



Exploring culturally appropriate dispute resolution for Aboriginal and
Torres Strait Islander peoples

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Abstract

This paper is a follow-up report into the Victorian Law Reform Committee's Inquiry into Alternative Dispute Resolution. Throughout the inquiry, it was evident that the Committee was particularly interested in identifying precisely what was meant by the terms 'culturally sensitive' or 'culturally appropriate' Aboriginal and Torres Strait Islander Dispute Resolution. Indeed, Kelly (2007) declares that these terms are often used within the Aboriginal and Torres Strait Islander context without providing concrete explanations. This paper will therefore endeavor to provide clarity to these terms by drawing on the factors outlined below.

The paper will begin by discussing how Aboriginal and Torres Strait Islander values differ to Western specific dispute resolution principles. This will include the antithetical nature of processes such as negotiation, arbitration, and the adaptation of mediation principles of an Aboriginal and Torres Strait Islander sensitive context such as neutrality, confidentiality, communication, and voluntary attendance.

Section two will delve into the particulars of Aboriginal and Torres Strait Islander appropriate mediation models by highlighting best practice. This will include the importance of flexible and communal approaches, problem solving and therapeutic based mediations, co-mediation (in terms of gender and culture), and issues pertaining to the intake stage(s).

Section three will explore the appropriateness of mediating domestic violence matters. This includes an examination of the Feminist critique of the issue, as well as outlining the importance of Restorative Justice in working to achieve equitable outcomes within the criminal justice system.

Methodology

The paper primarily draws on the themes identified by participants of a public hearing for the Aboriginal and Torres Strait Islander community conducted as part of the inquiry into Alternative Dispute Resolution (ADR Inquiry 2008). Further interviews were conducted with a Koori Court Elder, a member of the Victorian Dispute Settlement Centre, and a VALS' Family Solicitor. The interviews were of a semi-structured qualitative nature, and were essentially conducted to supplement the themes identified within the ADR inquiry and public hearing.

Introduction

Since European settlement, Aboriginal and Torres Strait Islander's have had a history of oppression that has been propagated by the British legal system. The non-Aboriginal and Torres Strait Islander perception of *terra nullius* contributed to the oppression by falsely denying Aboriginal and Torres Strait Islander's their customary legal system and strong spiritual connection with their sacred land. The *terra nullius* myth then legitimated the imposition of foreign British laws and institutions by essentially excluding Aboriginal and Torres Strait Islander involvement and sacred values (Behrendt 1995).

The over-representation of Aboriginal and Torres Strait Islander peoples throughout all levels of the criminal justice system since is merely one outcome that has validated the notion that

oppression is prevalent within society even today (VAJA2 2003). Indeed, there is no denying that by locking out Aboriginal and Torres Strait Islander involvement from the development of policies and laws, and the subsequent locking up of Aboriginal and Torres Strait Islander's in prisons, the traditional Westminster legal system has played and continues to play a great role in locking in repressive outcomes. Inclusive and sensitive alternatives to this system are therefore needed if we are to move towards achieving equitable results (Behrendt 1995). By equitable results, VALS does not propose the imposition of mechanisms that further add to the disempowerment of Aboriginal and Torres Strait Islanders, but rather strengthen Aboriginal and Torres Strait Islander capacity and skills so that Aboriginal and Torres Strait Islanders themselves can move 'one step closer toward re-empowerment' (Pringle 1996:253).

Alternative Dispute Resolution (ADR) is by no means the panacea for Aboriginal and Torres Strait Islander empowerment. Nevertheless, mediation is one process used in ADR that fundamentally enables Aboriginal and Torres Strait Islanders the opportunity to retain ownership of disputes. It places the means of dispute resolution back into Aboriginal and Torres Strait Islander hands, and in doing so provides a sense of empowerment which comes from confronting and dealing with one's own conflict. Mediation engenders a process that is inexpensive, informal, non-coercive, non-punitive and flexible in practice, making it 'more suited to Aboriginal communities than the Western adversarial system' (Pringle 1996:254). It is a process that is more reflective of traditional Aboriginal and Torres Strait Islander dispute resolution practices and has the ability to resolve matters quickly to prevent the often destructive consequences of escalated disputes (Sauvé 1996). As stated by one Aboriginal and Torres Strait Islander participant of the ADR inquiry public hearing 'mediation works for our mob ... if done in a culturally appropriate way, then it can be very effective' (2008:18).

The increased use of court annexed ADR has ensured that the process operates as an institutionalised mechanism rather than an 'alternative' to the courts (Ardagh & Cumes 2007). In many ways the Dispute Settlement Centre's (DSC) Koori program is the Victorian Government's response to provide a culturally appropriate dispute resolution service for the Aboriginal and Torres Strait Islander community. However, the DSC is admittedly facing the challenge of obtaining the Koori community's confidence in the process. In turn, 'Koories are slipping through the system without realising the processes' true potentials (ADR Inquiry 2008:12).

VALS believes that there must be more of an emphasis on the separateness of Aboriginal and Torres Strait Islander dispute resolution from mainstream dispute resolution. It has been highly documented that the Western style of dispute resolution is culturally alienating because it does not fit with Aboriginal and Torres Strait Islander values (Behrendt 1995). Mainstreaming Aboriginal and Torres Strait Islander disputants through Western specific dispute resolution processes will perpetuate the distrust towards the process and this will result in an array of missed opportunities.

Section I – The Clash of Values

Behrendt (1995) outlines that despite the influence of Western culture, contemporary Aboriginal and Torres Strait Islander values have remained true to traditional values. The National Alternative Dispute Resolution Advisory Council (NADRAC 2006) highlights that due to European colonisation, Aboriginal and Torres Strait Islanders live in overlapping worlds of traditional and Western culture. Both reports highlight that purely Western models of dispute resolution often clash with and do not meet the needs of the contemporary Aboriginal and Torres Strait Islander people (NADRAC 2006 and Behrendt 1995).

