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Literacy demands of mediation: issues of fairness for low literacy Australians

Joy Cumming

Much has been written about issues of fairness in mediation for cultural differences, including concerns for those with language backgrounds other than English and indigenous Australians.

At present, groups from different cultural backgrounds in Australia, including non-English speaking backgrounds and indigenous groups, are not using the mediation process, often perceived to be an essentially oral communicative process,¹ to any great extent. Language problems and the lack of interpreters, confidentiality and sensitivity issues such as discussion in front of strangers, and problems of power balances (cross-cultural, gender within culture) have been found to be major barriers to participation.²

However, another group of Australians with English as their first language may also be disadvantaged in the mediation process. Mediation issues regarding the needs of Australians with low literacy skills in English, not just in reading and writing, have not been a focus of concern. While language and culture are concepts that many legal practitioners feel comfortable with, modern conceptions of literacy in first language are not so well understood.

Being literate

Literacy is defined in a variety of ways. It is not just a capacity to decode written symbols (recognise words) or spell accurately, as often portrayed in the popular media. In recent years, two strong principles have been endorsed by literacy experts and practitioners, principles that underpin definitions of literacy.

The first principle is that literacy is a continuum³ — those involved in literacy do not speak of a literate/illiterate dichotomy, but acknowledge that we all have varying

degrees of literacy in different contexts.

This has led to the second principle — the concept of 'multiliteracies', where each context is seen to create its own literacy. For example, adjudication and mediation create two different contexts of legal discourse.⁴ Both are known to be 'communicatively complex'.⁵ Even legal practitioners who are literate in the traditional discourses of law need to develop new literacies in mediation. Similarly, it is possible in the mediation process to encounter a disputing party who is literate in some areas and in some ways, particularly through familiarity, but not others.

To provide another, more extreme example, Young⁶ refers to various sources of non-oral evidence which may need to be considered with regard to indigenous native title discussions including 'gestures, ceremonies, field visits and displays'. The non-indigenous city dweller may have as much difficulty 'reading' these records as a rural indigenous person may have of court sanctioned legal documents; everyone has different literacies in different contexts.

Hence literacy is defined as a continuum, which is contextual and includes several macro-skills.

A functional definition of literacy commonly used in Australia incorporates reading, writing, listening, speaking, viewing and the critical thinking required to make sense of these in our society.⁷ For Australians with English as their first language, listening and speaking are not as problematic for mediation as they are for people with language backgrounds other than English (who in many cases due to traditional language education may have more written fluency than oral fluency). Therefore, it might seem that

literacy for first language speakers is not a major concern for mediation — certainly most investigations of the nature of mediation discourse and cultural barriers focus on mediation as an oral process.

The issue raised here, however, is that mediation involves more than oral processes. Although the communication of ideas and negotiation of outcomes are strongly oral, mediation also involves written processes. Therefore the literacy demands of mediation can pose a cultural barrier for adults who speak English as their first language but have limited written literacy skills; adults who have developed ways of coping in a world which is dominated by printed texts and expectations, and who have developed their own expectations of interactions with others and with the literate culture of the world.⁸

While ways of interacting with the world developed by less literate adults may not be as culturally diverse as those usually considered in mediation,⁹ they will certainly have an impact on the balance and processes of a mediation. In addition to difficulty in following the processes of mediation, an adult with low literacy skills in everyday or business matters suffers the social stigma of 'illiteracy' which they are at pains to avoid,¹⁰ a stigma that is not associated with cultural difference in terms of language background or ethnicity.

The stigma associated with literacy problems is directly related to stereotyping and lack of understanding of the nature of literacy, given the extent to which literacy difficulties are common. For example, a mediation could easily arise to deal with a dispute between partners where one partner may have reading and writing literacy difficulties which are about to be exposed because of changes in personal or work circumstances. Often literacy difficulties become apparent when a marriage which also operates a small business partnership — and in which one partner, usually the wife, handles the paperwork for a husband who can't read — breaks up. A business person may be willing to go to extraordinary lengths, even the risk of business failure and a sham mediation process, to ➤



➤ prevent exposing their literacy problems to others.

