

ADR at the New South Wales Bar

Data collected by the New South Wales Bar Association, 2018–19

By Ingmar Taylor SC and Chris Winslow

One of the principal objectives of the Bar Association's *Strategic Plan 2017-20* is dispute resolution outside courts. According to the rationale, '[t]raditional litigation is now complemented and augmented by numerous alternatives. The Bar Association should ensure members are able to offer a full suite of services to consumers.'¹ Among the aims is to 'increase the number of barristers as mediators and arbitrators, especially for complex matters'.²

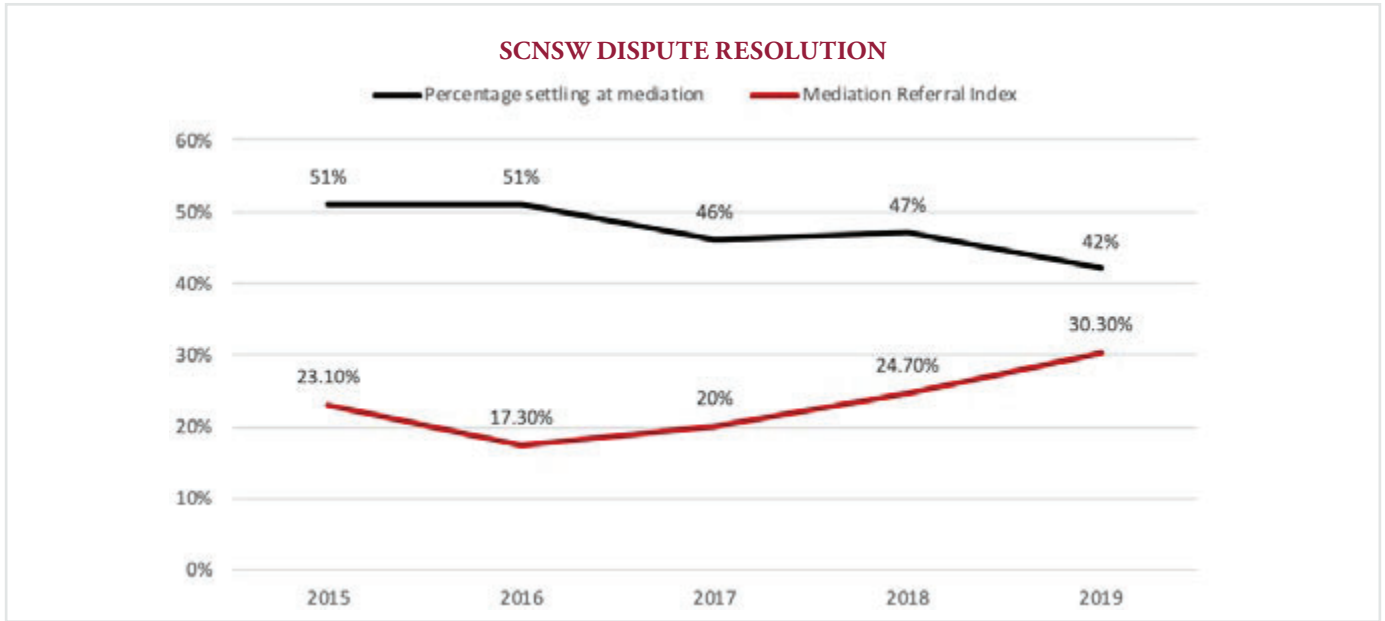
This is a clear and important objective, but the plan itself is silent on benchmarks or performance indicators. How many New South Wales barristers are accredited mediators or arbitrators? How many appear for a party to a mediation or arbitration and to what extent does ADR now constitute a significant part of a barrister's practice? Should that be measured by the proportion of gross fee income, allocation of time, the number of matters or simply by accreditation? Is there an optimal proportion of a barrister's practice that should be devoted to ADR, given the relative size and growth of ADR vis-à-vis 'traditional litigation'?

