



**NADRAC**

NATIONAL ALTERNATIVE DISPUTE  
RESOLUTION ADVISORY COUNCIL

**Indigenous  
Dispute Resolution and  
Conflict Management**

***January 2006***

The National Alternative Dispute Resolution Advisory Council (NADRAC) is an independent body which provides advice on ADR to the Australian Attorney-General.

Members of NADRAC as at July 2005 are:

The Hon Justice Murray Kellam AO (Chair)  
Ms Josephine Akee\*  
Mr Fabian Dixon SC  
Mr Ian Hanger QC  
Mr Greg Hansen\*  
Federal Magistrate Norah Hartnett  
Mr Ian Govey  
Dr Gaye Sculthorpe\*  
Mr Warwick Soden\*  
Prof Tania Sourdin  
Mr John Spender QC\*  
Ms Lynn Stephen\*

\* Members of the Indigenous dispute resolution committee

To obtain more information or copies of other publications contact:

NADRAC secretariat:

Robert Garran Offices, BARTON ACT 2600  
Phone 02 6250 6272 Fax 02 6250 5980  
e-mail [nadrac@ag.gov.au](mailto:nadrac@ag.gov.au)

or visit NADRAC's web-site  
[www.nadrac.gov.au](http://www.nadrac.gov.au)

# Contents

Overview.....	1
Introduction.....	3
Current Indigenous dispute resolution and conflict management services.....	4
Key principles .....	5
Traditional Indigenous dispute resolution .....	6
Indigenous-specific services .....	7
Mainstream services.....	8
Practice issues in disputes involving Indigenous people .....	10
Choosing the practitioner(s).....	10
Intake, preparation and follow up .....	11
Time and place.....	11
Who attends an ADR session.....	12
Process and ground rules .....	12
Involvement of Indigenous staff and practitioners .....	13
Information sharing and Network.....	15
Evaluation .....	16
Statements of Principle .....	17
Recommendations for action .....	22

## Overview

Effective dispute resolution and conflict management services assist Indigenous people to achieve a range of social, cultural and economic goals and improved access to justice. However, traditional Indigenous practices have been weakened over time and mainstream services are under-utilised by, and often ineffective with, Indigenous people.

Indigenous people at the local level need to be involved in the design and delivery of dispute resolution and conflict management services directed to them, and services need to take into account Indigenous perspectives on disputes and their resolution.

Customary and western practices overlap and, although customary processes can be supported in some instances, new Indigenous-specific services and practices may be required to address contemporary problems. Mainstream agencies also need to address the barriers faced by Indigenous people in using their services.

Dispute resolution practices should take into account:

- additional intake and preparation issues
- the selection of practitioner(s)
- differing concepts of time and place
- attendance and representation at ADR sessions, and
- changes to conventional processes and ground rules.

The recruitment and training of Indigenous practitioner and support staff is crucial. Training and accreditation, however, need to be attuned to Indigenous needs and ongoing support is required for Indigenous practitioners and staff. Information sharing between Indigenous and non-Indigenous practitioners and agencies is a key to improved services.

Evaluation methods and performance indicators need to take into account the complex and overlapping natures of many Indigenous disputes, and the fact that conventional methods may not provide a reliable or valid picture of effectiveness.

Promising dispute resolution and conflict management practices have and are being developed to address Indigenous needs. This paper recommends several strategies to identify and promote such practices.



## Introduction

The National Alternative Dispute Resolution Advisory Council (NADRAC) is an independent body established to advise the Attorney-General on high quality, economic and efficient ways of resolving disputes without the need for a judicial decision. Under its charter, the matters on which NADRAC is to give advice include ‘the suitability of ADR processes for particular client groups’ and ‘the accessibility of alternative dispute resolution services’. In accordance with the charter, NADRAC has made general recommendations on how ADR processes and services should take account of the needs of diverse groups in the community.

In March 2003, NADRAC decided to undertake a consultation process to learn about effective approaches to ADR in disputes involving Indigenous people. NADRAC consulted with Indigenous people in selected urban and regional centres in Australia. Consultative forums were held in Alice Springs (June 2003), Brisbane (November 2003), Melbourne (March 2004), Broome (July 2004) and Cairns (April 2005). NADRAC has also met with relevant Indigenous groups around Australia, including in Tasmania, Western Australia and South Australia, and has examined the outcomes of relevant consultations and evaluations conducted by other bodies.

In addition, a national consultative group of Indigenous dispute resolution practitioners was formed to guide the project. The consultative group includes two current NADRAC members, Dr Gaye Sculthorpe and Ms Josephine Akee as well as former NADRAC member Ms Helen Bishop. The other consultative group members are Ms Toni Bauman, Ms Maureen Abbot, Ms Jackie Ah Kit, Ms Loretta Kelly, Mr Robin Thorne and Mr Charlie Watson. There was also close cooperation with a related project on Indigenous Facilitation and Mediation (IFaMP) being undertaken by the Native Title Research Unit of the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS).

Effective dispute resolution and conflict management services assist Indigenous people to achieve a range of justice, social, cultural and economic goals. The services have the potential to reduce levels of violence in Indigenous communities, reduce levels of adverse contact of Indigenous people with the criminal justice system, promote healing of damaged relationships between Indigenous people and enhance governance and decision-making by Indigenous communities. However, these potential benefits have not been realised.