Arbitration

The process of arbitration replicates the litigation process by promoting an adversarial culture. Decision-making is rigid and inflexible and the process has an individualised focus. These aspects are antithetical to Aboriginal and Torres Strait Islander cultural values. Traditional Aboriginal and Torres Strait Islander dispute resolution practices consist of a co-operative process where discussions are based on consensus rather than authoritarian procedural requirements. The procedures are flexible, informal and decisions are made for the community, by the community, rather than for and by the individual. Behrendt (1995) asserts that just like litigation, arbitration does nothing to eliminate the power imbalance between Aboriginal and Torres Strait Islander and non- Aboriginal and Torres Strait Islander disputants. Economic factors and court-like environments often provide a power advantage to the non-Aboriginal and Torres Strait Islander party, thus failing to offer an Aboriginal and Torres Strait Islander sensitive alternative to the courts.

Negotiation

Negotiation is the most common form of dispute resolution however just like arbitration, the process provides a power imbalance in disputes that occur between Aboriginal and Torres Strait Islander and non- Aboriginal and Torres Strait Islander disputants. The lack of a facilitator can exaggerate this power imbalance. This means that parties rely on legal representatives for their negotiations. Due to economic factors, non-Aboriginal and Torres Strait Islander people are likely to have the bargaining advantage (Behrendt 1995). Further to this, lawyers are usually equipped with a hardball zero-sum¹ approach to negotiations, often failing to meet the true needs of the client. Settlements made through lawyers also impinge on the level of empowerment one can otherwise gain through direct party-to-party settlements (Caputo 2007).

Mediation

Reports arising from the 1990s suggest that the principles of mediation are inconsistent with Aboriginal and Torres Strait Islander customs and values. Sauvé, for example, states that the ‘Aboriginal conceptualization of what “mediation” means bears little resemblance to this Western

¹ A hardball zero-sum approach refers to the fact that lawyers are primarily concerned with the duty to represent their clients zealously within the bounds of the law. They work in an adversarial mind-frame with the belief that if one party wins the other party loses. Victory is therefore reduced to a monetary value and all other nonmaterial values (such as respect, dignity, and empathy) are of residual importance (Riskin 2002).

model' (1996:10) and highlights inconsistencies with mediation principles such as neutrality, confidentiality, and voluntary attendance. Behrendt (1996) agrees, stating that the Western structure still remains foreign to traditional dispute functions. Furthermore, she asserts that mainstream mediation does not address the power imbalance between Aboriginal and Torres Strait Islander and non- Aboriginal and Torres Strait Islander disputants because the process is reflective of Western values.

Kelly (2007), on the other hand, suggests that the key advantage of mediation is its ability to remain flexible. Mediation can be 'culturally appropriate' if its principles are adapted to accommodate and build on traditional Aboriginal and Torres Strait Islander dispute resolution processes. These principles include:

Neutrality & Impartiality

Neutrality essentially refers to the mediator's background and relationship with the disputants. It involves aspects such as the degree of contact between the mediator and the parties, prior knowledge about the dispute, and the level of mediator interest in the outcome of the dispute (Boulle 1996). It is argued that the insistence of mediator neutrality is a Western preference and may not be appropriate in the Aboriginal and Torres Strait Islander context. For example, given the detailed and complex structures of Aboriginal and Torres Strait Islander family networks, kinship obligations, and far-reaching community knowledge (the 'Koori grapevine'), it may be impossible to find a completely neutral Aboriginal and Torres Strait Islander mediator (Cunneen et al 2005).

Kelly (2007) asserts that the lack of mediator neutrality can result in positive outcomes for disputants. An Aboriginal and Torres Strait Islander Elder outlined an example of this at the inquiry into ADR (2008). The participant spoke about 'a young fellow who, because of his surname, thought it was appropriate to keep committing crimes, because that is what everybody said his family did' (p.10). The Aboriginal and Torres Strait Islander Elder knew the boy's ancestry and reminded him that he belonged to a background of esteemed Aboriginal and Torres Strait Islander servicemen. Thus, she was able to convince him that he was not doing the right thing by his ancestry. Although this example was not relayed in the context of mediation, it essentially illustrates the point that intimate relations and direct knowledge of parties can work to generate positive outcomes in Aboriginal and Torres Strait Islander communities.

It is also important to note that not all Aboriginal and Torres Strait Islander disputants prefer Aboriginal and Torres Strait Islander mediators. In certain circumstances disputants may prefer more neutral mediators with no community links. For example, disputes in small Aboriginal and Torres Strait Islander communities may affect all community members, in which case a mediator from the outside might be preferred. Furthermore, kinship obligations might create pressure for the Aboriginal and Torres Strait Islander mediator to take a particular side (Cunneen et al 2005). As stated by an Aboriginal and Torres Strait Islander Elder in the ADR inquiry (2008), 'we can be seen to be taking sides with one family over another, or partner over a partner' (p.17).

Kelly (2007) argues that impartiality is the essential ingredient for fair Aboriginal and Torres Strait Islander dispute resolution. Impartiality refers more directly to issues of fairness and even-headedness, encompassing ‘matters such as time allocation, facilitation of the communication process, and avoidance of any display of favoritism’ (Boulle 1996:19). Respected figures within Aboriginal and Torres Strait Islander communities are often valued for their ability to remain impartial. Nevertheless, as stated in an interview with a member of the DSC, care needs to be taken to affirm to disputants that the mediator is there to assist in the process rather than to solve the disputes. Ultimately, it must be understood that the concept of a ‘neutral third party’ may not completely apply to Aboriginal and Torres Strait Islander mediations. The degree of mediator impartiality must therefore remain flexible enough to be determined upon a case-by-case basis (Cunneen et al 2005).

Confidentiality

Although confidentiality is not viewed as the defining feature of mainstream mediation, the ‘without prejudice’ principle is often promoted in mainstream mediation to ensure that parties can negotiate honestly, without the fear of having the dialogue used as evidence in subsequent court proceedings (Boulle 1996). The guarantee of confidentiality is believed to be important when attempting to gain the trust of disputants in the process (Kelly 2007). However it is argued that honouring the confidentiality principle is rarely possible within the Aboriginal and Torres Strait Islander context. Due to close kinship ties, living arrangements, and the multi-party nature of disputes, the Aboriginal and Torres Strait Islander community is often aware of a dispute, its source, and the history of the families involved (Cunneen et al 2005).