Court-annexed dispute resolution

The scope of this article is limited to the extent of data collected by the Supreme Court and the New South Wales Bar Association during annual practising certificate renewals and BarADR accreditation. The Supreme Court publishes data annually on 'court-annexed mediation', which is to say 'mediations conducted by the registrars of the court who are also qualified mediators'.³

	2015	2016	2017	2018	2019
Court-annexed mediations listed					
Common Law Division	32	38	51	29	27
Equity Division - not probate	447	528	455	344	366
Equity Division - probate	39	48	64	55	80
Court of Appeal	0	1	1	0	1
Total	518	615	571	428	474
Percentage settling at mediation	51	51	46	47	42
Referrals to mediation					
Total referrals recorded	1071	806	943	1169	1407
Mediation Referral Index	23.1%	17.3%	20%	24.7%	30.3%

There are many factors contributing to the warp and weft of mediation of Supreme Court matters. There are obvious limits to what can be extrapolated from this data and, if anything, these figures understate the amount of mediation and arbitration of matters lodged each year at the Supreme Court.⁴ That said, of particular interest is the 'Mediation Referral Index', which is the number of cases referred to mediation during the year, divided by the number of cases lodged in that year that are of a type for which 'mediation is considered to be applicable'.⁵ This index and the number of cases settled are trending towards convergence, which suggests the court is increasingly likely to identify the cases in which mediation is considered to be applicable. If, as appears likely, this figure is around one-third of cases, then evidently no barrister with a civil practice in the Supreme Court can afford to neglect ADR in their professional and practice development.



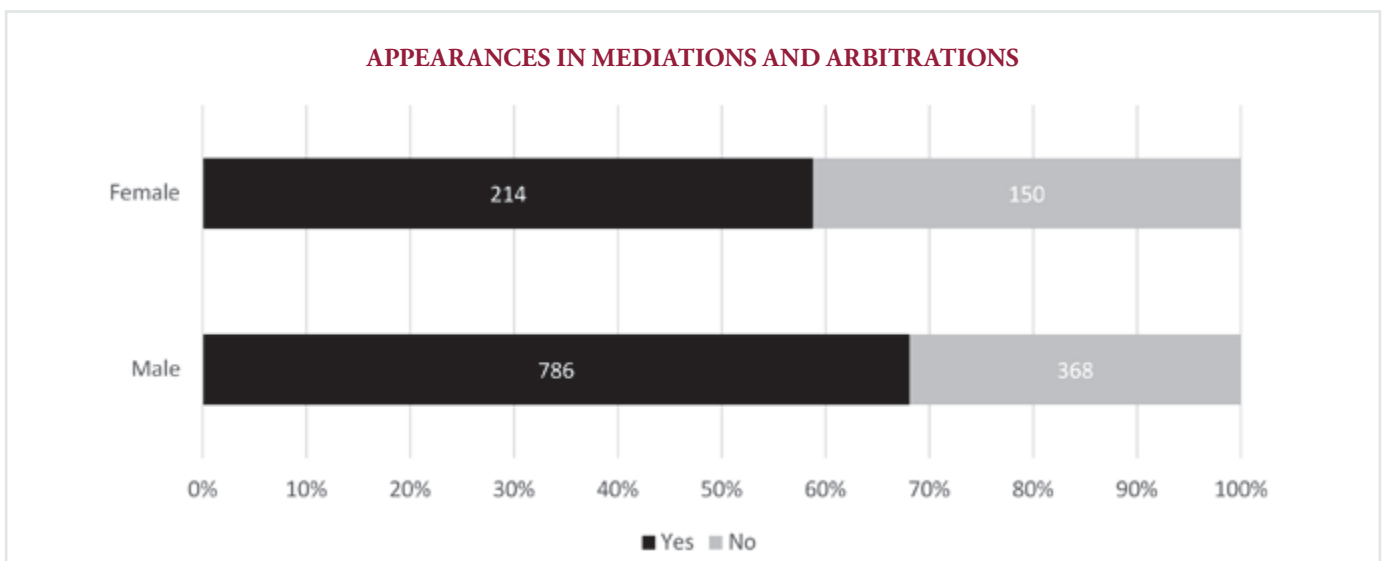
Appearing for a party in a mediation or an arbitration

In 2018 the Bar Association began to collect data on all aspects of barristers’ practices, including ADR accreditation and appearances in mediations or arbitrations.⁶ Barristers were asked about appearances for a party in a mediation or arbitration. A total of 1518 members responded to this question: a response rate of 62.88 per cent.