In contemporary society, Indigenous people live in two overlapping worlds, the western and traditional, and neither is fully capable of dealing with disputes involving Indigenous people. Purely western models of dispute resolution are often incongruent with the culture of Indigenous people and fail to meet many of their needs. At the same time, European colonisation has weakened many traditional ways of resolving disputes between Indigenous people. Moreover, in disputes between Indigenous and non-Indigenous people, the application of western models may work against Indigenous needs and perpetuate disadvantage.<sup>1</sup> It is important that ADR programs recognise these problems and, in doing so, promote the substantive equality of Indigenous people participating in ADR.

A re-appraisal of how dispute resolution approaches apply to disputes involving Indigenous people is therefore needed. Traditional practices of Indigenous people may need to be supported, new approaches fostered and mainstream dispute resolution practices modified. A focus on conflict management, rather than the resolution of a particular dispute, may also be more helpful.

## **Current Indigenous dispute resolution and conflict management services**

Currently, dispute resolution and conflict management services are provided through traditional structures in individual communities, by services specifically established for Indigenous people and through mainstream agencies. Many agencies have an interest in promoting the more effective provision of dispute resolution services to Indigenous people. The following are examples of dispute resolution services provided to Indigenous people:

- In the native title area, the National Native Title Tribunal and the Federal Court of Australia have undertaken initiatives to improve their mediation practices. The Australian Government has funded a project on Indigenous Facilitation and Mediation by the Native Title Research Unit of the Australian Institute of Aboriginal and Torres Strait Islander Studies. The project aims to build the dispute resolution capacity of Native Title Representative Bodies (NTRB).
- In the family law area, the Family Court has engaged Indigenous family consultants to assist in the delivery of Family Court services, including primary dispute resolution services, to Indigenous communities. Legal Aid New South Wales has also piloted an Aboriginal and Torres Strait Islander Family Mediation Project, and Legal Aid Queensland has conducted a study into the feasibility of a specialised Indigenous Mediation service for family disputes. The Family Law Pathways Advisory Group also examined issues associated with the provision of family dispute resolution services to Indigenous people.
- In Western Australia, a specialised Aboriginal Alternative Dispute Resolution Service was established in the early 1990s. The service focussed especially on inter-family feuding. Since the early 1990s specialised Indigenous dispute resolution projects have also been established under the auspices of community mediation programs, including the Indigenous mediation program in the Queensland Dispute Resolution Centres, the Aboriginal Mediators Network in the NSW Community Justice Centres and the Koori mediation program in the Victorian Dispute Settlement Centres.
- The Human Rights and Equal Opportunity Commission and State and Territory Equal Employment Opportunity, Human Rights and Anti-Discrimination Commissions have also conducted programs aimed at improving services to Indigenous people.

- A recent project, Mawul Rom, aims to provide leadership and dispute resolution skills among Indigenous youth and to provide cross-cultural mediation training.
- In the criminal justice system, mediation-type approaches have been used in diversionary conference programs for Indigenous people. Koori, Murri and Nungar Courts, and the NSW circle sentencing program use collaborative processes in deciding on sentencing options. These criminal justice programs, while not usually considered ‘alternative dispute resolution’ in the conventional sense, can use similar processes and may engage Indigenous dispute resolution practitioners.

Although each of these areas is different, several consistent themes have emerged.

## **Key principles in developing effective dispute resolution and conflict management services for Indigenous people**

NADRAC uses the term ‘effectiveness’ to mean how well a service addresses Indigenous needs including its accessibility, fairness, impact and sustainability. Therefore, ‘effectiveness’ requires dispute resolution and conflict management services to look at all aspects of their services including cultural practices, physical facilities and the selection and training of both Indigenous and non-Indigenous practitioners.

Service providers and policy-makers may need to think laterally when developing dispute resolution and conflict management programs for Indigenous people. In Indigenous communities, issues often do not fit the structures which have been developed to address western needs.<sup>2</sup> For example, western history has given rise to institutions based on distinctions between ‘criminal’ and ‘civil’ justice matters that may not be relevant to Indigenous experience. In an Indigenous community, an interpersonal or inter-family dispute may escalate to the point that the criminal courts become involved, whereas a dispute resolution or conflict management process may be better equipped to deal with the issues and relationships involved.<sup>3</sup> Concepts of ‘family’ may be different,<sup>4</sup> and the boundaries between ‘family’, ‘community’ and ‘work’ may be blurred. Conflicts can be cross-generational and historically based. A conflict in one area may therefore impact on other aspects of community life. For example, a native title claim may be linked to housing issues and lead to family disputes. In the Indigenous context, western dispute resolution concepts such as ‘mediation’ and ‘neutral third party’ may not make sense.

In Indigenous disputes, an integrated approach to dispute and conflict management is especially important. The overlapping nature of problems and lack of access to services means that a dispute resolution service will need to address a range of issues that may not fit within its formal mandate. Services may therefore need to have a broad mission, or develop cooperative arrangements with other services through referral protocols or partnerships.

