service in advocating in or conducting ADR that takes place outside of the courtroom.

One of the most pressing challenges lies in rethinking how we as a profession educate solicitors, in-house counsel and the general public on our qualities that distinguish barrister ADR practitioners from others who provide ADR services.

This involves working to identify a point of market differentiation to promote the services and expertise of our barrister ADR practitioners as a viable, cost effective option to access justice, against competing providers such as solicitors or those without legal training.

Our specialist skills and expertise in advocacy and dispute resolution should be our market differential in a profession of disruption. We need to work on how we promote that speciality to the wider world.

Although New South Wales is the largest and oldest Bar in Australia, we cannot go it alone. Australia is increasingly moving towards a more uniform, national legal profession. There is merit – and also necessity – to working collaboratively with interstate bars and national organisations, including the Australian Bar Association.

There are important policy discussions taking place at national level which have implications for the practice of ADR.

There are important points to be made about the role and the value of ADR in each of these contexts – but these discussions must be part of a bigger conversation with policy makers and practitioners.

We cannot progress meaningful change, nor can we take advantage of the opportunities that exist for ADR, if we are shackled by a parochial approach to ADR.

Not only is there a place for barrister ADR practitioners at the NSW Bar, I believe that ADR barristers will increasingly be looked to for advice and counsel as our profession seeks to adapt to the challenges that lie ahead.

Barrister ADR practitioners can lead in three chief respects.

First, continue to strive for excellence in your own practice.

Lead by example – to promote and improve the standards of ADR practice, and consolidate

our reputation. As specialist advocates, we must deliver and demonstrate a specialist product. As specialist advocates working outside of the court, we work in situations that are highly confidential, which is seemingly at odds with the principles of open justice.

That places even greater ethical and professional responsibilities upon us to practise with the utmost rigour.

Second, work with the Association and its national partners to make the New South Wales Bar a hub of excellence for local and international ADR.

Third, be part of the conversation. Be a part of broader discussions about the direction of the profession and seek to educate, inform and influence, not to condemn.

Talk to your colleagues – those who practise ADR frequently as well as those who practise ADR less frequently. Talk to the Junior Bar – share your successes, your learnings, your challenges.

There are important discussions to be had, and these discussions will be most fruitful and constructive when held collaboratively, respectfully and professionally.

In conclusion, in a profession facing unprecedented disruption and change, we are strongest as a Bar when we stand together.

There is no room for a 'them and us' mentality. Just as ADR is an integrative part of our legal system, so too is it an integrative part of our Bar. There is not only a place but an opportunity for ADR barrister practitioners in NSW in the 21st century. What the NSW Bar makes of that opportunity is up to it. The NSW Bar should embrace that opportunity and not cede ADR to others. This would be to the detriment of the community and the administration of justice in NSW.

This speech was originally delivered at the NSW Bar Association's ADR Masterclass on 11 August 2018.

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ENDNOTES

- 1 New South Wales Law Reform Commission, *Dispute resolution frameworks in New South Wales Consultation*, Consultation Paper 16 (2014) [1.9].
- 2 National Alternative Dispute Resolution Advisory Council, *Legislating for alternative dispute resolution – a guide for government policy-makers and legal drafters* (2006) 7 [2.10] <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Legislating%20for%20Alternative%20Dispute%20Resolution.PDF>.
- 3 New South Wales Law Reform Commission, *Dispute resolution frameworks in New South Wales Consultation*, Consultation Paper 16 (2014), [1.11] <<http://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/ADR/Consultation-paper/cp16.pdf>>.
- 4 *Ibid*, Appendix A.
- 5 Sir Laurence Street AC KCMG, 'The Language of Alternative Dispute Resolution' (1992) 66 *Australian Law Journal* 194, 194 citing Sir Laurence Street, (speech delivered at the Chartered Institute of Arbitrators 75th Anniversary Conference, London, 4 October 1990).
- 6 *Ibid*.
- 7 The Hon T F Bathurst AC, *Off With the Wig: Issues that arise for advocates when switching from the courtroom to the negotiating table*, (Speech to the Australian Disputes Centre, 30 March 2017) [3].
- 8 *Ibid*.