HAVE YOU APPEARED FOR A PARTY IN A MEDIATION OR ARBITRATION?			
	Male	Female	Total
Yes	786	214	1000
No	368	150	518
Total	1154	364	1518

Given the response rate and the results, we can infer, with confidence, that *two-thirds of practising barristers in New South Wales had appeared in at least one mediation or arbitration* in the 2017-18 practising year. The 2018 survey did not match respondents to their areas of practice, but it is conceivable that among barristers whose practice is concentrated in particular jurisdictions, the proportion who have appeared in at least one mediation or arbitration could be higher. Conversely, barristers who practise mainly in criminal law⁷ might be over-represented among those who did not appear for a party to an ADR hearing at all during 2017-18.

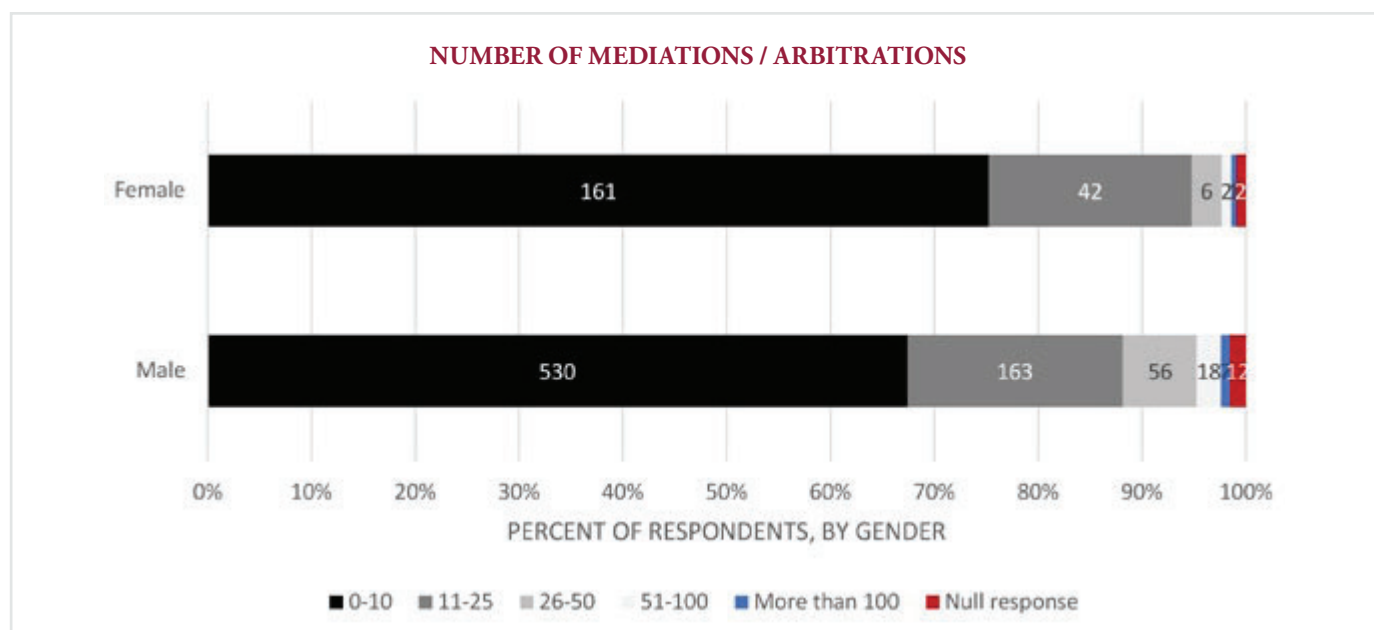
While there is no significant gender difference in accreditation as a mediator or arbitrator, the data indicates that a higher proportion of male than female barristers had appeared for at least one party to a mediation or arbitration during the 2017-18 practising year: 68 per cent of men compared to 59 per cent of women.