Sauvé (1996) asserts that the ‘Koori grapevine’ was traditionally used as a tool to maintain social order. Mediated outcomes were made public so that the moral weight of the community could be brought to bear on the agreements. This meant that the community retained ownership of a dispute. Hence, demanding confidentiality can contradict the notion of community ownership over a dispute (Cunneen et al 2005).

Pringle (1996) states that as long as disputants agree to the removal of the confidentiality clause², there should be no reason why the confidentiality principle cannot be applied in a flexible manner. Kelly (2007) agrees, and highlights the fact that exceptions to confidentiality are commonly practiced within mainstream mediations (i.e. in situations where disputing work colleagues notify management of the mediated outcome).

Voluntary Attendance

The concept of voluntary attendance at mediation has also been widely debated within the Aboriginal and Torres Strait Islander context. Much of the literature refers to Noble’s (1994) argument that community leaders may pressure parties into attending and

² A confidentiality clause is a contractual privilege that is commonly added to the terms of an agreement to mediate. The clause extends to the mediator as well as the participants (Field & Wood 2007)

participating in mediation. Kelly (2007) does not agree. She asserts that coercion by Elders into mediation is uncommon and highlights that even in pre-invasion Aboriginal and Torres Strait Islander society, an aggrieved person must have consented (to a certain degree) to the dispute resolution process and the sanctions imposed. Otherwise, the dissatisfaction would have filtered through to the extended family. Kelly (2007) argues that so long as the process is sensitive to the needs of Aboriginal and Torres Strait Islanders, the voluntary aspect of mediation will not undermine the process of Aboriginal and Torres Strait Islander dispute resolution.

In any case, the reality is that mediation is increasingly not a voluntary process. Whether it is court-annexed mediation, conditions set by legal aid, or financial or social pressures, parties are gradually being compelled to attend mediation (Cunneen et al 2005). This heightens the need for culturally sensitive Aboriginal and Torres Strait Islander dispute resolution processes, otherwise Aboriginal and Torres Strait Islander's will be forced to use culturally inappropriate services. This situation will inhibit the effectiveness of mediation in terms of accessibility, process and outcome. It is important that when a person does not have a choice to attend mediation, they at least have the ability to choose which service they access.

Communication Barriers

Since the 1960's, educators have officially recognised a difference between Aboriginal English (AE) and Standard Australian English (SAE). Some forms of AE are similar to SAE. However there are differences in areas such as grammar, vocabulary, meaning use and style depending on the geographical location of the Aboriginal and Torres Strait Islander community. A significant concern to the mediation process is the concept of 'gratuitous concurrence', where the Aboriginal and Torres Strait Islander participant will agree to a direct question that they have not understood (Roberts 2007).

Pringle (1996) asserts that quantifiable specifications such as time, location, and quantity should be avoided in direct questioning, as Aboriginal and Torres Strait Islander people do not often use these terms. To ensure that these incidents do not occur, mediators must adopt the use of open-ended questioning rather than closed questioning, or must consider the use of an AE interpreter (Roberts 2007 & Pringle 1996).

Mediators must also ensure that they remain sensitive to non-verbal communication barriers. For example, mediators must wait until the disputant volunteers the information and respect incidence of silence. Mainstream mediators may regard silence as a sign of evasiveness. However, it is an accepted feature of the conversation in some Aboriginal and Torres Strait Islander cultures. This is particularly important in Family law mediations, where silence can be misinterpreted and used against the disputant who is mandated to make a 'genuine effort' in resolving the dispute.³

Ground rules may need to provide a degree of tolerance for strong language. For example swearing may be considered as a normal way of speaking and not an intended attack on

³ s.60I Family Law Amendment (Shared Responsibility) Act 2006 (Cth)

the other party or mediator (NADRAC 2006). Mediators should also demonstrate leniency with parties walking out in times of heightened emotions (Pringle 1996). Taboo topics such as genitals, pregnancy and speaking the names of recently deceased must be avoided. There is also a reluctance of Aboriginal and Torres Strait Islander peoples to discuss 'men's business' and 'women's business' with each other. Hence, it is important for certain matters to be discussed with same gender mediators (Pringle 1996).

Section II – Self Determination & Culturally Appropriate Mediation Models

Section it was discussed how Aboriginal and Torres Strait Islander adaptations of Western principles and processes of mediation which reflect the spirit of self-determination. However, there is a need to describe in concrete terms how mediation can actually facilitate self-determination to move beyond a vague rhetorical conception.

Behrendt (1995) contends that it is not enough to establish mainstream ADR mechanisms in Aboriginal and Torres Strait Islander communities, even where provisions have been made for culturally sensitive training. She proposes mediation models that are radically different to mainstream models and emphasises community control and consultation. Pringle (1996) also acknowledges that mediation is not the sole source for Aboriginal and Torres Strait Islander empowerment, and asserts that the use of mediation enables Aboriginal and Torres Strait Islander communities to effectively own, manage and resolve their disputes. She emphasizes that it is unacceptable to inform the Aboriginal and Torres Strait Islander community about what Western mediation models suits them best.

The solutions have to ultimately come from the inside out (i.e. Aboriginal and Torres Strait Islander community generated) rather than the outside in (i.e. non-Aboriginal and Torres Strait Islander generated), the latter contributing to the cycle of disempowerment many Aboriginal and Torres Strait Islander experience. Thus mediation must remain flexible to accommodate the diverse needs and aspirations of the Aboriginal and Torres Strait Islander community.

