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## NSW Bar marginalising mediation: George Golvan



Mary Walker, whose silk application was not considered by the NSW Bar Association. Picture: Adam Yip

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One of Victoria's most experienced mediators has accused leaders of the NSW Bar Association of trying to marginalise mediation by discriminating against barristers who specialise in this area of practice.

“Leaders of the NSW Bar Association, and a number of members of the NSW Bar, have effectively sought to marginalise and downgrade the standing of mediation and barristers who practice mediation,” said George Golvan QC, who estimates that mediation accounts for about half his practice.

“They have effectively tried to prevent barristers who practise largely as mediators from being awarded silk, and barrister-mediators are really furious about what has occurred.”

Mr Golvan’s remarks come soon after a ruling by the Federal Court revealed last week that the NSW Bar Association’s silk selection committee had not even considered an application for silk from barrister Mary Walker because her practice is dominated by mediation.

Ms Walker, who is a member of the Bar Council, lost Federal Court proceedings against the Bar Association, its president Noel Hutley SC and its former president Jane Needham SC.

She had sought declarations that the silk selection protocol does not prevent a barrister being awarded silk merely because their practice specialises in mediation.

Federal Court judge Anthony Besanko ruled that the silk selection committee was free to apply the protocol in the way it wished. He also declined to make declarations that the silk selections in 2014 and 2015 had been conducted in a manner that was oppressive, discriminatory and prejudicial to Ms Walker.

But his judgment revealed that the selection committee was interpreting the protocol in a way that is at odds with resolutions from the Bar Council, which is the governing body of the Bar Association. Bar Council minutes that are reproduced in the judgment show that it resolved in 2010 and again in 2011 that the protocol should be amended.

The 2011 resolution states: “The Bar Council agreed that the protocol should be amended to make it clear that there is no reason why a barrister who practises as a ‘pure mediator’, that is, who sits as a mediator or in related ADR (alternative dispute resolution) proceedings, should not be appointed senior counsel.”

Last year, the Bar Council considered two drafts of an updated selection protocol. It approved a version that is largely based on the existing wording.

Justice Besanko's judgment says the rejected version would have made "substantial changes, arguably making it clearer that those whose current practices involving conducting mediations could be appointed senior counsel".

Mr Golvan said the approach in NSW was out of step with the approach taken in Victoria and this might dissuade the best barristers in NSW from acting as mediators. He believed this would have a detrimental effect on the legal process. Mr Golvan believed the silk selection protocol needed to be revised — and this view is in line with that of NSW barrister Katherine Johnson who is president of the Australian Disputes Resolution Association.

Ms Johnson said she was unable to speak on the issue on behalf of her association, but her personal view was that much of the impetus at the NSW Bar in favour of mediation had dissipated because of the long illness of its chief proponent, former NSW chief justice Sir Laurence Street.

"My personal view has always been that the Sydney Bar in particular had always been a little reluctant to adopt dispute resolution," Ms Johnson said.

Ms Walker, along with Sir Laurence, had been strong advocates for greater acceptance of mediation, Ms Johnson said. But she believed the conduct outlined in the Federal Court judgment left the impression that the Bar Association "have thrown dispute resolution out".

"Mary Walker is one of the few women who have appeared in the High Court and for them to turn around and say she doesn't have enough experience and is mostly a mediator — well that is

absolute nonsense and everyone at the Sydney Bar knows that,” Ms Johnson said.

Mr Golvan said the affair had confirmed the strength of the Victorian silk selection system, where appointments are not controlled by the Victoria Bar but are the responsibility of Chief Justice Marilyn Warren. “What has happened in this case demonstrates that there is a problem with silk selection in NSW,” Mr Golvan said.

“I am not aware of any discrimination against counsel in Victoria who practise purely or extensively as mediators in relation to silk selection. As far as I am aware, senior counsel have been appointed (in Victoria) who practise primarily as mediators.

“The Chief Justice of Victoria has described mediation as an accepted and ‘entrenched part of the civil litigation system’ in Victoria which is strongly encouraged by the court.”

While opening the court’s Mediation Centre in 2008, the Chief Justice Warren said the Supreme Court “had always seen the Victorian Bar as the primary source for mediators and their services”.

“The parties have been assisted in some very difficult trials and appeals. Importantly, judges have been freed up to hear other cases,” Chief Justice Warren said.