Furthermore, some significant disparities in the gender and age of the cohort of barristers appearing for parties in more than 10 mediations and arbitrations per year.

Number of mediations and arbitrations

IF YOU ANSWERED 'YES', APPROXIMATELY HOW MANY MEDIATIONS OR ARBITRATIONS?			
	Male	Female	Total
1-10	530	161	691
11-25	163	42	205
26-50	56	6	62
51-100	18	2	20
More than 100	7	1	8
Null response	12	2	14
Total	786	214	1000



Among barristers appearing for parties in the same numerical band of mediations or arbitrations, the male barristers are significantly older and more senior than their female equivalents.

No. of matters	M:F ratio	Median age (M)	Median age (F)	Median seniority (M)	Median seniority (F)
1-10	3.29	52	44	16	9
11-25	3.88	56	49.5	21	12
26-50	9.33	58.5	55	27	10.5
51-100	9.00	61.5	40	34	8.5

Similarly, representation for clients at an interstate mediation or arbitration is work done predominantly by male barristers, with some surprising imbalances. Male barristers outnumbered women barristers in Victorian matters by more than seven to one.

No. of matters	Male	Female	Total	M:F
Victoria	30	4	34	7.5
Tasmania	1	0	1	0
South Australia	9	2	11	4.5
Western Australia	7	2	9	3.5
Queensland	29	7	36	4.14
Northern Territory	4	1	5	4
ACT	51	14	65	3.64
Total other state or territory	131	30	161	4.37
No other state or territory	655	184	839	3.56

Time devoted to ADR work

In addition to work done as an accredited mediator or arbitrator, the Bar Association's surveys have also sought to identify the extent to which ADR forms a significant component of a barrister's work.

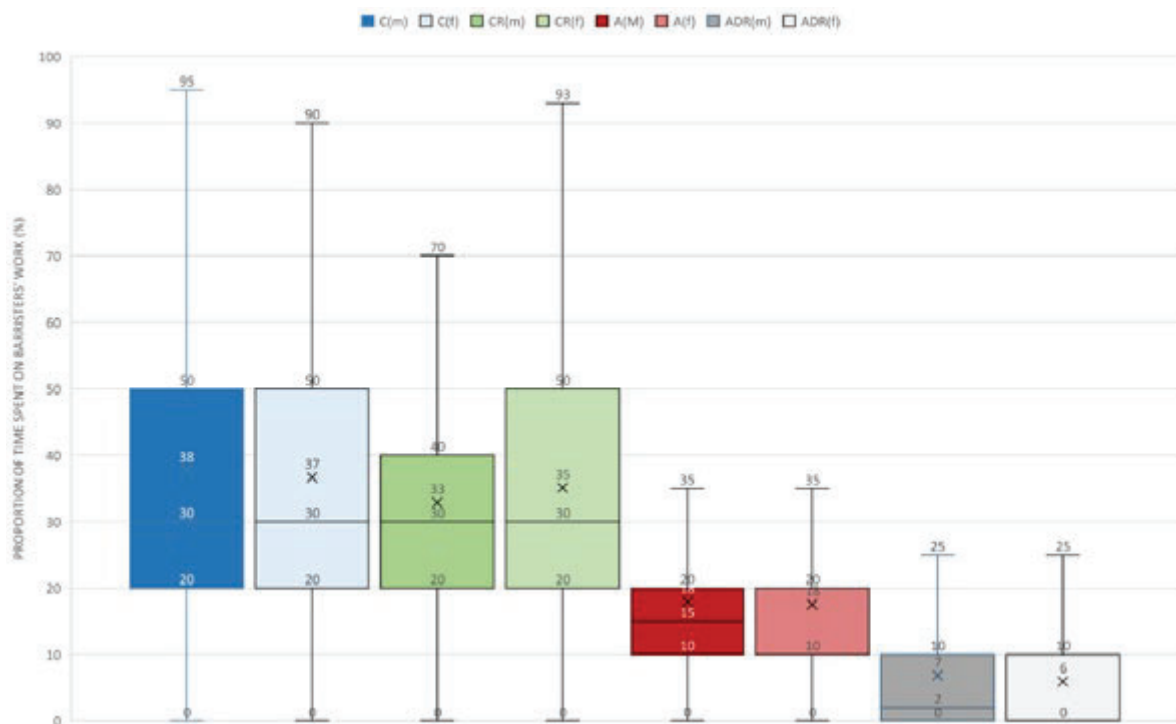
In 2019, barristers were asked to indicate the proportion of their time spent on the various aspects of barristers' work, including ADR. There were 1584 responses (a 66.17 per cent response rate). The question made no distinction between time spent acting as a mediator or arbitrator, appearing for a party to a mediation or arbitration or in preparation for either.