Although new approaches may need to be developed for Indigenous people, the possible negative impacts of change also have to be considered. For example, new services may further undermine traditional processes.<sup>5</sup>

As the Productivity Commission and other bodies have pointed out,<sup>6</sup> it is essential to involve Indigenous people at the grass roots level in the design and development of services. Time is needed to identify relevant groups and individuals in order to assess local needs and develop strategies to address these needs. The process of consultation itself is also a critical factor. Effective consultation will help to build Indigenous people's trust in the eventual service provided.

It is important to avoid over-generalisations. Indigenous experiences, culture and attitudes to customary law vary across individuals, communities, gender and age groups, and are influenced by a range of social factors such as the degree of urbanisation. Services should therefore be flexible and take account of local needs and practices and should adapt to meet the needs of each dispute and each participant.

### **Statement of Principle 1**

Dispute resolution agencies and policy makers should promote the further development of dispute resolution and conflict management services to Indigenous people based on:

- recognition of Indigenous perspectives on disputes and their resolution
- consultation with Indigenous people at the local level
- flexibility and adaptability of services
- long term and sustainable outcomes, and
- integrated approaches across program, process and jurisdictional boundaries.

## **Traditional Indigenous dispute resolution**

NADRAC has noted the complex issues associated with the recognition of customary law outlined in reports and papers by the Australian, Northern Territory and Western Australian Law Reform Commissions.<sup>7</sup> In general terms, NADRAC supports the position that traditional ways of resolving disputes should be supported and encouraged where communities wish and where such ways are not inconsistent with other benchmark obligations, for example, aspects of criminal law.

Indigenous people consulted by NADRAC emphasise that they have had effective dispute resolution systems for thousands of years and such systems still operate to some extent in some communities. However, the impact of European colonisation has meant the imposition of a new and alien set of laws and systems, the dislocation of

people, the consequent breakdown of social structures, and the introduction of a set of previously unknown issues. Key people who are able to resolve a dispute may be absent or incapacitated<sup>8</sup> and traditional structures may not be well equipped to deal with western problems, such as alcohol abuse.<sup>9</sup> Weakened traditional processes are being confronted by new problems outside past experience.

Moreover, Indigenous people's experience of and attitudes about traditional dispute resolution have changed over time and vary from person to person and from community to community. Western and customary legal systems overlap not only in disputes between Indigenous and non-Indigenous people but also between Indigenous people themselves.<sup>10</sup>

For these reasons, a purely traditional system of dispute resolution is unlikely to meet all contemporary Indigenous needs.

### **Statement of Principle 2**

Traditional Indigenous dispute resolution processes should be recognised and supported subject to any constraints arising out of civil, criminal, human rights and equal opportunity laws and professional conduct requirements and other legal obligations relevant to the conduct of ADR. In the course of recognising traditional processes there needs to be acknowledgement of the importance of local differences.

## **Indigenous-specific services**

Many Indigenous people consulted by NADRAC have stressed that new types of services should be developed by and for Indigenous people themselves to address contemporary needs. Since Indigenous people have been prevented from doing this in the past, mainstream agencies and policy makers need to respect and allow the development of such services. However, the role of mainstream agencies and policy makers should also extend to providing encouragement and support. If there is a partnership between a mainstream agency and an Indigenous group to provide dispute resolution services, then the program should ultimately belong to the Indigenous group.

Because of the unique circumstances of each Indigenous community, dispute resolution and conflict management approaches need to be developed at the local level. NADRAC's consultations indicate that Indigenous-specific dispute resolution services should generally:

- be open-ended so that matters can be dealt with and finalised at the service and flexible enough so that they can deal with all disputes and with the whole history of a dispute

- be community based, and
- involve Elders and/or those representing Elders, community and those authorised by Elders and community in general to speak on their behalf.

Indigenous-specific services would be likely to develop different models, processes, concepts and terms that are more congruent with Indigenous experience. For example, a term such as ‘peace-making’ may be preferred over ‘mediation’, the process may be described more like ‘having a yarn’ than applying a strict process, and a dispute resolution or conflict management process may serve broad objectives, such as ‘healing’ or ‘better governance’.

Indigenous people have connections to both contemporary and traditional lifestyles. It is likely therefore that Indigenous-specific services will draw from both western and traditional practices and may well use non-Indigenous practitioners where needed. There is value therefore in providing skills relevant to western dispute resolution practices, while respecting and supporting traditional practices. Conversely, western dispute resolution practices may also be enhanced through a better understanding of Indigenous ways of resolving disputes.

Not all disputes involving Indigenous people can be dealt with by Indigenous-specific services. Statutory requirements may require participants to use a mainstream service such as a court or tribunal. Indigenous-specific services may also not be appropriate in disputes between Indigenous and non-Indigenous participants, although collaboration between such services and mainstream agencies would be beneficial.

### **Statement of Principle 3**

Mainstream agencies and policy makers need to respect and allow the development by Indigenous people of new Indigenous-specific dispute resolution and conflict management services. The role of mainstream agencies and policy makers should also extend to providing encouragement and support.

## **Mainstream services**

Mainstream services are those provided to the general community, but not specifically targeted at Indigenous people or provided within Indigenous communities. Such services may be called on to assist with disputes between Indigenous people and between Indigenous and non-Indigenous people.

