Aboriginal and Torres Strait Islander people and ADR

14 Sep 2016

ADRAC gratefully acknowledges the suggestions and input of Gaye Sculthorpe who kindly reviewed this paper.

This topic is a sizable one which raises many sensitive and complex issues well beyond the scope of any snapshot overview.

Indeed, in some respects, any introductory treatment of the topic is fraught with risk. The availability and use of ADR might be dismissed, by some, as classic 'first world' issues which should barely rate a mention in light of the inability of many Aboriginal people and Torres Strait Islanders to access basic health, education, housing, community, occupational, legal and welfare services.

Other cultural and cross-cultural sensitivities arise. For instance, 'understandings, priorities and responsibilities to land and kin differ markedly between and amongst Indigenous communities across Australia. There is no single, immutable Indigenous culture'.[1] And there are real dangers of perpetuating 'colonising' practices, concepts and institutions when approaching issues facing Indigenous peoples.[2]

It is often said that Western styles of dispute resolution and conflict management are culturally alienating for Aboriginal and Torres Strait Islander participants and fail to meet their needs. Many reasons for this have been identified, such as perceived pseudo-judicialising of ADR processes; language and communication barriers (including difficulties accessing reliable and private telephone, mail and internet services); financial and transportation constraints; and different understandings of appropriate concepts of time and place for dispute resolution which may cause confusion or intimidation).

Despite the complexities and sensitivities attending the topic, ADRAC considers that the role which ADR plays (or might in the future play) in the lives of Indigenous peoples is an issue which warrants special and significant attention. As noted by the Senate Legal and Constitutional Affairs Committee in 2004, Indigenous Australians are generally regarded as the 'most disadvantaged group in the Australian justice system'.[3] It has been widely reported that (i) the justice system (civil and criminal) needs to develop new and better ways to engage with Indigenous peoples; (ii) Indigenous peoples face a range of barriers in using mainstream ADR services; and (iii) and mainstream services are under-utilised by, and are often ineffective for, Indigenous peoples.[4]

Opinions differ as to the value of particular forms of 'orthodox' ADR processes in disputes involving Aboriginal and Torres Strait Islanders.

For a detailed listing of uses of ADR-type mechanisms in the Indigenous context see: NADRAC's 2006 report entitled *Indigenous Dispute Resolution and Conflict Management*; and the recent (2015) and comprehensive essay published by the Australian Centre for Justice Innovation entitled *The use of Alternative Dispute Resolution Methods within Aboriginal and Torres Strait Islander Communities*, Harry Croft, Monash University. Some State Governments, such as WA, NSW and Queensland, operate/administer dedicated mediation services directed to the resolution of disputes involving Aboriginal and Torres Strait Islander people, details of which are readily able to be located on the internet. Other governments facilitate provision of mediation services to Aboriginal and Torres Strait Islander people through State/Territory Aboriginal Legal Aid Services, community and other services.

In cases where ADR is to be employed, there is general recognition that it should: be conducted in a 'culturally appropriate' manner; not replace existing traditional dispute mechanisms; be flexible; and whenever possible, be operated by respected community members.[5]

Community ownership, management and resolution of disputes is emphasised in the literature.

As a corollary, it has often been noted that it is 'unacceptable to inform the Aboriginal and Torres Strait Islander community about what Western mediation models suits them best'. The

assumptions, principles and values which conventionally underpin ADR – such as confidentiality and neutrality - may need to be questioned and modified.[6] As stated by the Federal Court in the preamble to its 2009 case study report to NADRAC:

> Indigenous perspectives on conflict management often differ markedly from mainstream understandings of "dispute resolution". Some Indigenous practitioners identify their practice as "peacemaking" or use other terms in describing what they do which embrace a deeper level of healing and renewal of relationships.
>
> Increased interest in Indigenous approaches to dispute resolution and conflict management is both welcomed and regarded with a degree of apprehension by Indigenous communities and practitioners who have worked for years to develop meaningful and effective processes. There is concern that Indigenous ownership of dispute management or "peacemaking" processes could be inadvertently lost if research findings are taken out of context from the cultural and community dimensions of effective practice.

ADRAC considers that these concerns are well-founded, but in a real sense they actually support a greater (not lesser) role for ADR in the area of Indigenous disputes – precisely because one of the strengths of ADR is the ability for dispute resolution processes (including intake processes) to be designed and implemented in ways which are not only respectful of, but are carefully calibrated to, individual, community and cultural interests of Aboriginal and Torres Strait Islanders.