Beattie (1997) acknowledges the enormous potential for Aboriginal and Torres Strait Islander adaptations of Western mediation to bring about higher degrees of Aboriginal and Torres Strait Islander autonomy than pure Western mediations. However, he stresses the importance of interrogating the assumptions of Western mediation and the political context in which it is instituted. He states:

'White Australia gets to look very magnanimous and enjoy that warm inner glow because it is 're-empowering' Indigenous communities, but what has it really done? If the enterprise is doomed to failure because it has been inadequately resourced or poorly managed, then the oppressor gets to jump back in and assert power again because Indigenous people 'obviously are not ready for self-determination as yet' (p.60)

There is a need for proper political, administrative and economic support to Aboriginal and Torres Strait Islander adaptations of Western mediation. Without such, we risk driving Aboriginal and Torres Strait Islander communities to their own defeat, ironically in the name of fairness and cultural re-empowerment (Beattie 1997).

Western Mediation Models

Some mainstream mediation models can be characterized as being more Aboriginal and Torres Strait Islander sensitive than others. Nevertheless, it will be highlighted that mainstream mediation models consist of assumptions that are often incongruent and insensitive to Aboriginal and Torres Strait Islander. In addition, it must be recognized that if the principle of self-determination is to be upheld, no single mediation model can be imposed on the Aboriginal and Torres Strait Islander community. Room must be provided for local adaptations and solutions to emerge (Cunneen et al 2005).

Problem Solving Mediation

Problem solving mediation models are ‘solution driven’ and due to its expediency and economic benefits to the Courts and disputants, they are the most widely practiced methods of dispute resolution. The traditional Evaluative model – also referred to as Advisory or Managerial mediation – includes the use of a mediator who provides an evaluation of the merits of a dispute, and makes suggestions for its resolution. Facilitative mediation, on the other hand, adopts an ‘interest based’ rather than a ‘right based’ approach. Again, the emphasis is on solving the problem by identifying options based on party needs and interests.

The direction of the process and any solutions reached remain with the disputants, while the mediator assists with the process rather than solving the dispute (Martin 2007).

Problem solving models are criticized for being far too simplistic and inadequate when applied to an Aboriginal and Torres Strait Islander context. Sauvé (1996) argues that Aboriginal and Torres Strait Islander seek a change of heart, a transformation and a healing of relationship and spirit. Settlement in an Aboriginal and Torres Strait Islander context relates to a settlement with the community, not a settlement that is separated from the whole of the community, and which pertains to the individual. Sauvé asserts, ‘what needs settling or redress is not issues, but relationships’ (1996:11), because settlement means reconciliation with the inner (the source of illness), reconciliation with the other (disputants) and the community (clans from all sides). Sauvé maintains that Aboriginal and Torres Strait Islanders are so tightly bound with their kin/community that the notion of self takes a similar meaning. Thus, the goal of individual settlement is merely a by-product to the essential goal, which is reconciliation with the community as a whole.

Therapeutic Mediation

Therapeutic models of mediation are driven by an emphasis on emotional healing rather than settlement. The Transformative model of mediation primarily deals with the emotional and relationship factors of disputants. The focus of the process is shifted from solutions to a transformation of the interaction between the relationships. The mediators’ role is to assist parties to move from weakness to strength (empowerment) and from self-absorption to responsiveness (empathy) (Bush & Folger 2005). Transformative mediation derives its roots from communication theory which holds that ‘human beings naturally have strengths and compassion, they desire to be neither victim nor victimizer, they have capacities for choice and decision-

making, and they constantly harbour a desire for connection with others' (Goodhardt et al 2005:319).

Narrative mediation also engenders a relationship focus. This is a storytelling model that seeks to deconstruct the negative societal influences in conflict, and endeavours to create a more harmonious term of events (Winsdale, Monk & Cotter 1998). Both forms of mediation view conflict interactions as a positive phenomenon. The assumption is that the transformation experience will assist disputants in dealing positively with future conflict situations, even if parties do not maintain an ongoing relationship (Noone 2008).

Although therapeutic models of mediation seem to be more in line with Aboriginal and Torres Strait Islander needs, its assumptions are criticised for being ethnocentric. Therapeutic models assume that parties with significant power imbalances have the capacity to communicate with one another and are sufficiently informed to generate just and reasonable agreements. Mediators adopt a non-interventionist role which maintains these power imbalances. Even though the process is built on communication theory, it is also argued that mainstream mediators often fail to recognise culturally specific communication barriers (such as those highlighted in Section 1). Thus, it is argued that mainstream therapeutic models of mediation do not have the capacity to protect minority groups (Noone 2008).

Best Practice within the Aboriginal and Torres Strait Islander Context

Within many States and Territories of Australia, mainstream mediation models have been contextualised to specifically target the Aboriginal and Torres Strait Islander population. It is important to remember that Aboriginal and Torres Strait Islander customs and culture vary geographically. Thus, it should never be assumed that other States or Territories mediation processes will suit the needs of the Victorian Koori population. However, this should not deter us from identifying some general themes that are currently considered to be 'best practice' in dispute resolution within the Aboriginal and Torres Strait Islander context.

Complexity of Aboriginal and Torres Strait Islander Matters & Intake Issues

Aboriginal and Torres Strait Islander mediations are much more complex than mainstream mediations. Complex family networks, close kinship ties, and crowded living arrangements increase the likelihood of multi-party disputes, many of who have other problems to contend with (Cunneen et al 2005). As stated in the ADR inquiry (2008) 'A lot of the system involves an individual against individual, but what we find when it comes to the Court is that there is more than one person involved' (p.7). Thus, the number of issues in the mediation are often compounded and may include drug and alcohol issues, family violence, illness, death in the family, family breakdowns, incarceration and child care issues. Because of the complexity of these matters, it may be insensitive for intake to occur via a telephone but should rather be made in person. The complex nature of Aboriginal and Torres Strait Islander disputes also heightens the need for frequent assessments. Mediators and intake officers need to consider if it would be more appropriate to travel to the home ground of the disputants to facilitate intake or undertake mediations (Cunneen et al 2005).

Due to neutrality concerns, mainstream mediation services often separate the roles of the intake officer and mediating officers. Pringle (1996) asserts that Aboriginal and Torres Strait Islanders are reluctant to discuss their views with people they have not established a level of trust. It therefore may be more appropriate for the intake officer to conduct the mediation as well.