NADRAC has emphasised that dispute resolution and conflict management services should aim to be accessible to all groups in the community and should work towards achieving fairness in procedure so that their processes do not disadvantage particular groups or individuals as a result of culture, gender, age or other differences.

As the Productivity Commission has reported, economic disadvantage means that while Indigenous people are dependent on government provided services, mainstream services do not meet Indigenous needs and are under-utilised by Indigenous people.<sup>11</sup> A report for the Attorney-General's Department on violence in Indigenous communities has also noted that mainstream mediation services do not figure highly in violence prevention programs studied.<sup>12</sup> Evaluations of mainstream dispute resolution services have shown that Indigenous people avoid such services, especially where they do not engage Indigenous professional or liaison staff.<sup>13</sup>

Indigenous people face a range of barriers in using mainstream dispute resolution and conflict management services. They include:

- Western concepts of dispute resolution, such as 'mediation', may not make sense in the Indigenous context.<sup>14</sup> The cultural differences and the lack of experience that Indigenous people may have had with dispute resolution processes mean that Indigenous people may lack understanding of these processes.
- Western structures and program types may not fit Indigenous problems and issues. For example, compared to the non-Indigenous population, Indigenous people are far more likely to live in multi-family households, especially in remote communities.<sup>15</sup> Family relationships may also include people who are members of a child's community but have no biological relationship with a child.<sup>16</sup> 'Family' services may not be equipped to deal with these arrangements. 'Family' violence may also have a different meaning in Indigenous communities as it may encompass extended family conflict and inter-family feuding as well as fighting between partners.
- Indigenous people may perceive a service as a 'white' or 'city' based service,<sup>17</sup> or as dominated by specific interest groups.
- Physical spaces may be intimidating and waiting lists may discourage use.
- Services may not be readily available. A large proportion of Indigenous people live in remote or very remote areas. 17.7% of Indigenous people live in very remote areas and 8.8% in remote areas compared to 0.5% and 1.5% respectively of the non-Indigenous population.<sup>18</sup>
- Indigenous people are also likely to be in rented accommodation or to experience overcrowding. They may experience difficulties accessing reliable and private telephone, mail and internet services.
- Language barriers exist. English may be a second, third or fourth language and many Indigenous people lack literacy. Written information materials may be unintelligible.
- Indigenous people's previous experience with mainstream legal agencies may be very negative. For example, they are far more likely to have been involved in the criminal justice system and are incarcerated at a far greater rate than the non-Indigenous population (over 19 times for women and 16 times for men<sup>19</sup>).
- Staff in mainstream agencies may lack familiarity and skills in dealing with Indigenous people. As Indigenous people tend to avoid mainstream agencies, staff in such agencies often lack experience in dealing with

Indigenous people. This in turn further discourages Indigenous people from using these services.

These barriers will require a range of strategies from mainstream agencies and policy makers. It is likely that, for mainstream agencies, the delivery of services to Indigenous clients will be far more resource intensive than those provided to non-Indigenous clients.<sup>20</sup> As mentioned above, services will need to be modified in consultation with Indigenous people at the grass roots level. Time may be required to build trust in the service. Suitable information materials and strategies will be required. Information should be delivered using appropriate methods which may include presentations to Indigenous people by Indigenous people in the first instance. Interpreters may also be needed. As outlined below, dispute resolution practices will need to be adapted to take account of Indigenous needs and, if possible, Indigenous people should be directly involved in service provision.

#### **Statement of Principle 4**

Mainstream dispute resolution agencies should address the barriers that affect the effectiveness of their services for Indigenous people and modify their practices to take account of Indigenous needs.

## **Practice issues in disputes involving Indigenous people**

As mentioned earlier, the needs of each dispute, individual and community differ, and a general template for practices across all areas is neither achievable nor desirable. Distinct issues arise in relation to disputes between Indigenous participants compared to those between Indigenous and non-Indigenous participants. In the former case, the cultural gap may be largely between the practitioner or process and both participants. However, where only one of the participants is Indigenous, the application of the western model may well be unfair and imbalanced.

NADRAC's consultations with Indigenous people indicate that the following issues should be considered in delivering dispute resolution and conflict management services to Indigenous participants. These issues are relevant both to mainstream agencies which need to adapt western models of practice, and to Indigenous-specific services that are examining the applicability of western dispute resolution models.

### **Choosing the practitioner(s)**

In selecting a practitioner for a particular case, services should assess the relative value of practitioner independence or neutrality against his or her connectedness to or familiarity with the community. Although an understanding of local culture is very

desirable, individual Indigenous practitioners may be unacceptable to some participants, for example, on kinship grounds. Traditional gender roles may require the use of a male-female team.<sup>21</sup> Depending on the circumstances, local as well as outside Indigenous and non-Indigenous practitioners may need to be used and the participants themselves should be involved in selecting the practitioner(s).

Services without Indigenous practitioners could consider cooperative arrangements with other organisations that do have Indigenous practitioners.

In disputes between Indigenous and non-Indigenous participants, services may also need to consider a teamwork model, such as co-mediation, in which both an Indigenous and a non-Indigenous practitioner are used.