Extent of adult literacy 'problems'

Mediators may think the chances of mediating with an English as first language speaker with poor reading and writing skills are low, particularly in business matters and high finance. However, the 1996 Australian Bureau of Statistics (ABS) Survey of Aspects of (Adult) Literacy,¹¹ undertaken through individual interviews and under census conditions, demonstrates otherwise.

The survey assessed adults' capacity to read and comprehend text in three forms:

- prose literacy — the 'ability to understand and use information from various kinds of prose texts, including texts from newspapers, magazines and brochures';
- document literacy — the 'ability to locate and use information contained in materials such as tables, schedules, charts, graphs and maps'; and
- quantitative literacy — the 'ability to perform arithmetic operations using numbers contained in printed texts or documents'.¹²

Skills were classified at five levels from 1 (lowest) to 4/5 (highest and combined for the Australian population). People identified as having skills at levels 1 or 2 are considered 'at risk' and are expected to have considerable or some difficulties respectively in using the printed materials that may be encountered in daily life.¹³

Overall, the findings of the (ABS) survey indicate that more than 6 million Australians over the age of 15 could have some difficulty adequately using information contained in written text of various forms, including those containing numbers (that is, they were assessed as being at levels 1 or 2).¹⁴

Findings for the Australian population

were comparable to those in countries like Canada, England and Germany; we were 'more literate' than the US, markedly superior to the results recorded by Poland, but considerably worse than adults in Sweden. (France declined to participate in the study after the survey trial.) It is clear that concerns regarding first language and literacy difficulties and their effect on the process of mediation are not restricted to Australia alone.

Most importantly,

... while a greater proportion of those Australians who first spoke a language other than English had Level 1 or 2 skills, in absolute terms there are more people whose first language was English at these levels. Some 1.5 million English-first-language speakers were at Level 1, compared with approximately one million other first language speakers.¹⁵

The differences become more significant with older groups. For Australians with English as their first language, 21 per cent of men and 31 per cent of women aged 55 to 74 years had skills at level 1.

Table 1 shows the occupations of those identified as having difficulty in processing even moderately demanding written text. Ten per cent of people assessed at level 1 indicated that they were required to work with estimates or technical specifications, prices, costs or budgets several times a week in their work.

Some 10 per cent of those with only level 1 skills were identified as managers and professionals. It is therefore quite possible that a successful middle aged and middle class businessman or woman with English as first language, has difficulties dealing with business or personal paperwork, especially as new bureaucratic and technological demands come into force.

Literacy and the law

Since literacy could have such an impact on legal processes, it is interesting that the law itself does not define literacy or literate expectations of society. For example, it has been held¹⁶ that under the *Freedom of Information Act* s 12(2), access to documents is to be evaluated against standards of normal intelligence and 'literacy' — which the Court left undefined.

It would appear that literacy and language are basically of interest to the law only in indecent, offensive or defamatory contexts. Perhaps because of this, as much as lack of awareness, issues of fairness of mediation and cultural considerations have not been considered deeply with regard to the literacy of parties with English as a first language.

Literacy and mediation

Is written literacy really an issue for mediation? Consider the following hypothetical scenario.

Gary is a business partner with John. Gary, whose marriage has just broken up, has poor written literacy skills and low levels of reading and has always relied on his wife to help with paperwork. Suddenly, John, who is not aware of Gary's literacy difficulties, feels that Gary is no longer carrying his weight. Gary has also announced he wants to be a more 'hands on' partner, visiting sites and drumming up business, leaving John to do the paperwork. Their partnership is threatened and the issue has come to mediation. Gary has also succeeded in keeping his literacy problems from the mediator, relying on a solicitor to prepare initial documents and 'forgetting his glasses' (a classic indicator to adult literacy workers) at preliminary meetings. At the mediation, the mediator says, 'John and Gary, now that you've talked through the issues as we've seen them, and we've been able to have further discussions during each of the private consultations, what I'd like to do now is summarise the issues on this white board and then we shall try to establish which issues are most important and write down some options to address these. What I find best with the issues is to put them down as questions for consideration. Are you both comfortable with this?' ➤

Table 1: Skill level by occupation for prose literacy *

| Occupation | % of those at level 1 | % of those at level 2 |
|-----------------------------|-----------------------|-----------------------|
| Managers and administrators | 9.8 | 24.8 |
| Professionals | 1.2 | 11.2 |
| Para-professionals | 5.7 | 13.9 |
| Tradespersons | 17.9 | 38.2 |

* For population groups determined to be at levels 1 and 2 only.