Mainstream dispute resolution mechanisms may not make sense to Aboriginal and Torres Strait Islanders. For example, there may be uncertainty about the differences between a 'meeting', 'Court hearing' and 'mediation'. It is important for time to be allocated in the intake stage so that all parties are informed about their roles, responsibilities and choices. This may mean that numerous meetings will need to occur with numerous participants (NADRAC 2006).

Negotiations may need to be made about the process itself in disputes that occur between Aboriginal and Torres Strait Islander and non-Aboriginal and Torres Strait Islander participants. Imposing customary or Western processes on disputants without notification will create the perception of bias. It is necessary to explain to both Aboriginal and Torres Strait Islander and non-Aboriginal and Torres Strait Islander participants the reasons for the process that is used. This may mean explaining to non-Aboriginal and Torres Strait Islanders the notion of substantive equality, which recognises difference.

Essentially, the complex nature of Aboriginal and Torres Strait Islander disputes demand a much more resource intensive approach to intake and assessment than mainstream disputes. To ensure best practice, shortcuts must be avoided, as this will ultimately impede on the level of trust in the process. By avoiding shortcuts, there is no reason why complexity can be problematic (NADRAC 2006).

Best practice for addressing complexity:

- Acknowledges the complexity of Indigenous Australian disputes;
- Differing intake needs (i.e. intake through telephone may not be appropriate) ;
- Adapt intake processes (i.e. travel to home ground of disputants);
- Combine the roles of intake officer and mediating officer(s);
- During intake(s), take time to explain the process (i.e. roles, difference to going to Court). This may take more time (i.e. multiple meetings), but is necessary to engender a trust in the process.

Evaluation Issues

Due to the multi-party nature of Aboriginal and Torres Strait Islander disputes, it is an unfair expectation for the same level of 'success' to be reached in negotiated outcomes than it is for mainstream mediations. That is, if 'success' is defined by the number of settlements and partial settlements reached. Best practice entails evaluations that are based on the party's perception of mediator impartiality and the level of satisfaction with the process (Cunneen *et al* 2005).

Best practice for evaluating success:

- Evaluations based on party perceptions of mediator impartiality and satisfaction with the process.

Time & Venue Issues

Aboriginal and Torres Strait Islander concepts of time may not correspond with Western case management practices (NADRAC 2006). Pringle (1996) asserts that non-Aboriginal and Torres Strait Islander people are quick to consider Aboriginal and Torres Strait Islanders as unreliable, but fail to realise that Aboriginal and Torres Strait Islander's commitment to the future generally depend on family and social obligations. Aboriginal and Torres Strait Islanders place primacy on family and social obligations, loyalty to kin, and on maintaining and developing family commitments. It is apart of Aboriginal and Torres Strait Islander culture for time to be taken to smooth out disputing relations. Thus, unlike the mainstream mediations, successful Aboriginal and Torres Strait Islander mediations can take a lot of time and effort requiring many visits and meetings. A significant consequence of this is a greater overall cost per mediation (Cunneen et al 2005).

Although formal offices may provide credibility to the process, they can be intimidating to Aboriginal and Torres Strait Islanders. Aboriginal and Torres Strait Islanders may associate past negative experiences, such as contact with the criminal justice system, with the venue. Formal venues may discourage the use of these services, and if the party does not attend, a formal venue will perpetuate the anxiety for future mediations (NADRAC 2006). It must be understood that informality assists cultural sensitivity. As highlighted in the ADR inquiry by one participant, "Don't bring it (the dispute) into the courtroom, don't bring it into a foreign building or anything, but have it somewhere on country, where it is a community organization or a place which is mutually acceptable to everyone" (2008:20). Decisions such as private or public, inside or outside, rural or urban land, and formal or informal seating must be considered within the intake stage so that parties feel that they are meeting on 'neutral grounds' (Pringle 1996:264). Leniency must also be provided for a change of venue if parties request so throughout the mediation process (Pringle 1996).

Best practice for addressing time and venue issues:

- Leniency with time constraints;
- Recognition that successful mediations may require many visits that result in higher costs per mediation;
- Consideration of private or public, inside or outside, rural or urban land, and formal and informal seating within the intake stage(s);
- Venue changes throughout mediation left to the discretion of parties.

Co-mediation (Gender & Culture)

As highlighted in section I, Aboriginal and Torres Strait Islander culture does not allow the communication of certain gender specific topics between male and female disputants. It is therefore a requirement for the use of a male and female co-mediator team in disputes between genders (Pringle 1996). Because parties cannot directly engage in conversation about these issues, shuttle mediation processes must be adopted where discussions occur in separate rooms/venues through the mediators. In disputes that occur between Aboriginal and Torres Strait

Islander and non-Aboriginal and Torres Strait Islander parties, it is appropriate for the use of a 'teamwork' model, where local as well as outside Aboriginal and Torres Strait Islander and non-Aboriginal and Torres Strait Islander mediators are employed (NADRAC 2006:11). To ensure that the parties develop a trust in the process, mediator selection must be left at the discretion of parties (NADRAC 2006).

The use of Aboriginal and Torres Strait Islander mediators ensures that Aboriginal and Torres Strait Islander parties can relate to the mediator without finding the need to outline Aboriginal and Torres Strait Islander culture. For example, non-Aboriginal and Torres Strait Islander mediators may not be familiar with unwritten Koori laws. Cunneen et al (2005) asserts that it may be more significant for a service itself to be Aboriginal and Torres Strait Islander rather than the use of Aboriginal and Torres Strait Islander mediators. This way, Aboriginal and Torres Strait Islander sensitivity is defined by the organisation's policies and processes across the entire service rather than a specific area of the organisation. This notion was also stressed by a participant at the ADR inquiry (2008), 'You have an Aboriginal worker at the front, but there is not that support at the back. I think the reason the Koori Courts have been successful is because the process is consistent. You have an Elder at the end' (p.14).