ALLOCATION OF TIME (MEDIAN, %) - MEN							
	<1	1-5 yrs	6-10 yrs	11-15 yrs	16-25 yrs	26-35 yrs	>35 yrs
Court appearances	0	30	30	35	40	40	30
Court related	0	40	35	30	30	30	22.5
Advice work	0	20	10	10	10	10	15
ADR	0	0	2	5	5	5	10
Other	0	0	0	0	0	0	0

ALLOCATION OF TIME (MEDIAN, %) - WOMEN							
	<1	1-5 yrs	6-10 yrs	11-15 yrs	16-25 yrs	26-35 yrs	>35 yrs
Court appearances	0	30	30	40	30	40	40
Court related	60	30	40	30	40	30	30
Advice work	0	20	10	10	10	10	30
ADR	0	0	5	0	5	10	10
Other	0	0	0	0	0	0	0

The following box-and-whisker chart shows the distribution of time spent on the main facets of a barrister's practice, including the upper and lower outliers, the median, the inter-quartile ranges and the average (marked with an x). Essentially, half the data for any type of response will be contained within the box. As the two boxes on the right indicate, a typical barrister devotes up to ten percent of his or her time on alternative dispute resolution work.

ALLOCATION OF TIME, PRINCIPAL AREAS OF WORK, MALE AND FEMALE



C(m) = Court appearances, male
A(f) = Advice work, female

C(f) = Court appearances, female
ADR(m) = ADR work, male

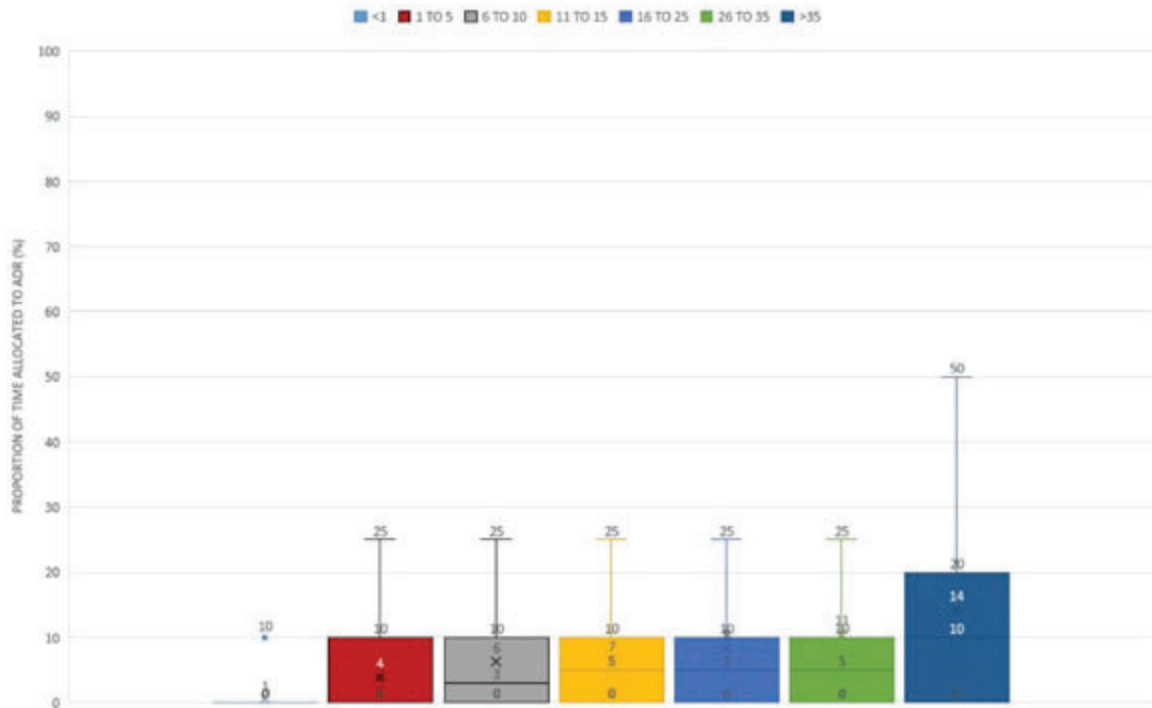
CR(m) = Court related work, male
ADR(f) = ADR work, female