➤ Mediation is not only an oral process. Communication orally to establish meaning, consensus and outcomes, the associated cultural issues of balance, fairness, empowerment (equally applicable to the English speaker with low reading and writing literacy) are important processes in the conduct of mediation. However the processes are also very dependent on written literacies, particularly in the determination of the outcomes to be implemented. These written processes (drawing on guidelines in Rogers and McCafferty)¹⁷ include:

- a pre-meeting agreement — '[t]he agreement should include not only the independent's fees, but also other elements, such as the process to be used, the powers of the independent, the requirements for disclosure of documents or information, confidentiality, and the consequences of breaching the process agreement';¹⁸
- '[t]he provision of a short statement of issues, not more than five pages long, by each party to the independent and to the other side';¹⁹
- other documents as may be necessary;
- a introductory statement by the mediator, during which the parties are 'not to interrupt, if there is an issue you want to return to, please *write* [my emphasis] it down';
- after identifying issues, 'the mediator will then prepare a list of issues, and questions that must be answered ... the mediator will frequently use a whiteboard or a flipchart to record the issues that have been raised by the parties. The issues may be listed as dot points or, more effectively, as a question begging an answer ... The theory behind identifying issues on a whiteboard is that it allows the parties to see that they are jointly working together to answer the questions. This externalises the dispute, or takes it outside themselves, even off the table, and puts it in a very visible and *neutral* position ... This does a lot to relax the parties';²⁰
- 'setting the agenda ... the discussions then flow from this issues chart';
- options — 'to be written down';²¹
- reaching agreement — 'It is your

responsibility as a solicitor helping your client to make sure that the agreement is written down in a way that accurately reflects your client's understanding of the agreement that has been made ... At the end of the document you add miscellaneous provisions and include definitions.'²²

If solicitors are not present, the role of the mediator is to ensure that, as stated in the last point, the final documentation also represents the actions to follow and the understandings that have emerged from the mediation. Guidelines for enhanced oral communication using plain English²³ can also apply to the written documentation.

However in any documentation of the outcomes of the mediation process, the agreement has to be clear as to its expectations. Some formalisation must occur and in general is expected to occur at the conclusion of the mediation meeting.

Even the simplest formal documentation is complex to a person with low reading literacy. For example, the text demand of common mediation agreements is very high. Paragraphs often combine financial, time and legal factors. An adult with ABS level 1 or 2 skills would not cope independently with such documents — many adults would be signing without comprehension or relying on another legal representative to assure them that the document was appropriate and reasonable. The person with low literacy skills will definitely be at a cultural disadvantage in dealing with such documentation.

As a further and final consideration, a common outcome of mediation is a monetary settlement. Even a simple agreement can be complicated by stamp duty and tax implications such as income or capital gains tax.²⁴ A sample level 1 task for quantitative literacy in the ABS survey involved a simple form with the instructions: 'Pat Evans wants to order two \$25 tickets to see *Les Miserables* on Saturday evening, October 29. Finish completing the order form on the opposite page to place the order'. As part of the task, participants had to add a \$2 handling charge to the sum they had calculated for the total cost of the tickets to

get the total charge. The understanding that \$2 had to be added and appropriate completion of this was a level 1 task, but many Australian adults were unable to do this.

The impact of mediation without representation²⁵ for those with poor quantitative literacy skills could be considerable and the mediator may not be aware that an injustice is occurring.

Conclusion

It is clear that low literate parties, a population subgroup that does not appear to have been previously considered, will be culturally disadvantaged in the mediation process if various issues are not addressed. They are disadvantaged both in terms of power relationships if their problem is known and in following the process, regardless of whether their problem is known or not.

A starting point in addressing fairness for this group, as in all cultural concerns in law, is for the legal profession to develop sensitivity to likely problems and the possible extent and impact of hidden literacy difficulties among participants in any legal process.

Culturally developed stereotypes²⁶ of who is 'illiterate' and who is more likely to be 'illiterate' need to be put aside. It is important to understand that literacy is not a 'have/have not' dichotomy and that lack of literacy does not indicate low social class, defective personality type, intellectual impairment, substance abuse or even lack of financial and social success. Similarly, the perception that the conduct of mediation is an oral process needs to be reconsidered, and the demands and impact of the written and quantitative expectations of mediation need to be more fully explored.