### **Intake, preparation and follow up**

Depending on the service model, the same or different people may conduct the intake stage and the actual ADR session.<sup>22</sup> Given the complexity of many disputes involving Indigenous people and the need to establish trust and understanding in the process, much of the intake stage may need to be carried out by the practitioner(s) selected to conduct the process itself.

Relationships between Indigenous people tend to be multi-layered, and dispute issues often overlap. Preparation for the dispute resolution process is therefore vital. Social mapping may be required to identify relevant participants and their relationships, obligations, duties and constraints. Ongoing management of the dispute may also be needed through providing follow up services or linking to other services and processes.

As mentioned above, western dispute resolution and conflict management concepts may not make sense within an Indigenous frame of reference. For example, the difference between a 'meeting', a 'mediation' and a 'court hearing' may not be clear. Time therefore needs to be spent with Indigenous people to explain the process being undertaken so that they can understand their roles and responsibilities and the choices they have within the process.

Services may need to take an active role in meeting with the participants on their home ground, rather than expecting them to come to the service.<sup>23</sup>

In disputes between Indigenous and non-Indigenous participants, there may need to be negotiations about the process itself to ensure that all participants are comfortable and that the 'playing field is level'. Taking time to explain western ways to Indigenous participants, or customary ways to non-Indigenous participants, may create perceptions of bias. It may therefore be necessary to explain to both Indigenous and non-Indigenous participants the reasons for differential treatment.

### **Time and place**

Indigenous concepts of time may not fit western case management practices. Waiting lists and fixed appointment times may prove to be unworkable, and western time frames or targets may not be particularly useful. A dispute involving Indigenous people may evolve over a very long time and past events may be part and parcel of

current problems.<sup>24</sup> A long period of conflict and frustration may, however, lead to a crisis point. Therefore, although dispute resolution and conflict management processes may be very time consuming and require a great deal of preparation and follow up at some stages, help may be needed almost immediately.<sup>25</sup> Services therefore need to be both responsive and patient.

Although formal offices may give credence to the process,<sup>26</sup> they can also be intimidating to some Indigenous people. Venues may be associated with past negative experiences, for example, contact with the criminal justice system. Enclosed rooms, high rise buildings and lifts may create fear and anxiety. Such venues may well discourage use of the service in the first place. If Indigenous people do attend, their anxiety about the venue will impact on their ability to participate effectively. It is important for services to work with the participants at the intake stage in choosing an appropriate venue, and to consider using community facilities and open air venues.

### **Who attends an ADR session**

Many Indigenous conflicts involved multiple parties, family groupings and external agencies. Advocates may also be involved.<sup>27</sup> It may therefore be necessary to involve a large number of people in an ADR session. However, this is not always the best approach and a series of smaller meetings involving only those directly involved would be more appropriate.

Forbidden relationships may also need to be considered. Some participants may not be permitted to communicate with each other and it may not be appropriate to involve them in the same session or to require or encourage them to talk to each other.

It may be inappropriate to expect individuals to represent their people. Requiring them to do so may place them at risk.

### **Process and ground rules**

Many of the processes and ground rules commonly accepted by western parties may not fit with Indigenous expectations. The process itself may need to be discussed and negotiated prior to and during each session. For example:

- Participants may need to ‘come and go’ as the session proceeds.
- Private note-taking by the participants or the practitioner may be inappropriate.<sup>28</sup>
- The use of private or separate sessions between the practitioner and one participant (or set of participants) may create mistrust (although a separate session may also be a necessary safeguard in some instances, especially where violence is involved).
- Whether an agreement should be expressed orally or in writing differs from situation to situation. It may not be appropriate to insist on a written agreement, as participants may prefer to honour an oral agreement or understanding. However, a written agreement may be useful, for example, as a public record or as a statement of rights that will be respected by others, including white agencies.<sup>29</sup>

- Ground rules may need to provide a degree of tolerance for strong language and even fighting. For example, swearing may be a normal way of speaking and not intended to be an attack on another participant or the practitioner. An inexperienced practitioner may struggle to distinguish between constructive and destructive forms of fighting. For example, ritualised fighting, which is controlled and constructive, may be part of a traditional dispute resolution process, whereas drunken violence can be uncontrolled and dangerous.<sup>30</sup>
- Rules and policies about confidentiality also need to be considered. Although in community and multi-party disputes, western notions of confidentiality may not make sense, in other cases (for example, family, interpersonal or workplace disputes) it may be vital to service acceptance.<sup>31</sup>

### **Statement of Principle 5**

Agencies should continue to identify and promote effective dispute resolution and conflict management practices in disputes involving Indigenous people.

## **Involvement of Indigenous staff and practitioners**

The recruitment and training of Indigenous people as ADR practitioners or for a liaison role is a critical factor in improving the effectiveness of dispute resolution and conflict management services for Indigenous people. Evaluations have shown that the presence of Indigenous mediators and staff has led to usage of services by Indigenous clients who had previously avoided such services.<sup>32</sup> Their involvement also serves to promote awareness of Indigenous needs among non-Indigenous practitioners and staff.