CR(f) = Court related work, female
Other(m) = Other, male

A(m) = Advice work, male
Other(f) = Other, female

This result appears to be remarkably consistent, regardless of seniority. It is only among barristers with more than 35 years' seniority that there is a significant increase in median amount (and interquartile range) of time allocated to alternative dispute resolution.⁸ Half of barristers in this cohort spend up to 20 per cent of their time on ADR work.

PROPORTION OF TIME ALLOCATED TO ADR, BY SENIORITY



One obvious limitation to these results is that court-related work is often re-purposed for mediation instead of, or in addition to, the trial for which the barrister was briefed. It is possible that respondents viewed ‘ADR work’ as time spent in the mediation itself.

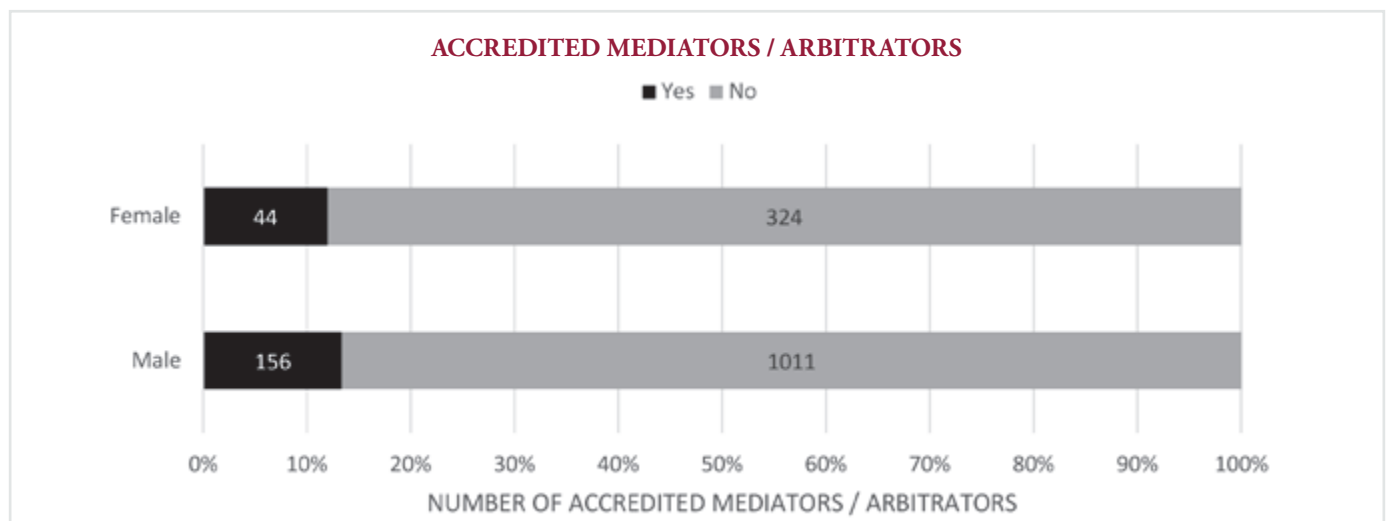
Accreditation

Another metric that can be used to study mediation and arbitration by barristers is the number of accreditations. A barrister may be accredited to act as a mediator under the National Mediation Accreditation System (NMAS). Since 2008 the Bar Association has been a Recognised Mediator Accreditation Body (RMAB). The ADR Committee issues a biannual call for members wishing to be accredited under the scheme.⁹ The Bar Association maintains the accreditation of 107 barristers as mediators and 90 barristers are appointed to the Supreme Court and District Court list of mediators for 2019-21. Alternatively, a barrister may practise as a mediator without being accredited, but again, that places them outside the scope of this article.