The criminal justice system has shown some willingness to adapt formal court processes to reflect the different and distinctive dynamics which often attend engagement with young offenders and accused persons who identify as Indigenous: see, for example, Koori Courts in Victoria, and the youth conferencing and circle sentencing initiatives canvassed in Criminal justice and ADR.

In the civil justice system, a number of ADR-type processes – such as facilitated conversations, agreement-making, and hybridised processes - appear to have some support within Aboriginal and Torres Strait Islander communities. For example, in the Northern Territory, the Ali-Curung 'three tier' process involves family and extended family gathering

to discuss a problem (tier 1), escalation to a meeting of Elders if unresolved (tier 2), and referral to traditional owners as final arbitrators.[7]

In the Federal Court's 2009 report to NADRAC entitled *Solid work you mob are doing*, a series of critical factors and strategies were identified to assist those with policy and operational responsibilities for the development and delivery of dispute management services to Indigenous peoples. The overarching recommendation contained in that report was as follows:

> [16] Properly realising these critical factors and strategies points to the need for a national Indigenous dispute management service. Such a service could develop regional panels of expert Indigenous and non-Indigenous dispute management practitioners and provide consistency in standards and training approaches. A national dispute management service could build on and integrate with existing networks, such as community mediation centres and justice groups, to provide timely, responsive, culturally and physically safe services that Indigenous people can feel they genuinely 'own'.
>
> [17] A national investment in an effective Indigenous dispute management service would ultimately create significant social and economic benefits. It would enhance the potential for sustainable partnerships with Indigenous peoples, avoid the costs of Indigenous contact with the criminal justice system, and strengthen governance and social cohesion in Indigenous communities. The functions of a national Indigenous dispute management service are therefore integral to "closing the gap" on Indigenous disadvantage and to the building of safer, self-sustaining Indigenous communities.

Soon after the Federal Court's 2009 Report, in November 2010 ATSILS (Aboriginal and Torres Strait Islander Legal Services) submitted a detailed proposal to the Commonwealth Government for establishment of a National Aboriginal and Torres Strait Islander Dispute Management Service (NATSIDMS),[8] adopting a slightly earlier (2009) recommendation made by NADRAC. The ATSILS proposal suggested that NATSIDMS would formulate, and coordinate delivery of culturally appropriate DR and conflict management services throughout urban, rural and remote Australia. ATSILS cited access to justice issues as

providing powerful support for the establishment of NATSIDMS. See Access to justice and ADR for more detail.

ATSILS recommended that NATSIDMS have a National Governing body, with Regional Advisory Boards responsible for developing regional services (which would be subject to codes, standards, competencies and specified accreditation structures).

More recently, at ADRIC (Alternative Dispute Resolution in Indigenous Communities) 2015 a number of speakers re-enlivened proposals for the establishment of a dedicated body to coordinate and promote delivery of appropriate ADR services to Indigenous peoples.

ADRAC considers that, absent the development of an Indigenous dispute management service at the national level, the availability and use of ADR to resolve disputes involving Indigenous peoples is likely to remain sporadic, piecemeal, uncoordinated, under-researched, and under-funded. ADRAC endorses the view, previously expressed by NADRAC, ADRIC and other commentators, that any national body should be structured and operate in a way which truly captures regional and local issues, circumstances and interests.

ADRAC welcomes input into this important topic.

1. Federal Court of Australia's 2009 report to NADRAC *Solid work you mob are doing*, [99].

2. Fiona McAllan, 'Getting 'post racial' in the Australian State: What Remains Overlooked in the Premise 'Getting Beyond Racism?' (2011) 7*Australian Critical Race and Whiteness Studies Association*.

3. Senate Committee Report, June 2004, *Legal Aid and Access to Justice*.

4. See NADRAC's 2006 report entitled *Indigenous Dispute Resolution and Conflict Management*.

5. Loretta Kelly 'Mediation in Aboriginal Communities: Familiar Dilemmas, Fresh Developments' [2002] 5 *Indigenous Law Bulletin* 7.

6. The various principles and values underpinning ADR are discussed in more detail in Principles of ADR.

7. Federal Court of Australia's 2009 report to NADRAC *Solid work you mob are doing*, p 81.

8. *Joint ATSILS Proposal to the Commonwealth Attorney-General for the Establishment of a National Aboriginal and Torres Strait Islander Dispute Management Service*, November 2010.