NADRAC's consultations indicate that, while the involvement of Indigenous people in service delivery is a valuable and in many cases, an essential step, attention needs to be paid to several issues:

- The selection of Indigenous practitioners needs some care and will require the involvement of local communities. Elders may need to be involved in the selection, although the Elders themselves need not be the practitioners.<sup>33</sup>

- Many of the barriers identified above for prospective clients (for example, language, economics, remoteness and understanding of dispute resolution and conflict management processes) will apply equally to prospective Indigenous practitioners. Training should therefore be provided at no or low cost and at local communities<sup>34</sup> where feasible. It should be delivered in culturally appropriate ways and ideally in an Indigenous language and by Indigenous trainers.
- Indigenous practitioners and staff need to be able to play a central role in policy and service development to ensure that the service evolves to meet the needs of Indigenous people.
- Ongoing training and professional support is required to enable Indigenous practitioners to maintain their skills and confidence. Mediator burn out is a danger.<sup>35</sup> Indigenous disputes can involve very painful experiences and may result in factions within the Indigenous community. Effective de-briefing is critical. Continued and adequate resourcing needs to be provided beyond the initial training stage.
- Training, supervision and professional development may also be difficult in remote areas. Flexible and creative ways to assess skills and provide training and supervision therefore need to be developed and implemented.

Services and policymakers also need to address the issue of accreditation and skills recognition for Indigenous practitioners. Any requirement for academic qualifications would act as a significant barrier as only 2% of Indigenous people have degrees compared to 10% of the non-Indigenous population. An accreditation system should therefore be based on practical performance, such as competencies in and recognition of the special skills, qualities and knowledge that Indigenous practitioners possess.

Unevenness exists in the demand for and availability of Indigenous practitioners. Where services are highly specialised, there may not be enough work for new recruits. On the other hand, several agencies have difficulties in locating Indigenous practitioners. Moreover, some key people in Indigenous communities may be overworked.

### **Statement of Principle 6**

Agencies should support the development of cross-cultural sensitivity and competence among ADR practitioners. Training programs for both Indigenous and non-Indigenous practitioners should be developed and evaluated.

### **Statement of Principle 7**

Professional and accreditation structures should be developed for Indigenous dispute resolution practitioners. Accreditation standards should be based on recognition of special skills and assessment of abilities, rather than academic qualifications and some current standards, such as those in the Family Law Regulations, should be reviewed in this regard.

### **Statement of Principle 8**

Funding arrangements need to reflect the complexity of Indigenous problems, ensure that process and outcome measures mesh with Indigenous experience and encourage dispute resolution and conflict management services to work collaboratively to meet Indigenous needs.

## **Information sharing and Network**

NADRAC's consultations indicate a need to promote information sharing between Indigenous dispute resolution practitioners, between Indigenous and non-Indigenous practitioners, between Indigenous-specific and mainstream services and between those involved in different dispute resolution and conflict management practice and program areas.

The Australian Institute of Aboriginal and Torres Strait Islander Studies Indigenous Facilitation and Mediation Project, which focuses on native title mediation, has identified a similar need<sup>36</sup> and the Family Law Pathways Group recommended sponsoring the establishment of local-level Indigenous community networks, where local expertise and knowledge can be shared with non-Indigenous service providers.<sup>37</sup>

A national network would also help to provide effective support and recognition to Indigenous practitioners, and to link agencies with Indigenous practitioners.

### **Statement of Principle 9**

A national Indigenous dispute resolution and conflict management network should be established in order to support local dispute resolution initiatives. Such a network could study and distribute information on best practice case studies, promote information sharing among Indigenous practitioners and provide links to services and practitioners with knowledge of local Indigenous needs.

## Evaluation

Although Indigenous dispute resolution needs vary widely, disputes involving Indigenous people will tend to be more complex, involve a larger number of people, comprise a series of overlapping issues and evolve over a longer period of time when compared to non-Indigenous groups. Remoteness and educational and economic disadvantage create problems in service delivery. Dispute resolution and conflict management practices will need to be highly flexible and take into account different notions of time and use a range of venues. Although processes may be more resource intensive, the long term benefits of a successful dispute resolution or conflict management process may be spread across different program areas.

The methods by which the effectiveness of Indigenous dispute resolution and conflict management services are measured needs to take these factors into account. The Productivity Commission has noted that Indigenous perspectives on measures of outcome differ from non-Indigenous perspectives, that indicators affect each other and that much of the currently available data is deficient as it measures met rather than unmet needs.<sup>38</sup>

Conventional statistical collection is likely to be misleading, firstly because the data may not be collected accurately (for example, due to literacy issues)<sup>39</sup> and secondly because statistics often fail to provide a valid picture of a complex dispute resolution or conflict management process.<sup>40</sup> Conventional qualitative surveys face similar problems to those raised above in relation to services delivery, for example, literacy issues, lack of understanding of the process, and difficulties in identifying informants.<sup>41</sup> Individual case studies may provide more useful information but these can be quite resource intensive.

The Federal Court of Australia, in collaboration with NADRAC and AIATSIS, is carrying out a scoping study to determine how case study research could be used to identify examples of best practice in Indigenous dispute resolution and conflict management.