In 2018 the Bar Association asked those seeking to renew their practising certificate about accreditation as a mediator or arbitrator. The question did not differentiate between accreditation schemes. More than 63.59 per cent of barristers responded.¹⁰

ARE YOU AN ACCREDITED MEDIATOR OR ARBITRATOR?				
¹¹	Male	Female	Total	M:F
Yes	156	44	200	3.55
No	1011	324	1335	3.12
Total	1167	368	1535	3.17

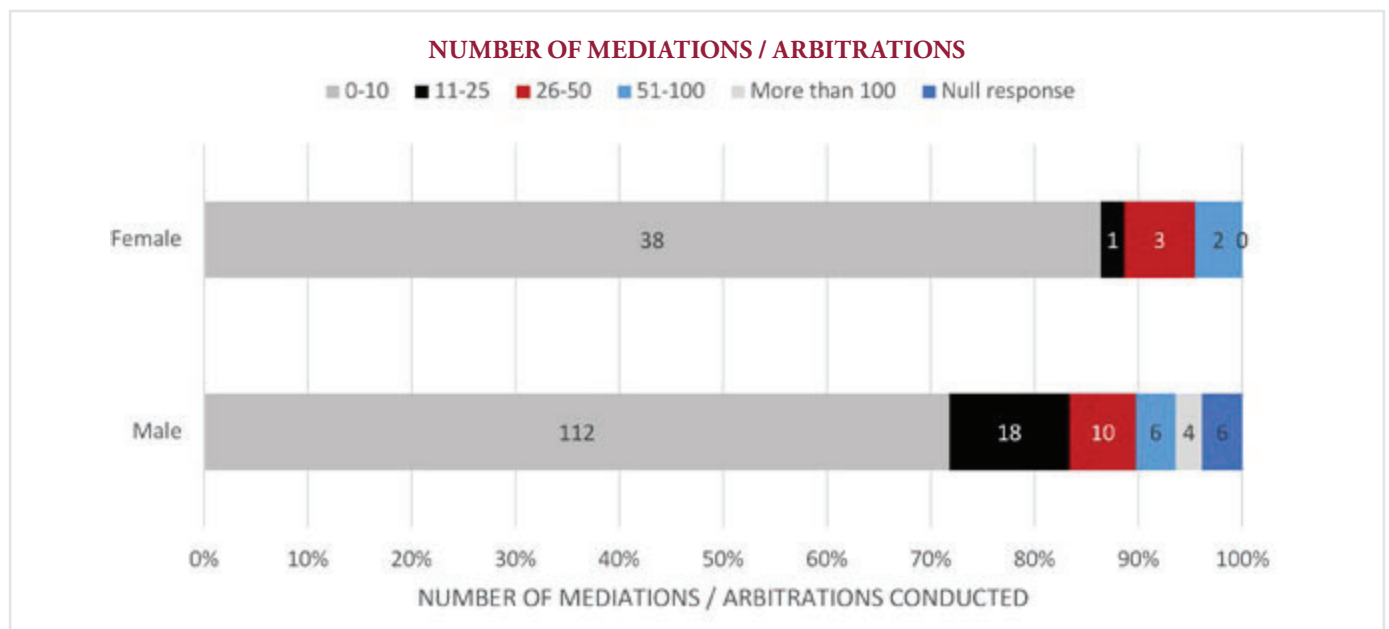
The survey found that 13 per cent of barristers are accredited as mediators or approved arbitrators, with only a modest gender difference (13.1 per cent of men and 11.95 per cent of women).



Nevertheless, beneath that headline ratio, there are some statistically significant differences between male and female mediators and arbitrators; particularly in respect of their ages and *the number of hearings* conducted.