Sensitivity is a most critical factor in mediating with a person for whom public exposure of their literacy difficulties is a major loss of face. This is always a situation to be avoided in a successful mediation. Perhaps the first approach to be taken is to make few assumptions and to work through documents and written materials carefully. Alternative approaches may need to be ➤

➤ developed rather than immediate assumptions of writing down issues and questions. ●

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Endnotes

1. Mediation in this article is discussed within the framework of facilitative mediation; Menkel-Meadow C, 'The many ways of mediation: the transformation of traditions, ideologies, paradigms, and practices' 1995 July *Negotiation Journal* 228.

2. Dimopoulos M, 'Mediating difference' in Fisher T & Shaw E (eds), *Proceedings of the 4th National Mediation Conference* La Trobe University, Melbourne, 1998, pp 375, 379, 381; and Frederico M, Cooper B & Picton C, 'Development of a model of culturally sensitive mediation' in Fisher T & Shaw E (eds) above, pp 385, 387.

3. Wickert R, *No Single Measure* Department of Education, Employment and Training, Canberra, 1989.

4. Maley Y, 'From adjudication to mediation: third party discourse in conflict resolution' (1995) 23 *Journal of Pragmatics* 95.

5. Candlin C N & Maley Y, 'Framing the dispute' (1994) VII (19) *International Journal of Pragmatics* 95.

6. Young S, 'Cross-cultural negotiation in Australia: power, perspectives and comparative lessons' (1998) 9(1) *Australian Dispute Resolution Journal* 51.

7. Lokan J, Withers G, Mellor S, Batten M, McQueen J & Carthy I, *Literacy and the Competencies: Potential Impact of Competency-Based Approaches on the Literacy Curricula and Assessment in Schools*, Australian Council for Educational Research, Melbourne, 1995.

8. Imbalance can occur not only during the mediation and other legal processes but also in capacity to access information on these issues. The highly functionally literate person can access basic information on mediation prior to entering into any agreement, such as information on fees, suitability of mediation for their dispute, and an overview of the processes,

ADR Bulletin, Vol. 2, No. 10 [2000], Art. 3 quite easily, for example, the Law Society of NSW's 'Fast Answers to Common Legal Problems' on their website. The person with less written literacy relies on oral ways of gaining information and in this situation is likely to be less informed.

9. Rogers B & McCafferty B P, *Dispute Resolution for the Queensland Legal Profession* Queensland Law Society, Brisbane, 1997 p 100.

10. Acknowledging a literacy problem is one of the hardest things to do in a Western society. Most people feel a sense of shame — compare this with the acceptability in our society of saying 'I'm not good at maths'.

11. Australian Bureau of Statistics, *Aspects of Literacy. Assessed Skill Levels. Australia 1996*, Australian Bureau of Statistics, Canberra 1997, also part of the International Adult Literacy Survey.

12. As above, p ix.

13. Above note 11, p x.

14. Cumming J, 'The quantitative literacy performance of Australians: implications of low level skills' in Australian Bureau of Statistics, above note 8, p 67.

15. As above, p 69.

16. *Waterford v Dept of Treasury* (1983) 5 ALD 193 (Cth AAT); (1984) 5 ALD 588 (AARI).

17. Above note 9, p 78.

18. Above note 9, p 71.

19. Above note 9, p 69.

20. Above note 9, p 78 (is Gary, a poor reader and writer, relaxed?).

21. Above note 9, p 80.

22. Above note 9, p 83.

23. See, for example, Spiegel N M, Rogers B & Buckley R P, *Negotiation Theory and Techniques*, Butterworths, Sydney, 1998, p 149.

24. As above, p 82.

25. The logical reader would consider that legal representation should have been a forgone conclusion for a person with low literacy skills. However the stigma of low literacy may be so strong for some that, rather than draw attention to the situation, a party would agree to mediation without representation, particularly if they had been successful for most of their life in coping without literacy skills and their literate status had been well concealed.

26. Kalowski J 'In a manner of speaking: a cross-cultural view of mediation' 1996 2(2) *Commercial Dispute Resolution Journal* at 205.

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