Policy makers and service providers should not be reliant on conventional evaluation and data collection methods and may need to develop new indicators and evaluation methods.

### **Statement of Principle 10**

Policy makers and service providers should consider the most effective means of evaluating Indigenous dispute resolution and conflict management services, including the use of case studies.

## Statements of Principle

### Statement of Principle 1

Dispute resolution agencies and policy makers should promote the further development of dispute resolution and conflict management services to Indigenous people based on:

- recognition of Indigenous perspectives on disputes and their resolution
- consultation with Indigenous people at the local level
- flexibility and adaptability of services
- long term and sustainable outcomes, and
- integrated approaches across program, process and jurisdictional boundaries.

### Statement of Principle 2

Traditional Indigenous dispute resolution processes should be recognised and supported subject to any constraints arising out of civil, criminal, human rights and equal opportunity laws and professional conduct requirements and other legal obligations relevant to the conduct of ADR. In the course of recognising traditional processes there needs to be acknowledgement of the importance of local differences.

### Statement of Principle 3

Mainstream agencies and policy makers need to respect and allow the development by Indigenous people of new Indigenous-specific dispute resolution and conflict management services. The role of mainstream agencies and policy makers should also extend to providing encouragement and support.

**Statement of Principle 4**

Mainstream dispute resolution agencies should address the barriers that affect the effectiveness of their services for Indigenous people and modify their practices to take account of Indigenous needs.

**Statement of Principle 5**

Agencies should continue to identify and promote effective dispute resolution and conflict management practices in disputes involving Indigenous people.

**Statement of Principle 6**

Agencies should support the development of cross-cultural sensitivity and competence among ADR practitioners. Training programs for both Indigenous and non-Indigenous practitioners should be developed and evaluated.

**Statement of Principle 7**

Professional and accreditation structures should be developed for Indigenous dispute resolution practitioners. Accreditation standards should be based on recognition of special skills and assessment of abilities, rather than academic qualifications and some current standards, such as those in the Family Law Regulations, should be reviewed in this regard.

**Statement of Principle 8**

Funding arrangements need to reflect the complexity of Indigenous problems, ensure that process and outcome measures mesh with Indigenous experience and encourage dispute resolution and conflict management services to work collaboratively to meet Indigenous needs.

**Statement of Principle 9**

A national Indigenous dispute resolution and conflict management network should be established in order to support local dispute resolution initiatives. Such a network could study and distribute information on best practice case studies, promote information sharing among Indigenous practitioners and provide links to services and practitioners with knowledge of local Indigenous needs.

**Statement of Principle 10**

Policy makers and service providers should consider the most effective means of evaluating Indigenous dispute resolution and conflict management services, including the use of case studies.

- 
- <sup>1</sup> L Behrendt, *Aboriginal Dispute Resolution*, 1995.
- <sup>2</sup> NT Law Reform Commission (undated) including Appendix B, T Fitzgerald, *Alternative Dispute Resolution in Aboriginal Communities*, 1997.
- <sup>3</sup> R Chadbourne, *An evaluation of the Aboriginal dispute resolution project*, 1992.
- <sup>4</sup> Family Law Council, *Recognition of traditional Aboriginal and Torres Strait Islander child-rearing practices. Response to Recommendation 22: Pathways Report, Out of the Maze*, 2004.
- <sup>5</sup> Legal Aid Queensland, *Indigenous Mediation Feasibility Report* (unpublished), 2004.
- <sup>6</sup> Productivity Commission, *Report on Indigenous Funding*, 2001, Commonwealth of Australia.
- <sup>7</sup> ALRC, *The Recognition of Aboriginal Customary Laws*, 1986.
- NT Law Reform Commission, *Report of the Committee of Inquiry into Aboriginal Customary Law*, 2003.
- WA Law Reform Commission (Inquiry in progress).
- <sup>8</sup> Reconciliation Australia Conference, 'NT Aboriginal Law and Justice Strategy', 2002.
- <sup>9</sup> NT Law Reform Commission, 2003.
- <sup>10</sup> ALRC, 1986.
- <sup>11</sup> Productivity Commission, 2001.
- <sup>12</sup> P Memmott, R Stacy, C Chambers, C Keys, *Violence in Aboriginal Communities*, 2001, Commonwealth Attorney-General's Department (National Crime Prevention)
- <sup>13</sup> Family Court of Australia, B White, *Evaluation of the Alice Springs Counselling Service and reengagement of Aboriginal Family Consultants in Alice Springs and Darwin*, 1998, summary report to the Family Court of Australia (published).
- Mandala Consulting (2002) *Review of the Dispute Settlement Centre of Victoria Koori Program*, 2002, report to the Victorian Department of Justice (Unpublished, but made available to NADRAC and consultative group)
- C Cuneen, J Luff, K Menzies and Ralph, *Evaluation of ATSIFAM*, 2004, report to the Legal Aid Commission of NSW (unpublished, clearance given to circulate to members).
- <sup>14</sup> Family Court of Australia, B White, 1998.
- <sup>15</sup> Social Justice Commissioner, Human Rights and Equal Opportunity Commission (HREOC), *Statistical overview of Aboriginal and Torres Strait Islander People in Australia*, 2004.
- <sup>16</sup> Family Law Council, *Recognition of traditional Aboriginal and Torres Strait Islander child-rearing practices. Response to Recommendation 22: Pathways Report, Out of the Maze*, 2004.
- <sup>17</sup> Legal Aid Queensland, 2004.
- <sup>18</sup> Social Justice Commissioner (HREOC), 2004.
- <sup>19</sup> Social Justice Commissioner (HREOC), 2004.
- <sup>20</sup> C Cuneen, J Luff, K Menzies and Ralph, 2004.
- <sup>21</sup> Legal Aid Queensland, 2004.
- <sup>22</sup> Legal Aid Queensland, 2004.
- <sup>23</sup> R Chadbourne, 1992.
- <sup>24</sup> Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the future for families experiencing separation*, 2001, Commonwealth of Australia.
- <sup>25</sup> Legal Aid Queensland, 2004.
- <sup>26</sup> C Cuneen, J Luff, K Menzies and Ralph, 2004.
- <sup>27</sup> R Chadbourne, 1992.
- <sup>28</sup> R Chadbourne, 1992.
- <sup>29</sup> Legal Aid Queensland, 2004.
- National Mediation Conference, *Indigenous mediation workshop*, 2004.
- <sup>30</sup> Reconciliation Australia Conference, 2002.
- <sup>31</sup> Legal Aid Queensland, 2004; Mandala Consulting, 2002.
- <sup>32</sup> C Cuneen, J Luff, K Menzies and Ralph, 2004; Mandala Consulting, 2002.
- Family Court of Australia, B White, 1998.
- <sup>33</sup> Legal Aid Queensland, 2004.
- <sup>34</sup> Legal Aid Queensland, 2004.
- <sup>35</sup> Legal Aid Queensland, 2004.
- <sup>36</sup> Check with Toni Bauman
- <sup>37</sup> Family Law Pathways Advisory Group, 2001.
- <sup>38</sup> Productivity Commission, 2001.
- <sup>39</sup> Reconciliation Australia Conference, 2002.