Best Practice entails a co-mediation model:

- The use of male and female co-mediator team in disputes between Aboriginal and Torres Strait Islander males and females;
- The use of shuttle mediation in disputes between Aboriginal and Torres Strait Islander males and females;
- The use of non-Aboriginal and Torres Strait Islander and Aboriginal and Torres Strait Islander mediators ('teamwork model), as well as local and outside mediators;
- Recognition that Aboriginal and Torres Strait Islander dispute resolution services may be more appropriate than a non- Aboriginal and Torres Strait Islander dispute resolution service

Section III – Mediating Domestic Violence & Restorative Justice

The question of the appropriateness of ADR processes to deal with domestic violence (dv) matters has been widely debated and is far from being settled. At the centre of the debate are the contending arguments that there is a need to allow Aboriginal and Torres Strait Islanders access to ADR processes to deal with dv, which may be more appropriate than the formal mode of justice in light of Aboriginal and Torres Strait Islander's relationship to that system of justice. On the other hand, there are mainstream concerns for the capacity of the process to protect victims of dv. It must be understood that while society debates, Aboriginal and Torres Strait Islanders continue to be nationally overrepresented as victims of dv. In fact Koories (particularly Koori women) are currently eight times more likely to be victims of dv compared to the non-Koori population (VIFVT 2003). As stated by a Family Law Solicitor at VALS, 'mainstream society may not see the real extent of this issue, however when one in every three of our cases involve Domestic Violence, we are confronted with this issue everyday'. It is therefore imperative for the debate about the appropriateness of ADR to be tied with the inappropriateness of maintaining the status quo.

Mediating Domestic Violence

Domestic Violence matters are generally not mediated in mainstream society due to the Feminist critique of power imbalances. The Feminist critique contends that mediation encourages disempowerment of Domestic Violence victims by assuming that perpetrators have the capacity to engage in cooperative bargaining with victims who have already not been valued. The Feminist critique maintains that it unreasonable to assume that a person can be confident enough to represent his/her own interests as a victim (Field 2006).

Nevertheless, it is argued that Domestic Violence is so endemic within Aboriginal and Torres Strait Islander communities that it may be unrealistic to exclude it from means of resolution of Aboriginal and Torres Strait Islander disputes. O'Donnell (in Hazlehurst ed. 1995) asserts that conflict within Aboriginal and Torres Strait Islander families and extended families are the most common form of disputes in Aboriginal and Torres Strait Islander communities and often involve issues of Domestic Violence. In fact, 'those are the very issues we found that people want mediated' (p. 99). By excluding Domestic Violence matters from mediation, Aboriginal and Torres Strait Islanders are restricted access to alternative channels of justice and are forced into a formal system of justice for which they do not trust (Cunneen et al 2005). As highlighted by Sauv , 'Aboriginal women's experience of the white world of justice has been primarily that from which one seeks protection, rather than pursues as a source protection' (1996:14).

Aboriginal and Torres Strait Islander men and women are victims of dv, but it is more common for women to be a victim of Domestic Violence. Aboriginal and Torres Strait Islander women who report to police the violent acts of their brothers, fathers, or husbands, who may be subsequently charged, are held responsible by the community for whatever danger or death that may result as the alleged perpetrators pass through the justice system. Securing an intervention order is viewed to be counter-effective. The perpetrator's anger is intensified and so too is the anger of his or her families, as they are forced to provide accommodation or are forced to move from the small community to maintain the requirements of the order. More importantly, the family may also attract the unwanted attention of child protection services. Thus, the victim

believes that they are responsible for placing their children in harms way and now risk losing them. Aboriginal and Torres Strait Islander women who seek formal legal remedies through the justice system are therefore ostracized by the community and 'hated by the family', so they believe that it is simply 'better the beatings' (Sauvé 1996:14).

By excluding Domestic Violence victims from alternative modes of justice it can be argued that the Feminist critique undermines its own moral position. It forces Aboriginal and Torres Strait Islander women to adopt formal legal remedies that compromise their safety.

Without alternatives to the formal system, Aboriginal and Torres Strait Islander women are more likely to tolerate the abuse (Sauvé 1996). Hence, it is no surprise for Aboriginal and Torres Strait Islander women to claim that Feminist policies do not reflect their needs (JCPA 2004).

Kelly (2007) asserts that it is important to make a distinction between mediating Domestic Violence matters where the violence is an 'aspect' of the relationship, and mediating Domestic Violence matters to 'resolve the violence' in a relationship. Kelly states that the latter is always inappropriate however the former takes into account the endemic nature of Domestic Violence in Aboriginal and Torres Strait Islander communities, and separates mediation from a process that might be seen to condone Domestic Violence. If mediators or intake officers can make this distinction within the intake phase, then the violence can be managed as a substantive matter of the mediation. Processes such as shuttle mediation and co-mediation can then work to equalize power imbalances. Kelly (2007) suggests that dispute resolution methods other than traditional western models must exist for Aboriginal and Torres Strait Islander communities. Restorative Justice (RJ), for example, is a more recent concept and seen as a more effective model in dealing with Domestic Violence matters in the Aboriginal and Torres Strait Islander context.

Restorative Justice (RJ) as an Alternative to the Courts

Current statistics indicate that formal avenues of justice have failed to address the issue of Domestic Violence within the Aboriginal and Torres Strait Islander community. Non-Aboriginal and Torres Strait Islander approaches to Domestic Violence emphasise individual responsibility, when in reality, acts of individual violence are not just restricted to the individuals involved. There is a greater dispute which concerns the effect of violence on the broader community to which the individuals belong. Hence, the Aboriginal and Torres Strait Islander community has a primary stake in each Aboriginal and Torres Strait Islander case of Domestic Violence, and must be provided the opportunity to denounce such behaviors through alternative channels of justice (Bauman & Williams 2004). As stated by an Aboriginal and Torres Strait Islander participant at the inquiry into ADR (2008), 'traditionally we did not deal with just one little bit [person], did we? We dealt with the whole mob because if we didn't, our societies would become dysfunctional and we would not survive' (p.20). The key to addressing Domestic Violence thus lies in a communal approach to justice that is reflective of traditional Aboriginal and Torres Strait Islander dispute resolution practices.