IF 'YES' IN HOW MANY MEDIATIONS OR ARBITRATIONS HAVE YOU APPEARED AS A MEDIATOR OR ARBITRATOR?					
Hearings	Male	Female	Median age (M)	Median age (F)	M:F
0-10	112	38	59	50	2.95
11-25	18	1	67.5	61	19
26-50	10	3	70	59	33.3
51-100	6	2	63	61.5	3
More than 100	4	0	61.5	n/a	0
Null response	6	0	66	n/a	0
Total	156	44			

More than three-quarters (75.62 per cent) of accredited respondents conducted 1-10 mediations or arbitrations over the relevant period.¹² Aside from that cohort, there are 44 older practising barristers who conducted significantly more mediations or arbitrations. This provides some support for anecdotal evidence that retired judges who have returned to the Bar do a significant amount of this work. Furthermore, the work is largely local. Only 13 accredited mediators or arbitrators held a mediation or an arbitration in another Australian jurisdiction – eight of whom conducted them in the ACT alone.



Conclusion

Alternative dispute resolution is now a salient feature of practice as a barrister in New South Wales and warrants further analysis. We can infer that two-thirds of barristers will appear for a party in at least one mediation or arbitration in a practice year and allocate up to 10 per cent of their time to ADR. One in eight barristers is now accredited as an ADR practitioner. That said, there is no firm evidence at this stage that ADR is more or less propitious for diversity than adversarial court work. It is true that the proportion of women who appear in a mediation, or who become accredited mediators, is not significantly less than their male peers. Indeed, the data on age and seniority suggests that women barristers are incorporating ADR into their practice earlier in their career than many of their male peers. That said, some gender and age imbalances do exist among the cohort of barristers who appear for a party or as a mediator in a greater number of matters (i.e. more than 10 per year) or in another jurisdiction.

The Bar Association will continue to improve and extend its data collection in all facets of ADR. Traffic to the BarADR LinkedIn page and analytics for the ADR pages on the Bar Association website, though outside the scope of this article, are of growing importance. Another crucial aspect of ADR – one that is of increasing strategic interest to the New South Wales Bar – was not covered in the 2018 and 2019 surveys: international commercial arbitration. In 2020 the Bar Association will extend the geographic scope of appearances in mediation and arbitrations from other states and territories to include Hong Kong, Singapore, London and other international centres. This data will, no doubt, be reported in a future edition of *Bar News*. **BN**

ENDNOTES

- ¹ *New South Wales Bar Association Strategic Plan 2017-20*, p.4.
- ² *Ibid.*
- ³ The data displays mediations for the year that they are listed, not referred to mediation.
- ⁴ *Ibid.*, fn 1. Figures exclude settlement conferences conducted by judges and mediations conducted by private mediators.
- ⁵ See: Supreme Court of New South Wales Provisional Statistics: Filings, disposals and pending cases (as at 27 February 2020), p.10, fn 8. [http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Provisional%20statistics%20\(as%20at%2027%20Feb%202020\).pdf](http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Provisional%20statistics%20(as%20at%2027%20Feb%202020).pdf)
- ⁶ An ADR-related question was not asked during the 2019 PC renewals, however one is included in the 2020 Appendix A survey.
- ⁷ For example, the 146 barristers who were Crown prosecutors and public defenders in 2017-18.
- ⁸ A survey respondent's seniority is calculated using the seniority date on the Bar Association's database. This date does not 'reset' in the event of an appointment to the bench, nor upon retirement and reattainment of a current practising certificate.
- ⁹ Each year, applications are sought from members of the New South Wales Bar who hold a current practising certificate with five years' experience and who wish to become an accredited mediator or re-accredited as a mediator. See: <https://nswbar.asn.au/bar-standards/for-baradr-members>
- ¹⁰ In 2018 1569 out of 2414 barristers (1193 men and 376 women) answered at least one question: a response rate of 64.97% and a male to female response ratio of 3.17.
- ¹¹ The question did not differentiate between BarADR and other approved accreditation programs. For example, a respondent could have been accredited through another body such as Resolution Institute or CIARB
- ¹² Defined as the 'practising year' – between 1 April and 31 March