<sup>40</sup> R Chadbourne, 1992.

<sup>41</sup> C Cuneen, J Luff, K Menzies and Ralph, 2004.

---

***National Alternative Dispute Resolution Advisory Council***

**Indigenous Dispute Resolution and Conflict Management**

**Recommendations for action**

**Recommendation 1 – Statements of Principle**

That Australian governments adopt the Statements of Principle in the paper on Indigenous dispute resolution and conflict management.

**Recommendation 2 – Family law**

- 2.1 That Indigenous organisations should be encouraged to seek contracts to operate the proposed Family Relationship Centres, particularly where they provide services to Indigenous communities. This would include a full brief, to relevant communities, on the structure role and operation of the Centres.
- 2.2 That, for each area of service, an appropriate number of employees in Family Relationship Centres have a demonstrated capacity to provide culturally appropriate services to Indigenous people.
- 2.3 That Indigenous advisers implement the Indigenous outreach services proposed as part of the system of Family Relationship Centres.
- 2.4 That the resources to fund the outreach work of the Indigenous advisers match the need for face-to-face assistance in regional and remote communities, including networking and support services.
- 2.5 That the number of Indigenous family consultants in the Family Court of Australia be sufficient to provide adequate support for those cases which proceed to court.

### **Recommendation 3 – Indigenous dispute resolution and conflict management training**

- 3.1 That the Government consider the design and development and funding of a curriculum and training package to be provided to those engaged in dispute resolution and conflict management involving Indigenous people.
- 3.2 That the package referred to in 3.1 above include strategies for:
  - appropriate consultation about the proposed training package
  - adoption of the proposed training package
  - appropriate management and continued implementation of the proposed training package,
  - formal accreditation and certification of trained practitioners, and
  - ongoing evaluation of the training package in order to respond to changing needs.
- 3.3 That an organisation be engaged to design and develop an Indigenous dispute resolution and conflict management curriculum and training package, including appropriate consultation.

### **Recommendation 4 – National network of Indigenous dispute resolution practitioners**

- 4.1 That Australian governments evaluate the proposal for a national network of Indigenous dispute resolution practitioners being developed by the Indigenous Facilitation and Mediation Project at the Australian Institute of Aboriginal and Torres Strait Islander Studies, and, if satisfied that it will be of practical benefit, examine ways in which it can be implemented.
- 4.2 That Australian governments consider, as part of a consultative network, how to involve the national network into relevant service areas such as the proposed Family Relationship Centres, the provision of Indigenous legal aid services, Family Violence Prevention Legal Services, native title, service delivery agreements, community development programs and restorative justice programs.
- 4.3 That Australian governments encourage the involvement of this network in their relevant service delivery areas.

---

**Recommendation 5 – Identifying best practice through case study research**

- 5.1 That Australian governments consider the findings and recommendations of the Federal Court scoping study on identifying best practice in Indigenous dispute resolution and conflict management through case study research.
- 5.2 That the recommendations from the study be implemented by government if it is satisfied that such research would assist in the identification of best practice.

**Recommendation 6 – Co-ordinating services**

That Australian governments foster the coordination of ADR services for Indigenous peoples at the Commonwealth and State levels through appropriate agencies and consultative forums.