RJ is a process whereby all the parties with a stake in a particular dispute come together to resolve collectively how to deal with the dispute and its implications for the future (Roche 2006). RJ differs from mainstream mediation because of its engagement with the community of concern. The presence of the community in RJ processes addresses the shortcoming of mediation in matters involving Domestic Violence, as the violence is open to public scrutiny. The community

is able to protect the interests of the victim, and can act to prevent future violence. It can be a forum to display the Aboriginal and Torres Strait Islander community's disapproval of violence (Kelly 2007).

Research suggests that non-Aboriginal and Torres Strait Islanders prefer RJ as a complimentary process to the formal mode of justice in Domestic Violence matters, whereas Aboriginal and Torres Strait Islander Australians prefer RJ as a primary channel of justice (Bluett-Boyd 2005 and Nancarrow 2003). In research conducted by Bluett-Boyd (2005), Victorian Aboriginal and Torres Strait Islander professionals identified an array of reasons as to why this was so, some of which include:

A Smart on Crime Approach

Aboriginal and Torres Strait Islanders recognise that Domestic Violence is a social problem within the Aboriginal and Torres Strait Islander community, and social problems require social solutions rather than legal solutions. The present system of justice a Domestic Violence advocates individual outcomes by adopting criminalisation as its only response ('tough on crime' approach). However, individual notions of guilt must be considered to be less important than the wider notions of taking responsibility for one's own actions. RJ is considered to be a smarter process of justice because it focuses on addressing the underlying problems that have produced the offence. Secondly, it engenders a victim focus by recognizing the emotional effects of crime to the victim, offender and community and seeks healing rather than attempting to channel emotions through some abstract entity such as the State. As stated by one participant, 'The Koori Court works in our community because there is an opportunity for the offender to say I behaved in that way because of X,Y and Z and it's also about admitting to what you've done, which is the first step to healing yourself' (Bluett-Boyd 2005:33). Thirdly, dispositional outcomes, whether they are an apology or other sanctions, are the product of a consensus decision, and not the unilateral decision of a paternalistic arbiter. Lastly, RJ is fundamentally an honesty process, and engenders respect between all participants. This is in direct contrast with Court protocols. The rights oriented approach with a relatively passive judicial role is replaced by a trust orientated process invested with emotions of hope, care, and an active and exposed communal role (Bluett-Boyd 2005).

Agency and Accountability

RJ provides agency at both the individual and community levels by: inviting all relevant parties to the process; the agency for the individual is established; including the Aboriginal and Torres Strait Islander community within the process; and the agency for the community is established. This is in direct contrast to the formal avenues of justice whereby the agency of the community and the individual is removed through a pro-prosecutorial approach. The fundamental strength of the process is the presence and authority of Elders and Respected persons. Distinguished representatives of the Aboriginal and Torres Strait Islander community legitimate the process by instilling values and morals through their authority. As stated by one participant: 'anyone in your family or whatever can tell you what you are doing is wrong, and you don't have to listen.

But when it comes from your Elders- It's like you've got no choice' (Bluett-Boyd 2005:34).

Accountability is established through two means: shaming and community exposure. Some Aboriginal and Torres Strait Islander communities see shame and exposure as the worst form of punishment because unlike the revolving doors of the formal justice system where 'nobody really knows what you've been through', RJ 'makes it out there and visible' to the community (Bluett-Boyd 2005:33). The success of the Koori Court is a clear testament to these ideals.

Restorative Justice (RJ) as a Part of the Koori Courts

If the RJ process has the potential to correct the injustices that are being caused through Domestic Violence, then the question remains, why hasn't Domestic Violence been extended into the Koori Court jurisdiction? One possible answer is fear.

Prior to the establishment of the Koori Court pilot program, there was a belief that Domestic Violence offences would be excluded from the Koori Courts jurisdiction because 'they wanted to take things slowly' (ADR inquiry 2008:17). The issue of Domestic Violence was considered to be 'very thin' (ADR inquiry 2008:17) and there were undoubtedly fears of a public backlash. However, the Koori Court has since established credibility. So much so, that the pilot has not only been rolled out Statewide, but is now entering the County Court jurisdiction. RJ has been proven to work within the Aboriginal and Torres Strait Islander context, and the process can now be used as a blueprint to address other Aboriginal and Torres Strait Islander problems.

The second aspect of fear is the risks that are associated with the Koori Court Elders and Respected Persons. As was outlined in the ADR inquiry (2008), 'we have got to be careful about how far we stretch our Elders' (p.16). In a private interview conducted with an Aboriginal and Torres Strait Islander Elder of the Koori Court, it was identified that there were concerns about the safety of Elders due to neutrality reasons. Firstly, 'Elders can be seen to be taking sides', and secondly, 'what happens when there is a connection to an Elder? Because more often than not, we know the person we are dealing with'. Furthermore, it was highlighted that Magistrates and lawyers have relevant training when it comes to dealing with cases of Domestic Violence, whereas the Elders have not. This would also be of considerable concern to the wellbeing of the Elders. Nevertheless, upon concluding the interview, the Elder also recognised that 'the problem [of Domestic Violence] needs to be addressed, and we need to start discussing how the process can work to correct this problem'. VALS submits that this is exactly where the problem lies. It is the fear of the unknown that has shied away appropriate discourse about the processes capacity to deal with Domestic Violence.

The Victorian Government has previously responded to RJ research by calling for further research. However by doing so, they fail to recognize that this response presents itself as a double-edged sword; devising RJ options depend upon research, while research depends upon the analysis of existing of RJ programs. All the while, the government neglects to see that their double-edged sword is continuing to strike down the Aboriginal and Torres Strait Islander victims of Domestic Violence.

CONCLUSION

This paper is an outcome of a public hearing for Aboriginal and Torres Strait Islanders about culturally appropriate alternative dispute resolution. The public hearing was in relation to the 'Inquiry into Alternative Dispute Resolution' by the Victorian Law Reform Committee. This paper contains an analysis of direct quotes from the public hearing and literature about Aboriginal and Torres Strait Islander practices in dispute resolution.

The writings of Loretta Kelly, who was present at the public hearing, highlights that terms like 'culturally sensitive' or 'culturally appropriate' Aboriginal and Torres Strait Islander Dispute Resolution are often used within the Aboriginal and Torres Strait Islander context without providing concrete explanations. Upon VALS analysis there is need for flexibility in resolving disputes involving Aboriginal and Torres Strait Islander peoples. This is the case because Aboriginal and Torres Strait Islander values differ to Western specific dispute resolution principles. For example some Aboriginal and Torres Strait Islander people question the emphasis that Western ADR places on impartiality of a mediator.

Best practice in dispute resolution is not only flexible, but is also inclusive of communal approaches, problem solving and therapeutic based mediations, co-mediation (in terms of gender and culture) and issues pertaining to the intake stage(s). An example of a Koori Dispute Resolution Centre is provided that Restorative Justice has an important role to play in working to achieve equitable outcomes within the criminal justice system. The question of the appropriateness of ADR processes to deal with domestic violence matters has been widely debated. VALS is interested in exploring this question in light of the arguments that there is a need to allow Aboriginal and Torres Strait Islanders access to ADR processes to deal with Domestic Violence, which may be more appropriate than the formal mode of justice in light of Aboriginal and Torres Strait Islander's relationship to that system of justice. The importance of Aboriginal and Torres Strait Islander self-determination is a flavour throughout the paper in relation to making alternative dispute resolution culturally appropriate and applies to whether Domestic Violence is dealt with in an ADR context.

Reference List

- Alternative Dispute Resolution Inquiry (2008) *Victorian Law Reform Committee Melbourne*: June 30 transcript.
- Ardagh A & Cumes G (2007) 'The Legal Profession Post-ADR: From Mediation to Collaborative Law' *Australian Dispute Resolution Journal* 18 205.
- Bauman T & Williams R (2004) *The Business of Process Research Issues in Managing Indigenous Decision-Making and Dispute in Land: Indigenous Facilitation and Mediation Project* Canberra: Australian Institute of Aboriginal and Torres Strait Islander Studies.
- Beattie S (1997) 'Is Mediation a Real Alternative to Law? Pitfalls for Aboriginal Participants' *Australian Dispute Resolution Journal* 8(1).
- Behrendt L (1995) *'Aboriginal Dispute Resolution'* Sydney: The Federation Press.
- Bluett-Boyd N M (2005) *In Search of Justice in Family Violence: Exploring Alternative Justice Responses in the Victorian Indigenous Australian Community* Fitzroy: Victorian Aboriginal Legal Service Co-operative Limited.
- Boulle L (1996) *Mediation: Principles, Process, Practice* Sydney: Butterworths.
- Bush R A B & Folger J P (2005) *The Promise of Mediation: The Transformative Approach to Conflict (revised ed.)* San Francisco: Jossey-Bass.
- Caputo C M (2007) 'Lawyers' Participation in Mediation' *Australasian Dispute Resolution Journal* 18:84.
- Cunneen C, Luff J, Menzie K, & Ralph N (2005) 'Indigenous Family Mediation: The New South Wales ATSIFAM Program' *Australian Indigenous Law Reporter* 9(1).
- Field R (2006) 'Using the Feminist Critique of Mediation to Explore The Good, The Bad and The Ugly Implications for Women of the Introduction of Mandatory Family Dispute Resolution in Australia' *Australian Journal of Family Law* 20(5): 45.
- Field R & Wood N (2006) 'Confidentiality: An Ethical Dilemma for Marketing Mediation' *Australian Dispute Resolution Journal* 17(2): 79.
- Goodhardt I, Fisher T & Maloney L (2005) 'Transformative Mediation: Assumptions and Practice' *Journal of Family Studies* 11(2): 317.
- Joint Committee of Public Accounts and Audit Public Hearing Transcript (JCPA) (13 June 2004).
Kelly L (2007) 'Mediation in Aboriginal Communities: Familiar Dilemmas, Fresh Developments' *Indigenous Law Bulletin* 28(6): 14.
- Martin J (2007) *'Conflict Management and Mediation'* ACT: Ginninderra Press.

National Alternative Dispute Resolution Advisory Council (2006) *Indigenous Dispute Resolution and Conflict Management* Canberra: National Alternative Dispute Resolution Advisory Council

Noble K (1994) *Alternative Dispute Resolution: Aboriginal and Torres Strait Islander Initiatives* Paper presented at the 3rd International Conference in Australia on Alternative Dispute Resolution, Surfers Paradise, 1-2 October.

Noone M A (2008) 'The Disconnect Between Transformative Mediation and Social Justice' *Australasian Dispute Resolution Journal* 19: 114.

O'Donnell M (1995) 'Mediation Within Aboriginal Communities: Issues and Challenges' in K. Hazlehurst (ed) *Popular Justice and Community Regeneration: Pathways of Indigenous Reform* Westport: Praeger.

Pringle K L (1996) 'Aboriginal Mediation: One Step Towards Re-Empowerment' *Australian Dispute Resolution Journal* 7(4): 253.

Riskin L (2002) 'Mindfulness in the Law and ADR: The Contemplative Lawyer: On the Potential Contributions of Mindfulness Mediation to Law Schools, Lawyers and their Clients' *Harvard Negotiation Law Review* 7: 1.

Roberts F (2008) *Aboriginal English in the Courts Kit* Fitzroy: Victorian Aboriginal Legal Service Co-operative Limited.

Roche D (2006) 'Dimensions of Restorative Justice' *Journal of Social Issues* 62(2): 217.

Sauvé M (1996) 'Mediation: Towards an Aboriginal Conceptualisation' *Aboriginal Law Bulletin* 3(80): 10.

Victoria Department of Justice (2006) *Victorian Aboriginal Justice Agreement: Phase 2 (VAJA2)* Melbourne: Victoria State Government

Victorian Indigenous Family Violence Task Force (2003) *Victorian Indigenous Family Violence Task Force: Final Report* Melbourne: Department for Victorian Communities – Aboriginal Affairs Victoria.

Winsdale J, Monk G & Cotter A (1998) 'A Narrative Approach to the Practice of Mediation' *Negotiation Journal* 14: 21.